NO. _____

IN THE

Supreme Court of the United States

ALOHA BED & BREAKFAST,
A HAWAI`I SOLE PROPRIETORSHIP,
Petitioner,

v.

DIANE CERVELLI AND TAEKO BUFFORD,
Respondents,

v.

WILLIAM D. HOSHIJO, AS EXECUTIVE DIRECTOR
OF THE HAWAI`I CIVIL RIGHTS COMMISSION,
Intervenor-Respondent.

On Petition for Writ of Certiorari to the Intermediate Court of Appeals of Hawai`i

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Phyllis Young, a retiree, rents three bedrooms in her family home using the name Aloha Bed & Breakfast to make ends meet. She welcomes everyone as guests provided they abide by her "house rules," including that no romantic partners share a bedroom unless they are a married man and woman. When a same-sex couple tried to reserve a bedroom in advance, Mrs. Young explained that accommodating them would violate her religious beliefs, cited Hawai`i's Mrs. Murphy exemption, and referred the couple to a nearby friend who was happy to host them.

The Hawai`i Intermediate Court of Appeals judicially rewrote the Mrs. Murphy exemption for the first time in Mrs. Young's case, holding that it applied only to long-term rentals. The Court then declared Mrs. Young's family home a place of public accommodation, and held her in violation of state public-accommodations law. This renders her liable for compensatory, treble, and punitive damages, statutory fines, and ruinous attorney fees and costs in conflict with this Court's precedent and decisions by the Second, Third, Fourth, Fifth, and D.C. Circuits.

The questions presented are:

1. Whether holding Mrs. Young liable without fair notice that her actions could be unlawful violates the Fourteenth Amendment's Due Process Clause.

2. Whether the Commission's efforts to punish Mrs. Young for exercising her religious beliefs in her own home violate the First Amendment's Free Exercise Clause.

PARTIES TO THE PROCEEDING

Petitioner Aloha Bed & Breakfast is a Hawai`i sole proprietorship owned by Phyllis Young, an individual and citizen of Hawai`i.

Respondents Diane Cervelli and Taeko Bufford are individuals and citizens of California.

Intervenor-Respondent William D. Hoshijo is the Executive Director of the Hawai`i Civil Rights Commission, an agency of the State of Hawai`i.

CORPORATE DISCLOSURE STATEMENT

Petitioner Aloha Bed & Breakfast is a Hawai`i sole proprietorship wholly owned by Phyllis Young. It does not have any parent companies and no entity or other person has any ownership interest in it.

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[1] ROA stands for the Record on Appeal, the original imaged record of the First Circuit State of Hawaii, electronically filed in the Intermediate Court of Appeals on July 11, 2013. ROA citations reflect the PDF page numbers in this combined PDF document.

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Statutes

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DECISIONS BELOW

The Hawai`i Intermediate Court of Appeals' decision is reported at 415 P.3d 919, and reprinted at App.1a–37a. The Hawai`i Supreme Court's order denying the Application for Writ of Certiorari of May 18, 2018, is not reported but is available at No. SCWC-13-0000806, 2018 WL 3358586 (July 10, 2018), and reprinted at App.38a–40a. The Hawai`i Circuit Court's decision is not reported but is available at No. 11-1-3103-12, 2013 WL 1614105 (Apr. 11, 2013), and reprinted at App.41a–44a.

STATEMENT OF JURISDICTION

On July 10, 2018, the Hawai`i Supreme Court issued an order denying Petitioners' Application for Writ of Certiorari, thus leaving in place the Hawai`i Intermediate Court of Appeals' decision rejecting Petitioner's constitutional defenses. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of the First and Fourteenth Amendments to the United States Constitution is found at App.57a. The relevant portions of Hawai`i's real-property-transaction and public-accommodation statutes are set forth at App.58a–65a.

INTRODUCTION

This case reflects a coordinated campaign by the Hawai`i government to punish Mrs. Young for her religious beliefs by reinterpreting a public-accommodation law to prohibit conduct that was previously authorized.

Phyllis Young, a retiree, rents three bedrooms in her family home in Hawai`i, using the name Aloha Bed & Breakfast, to make ends meet. She welcomes everyone into her home as guests provided they abide by certain "house rules," including that no romantic partners share a bedroom unless they are a married man and woman. Mrs. Young even applies this rule to family members.

Over 10 years ago, Respondents, Ms. Cervelli and Ms. Bufford, sought to rent a room at Aloha, and Mrs. Young explained her house rules to them. When Mrs. Young discovered that Ms. Cervelli and Ms. Bufford were in a relationship, she found them a bedroom in a nearby friend's home. Mrs. Young believed, in good faith, that Hawai`i protected her right to practice her faith at home because Hawai`i's statutory "Mrs. Murphy exemption" facially protects from state interference those who rent a few rooms in their dwelling.

The Hawai`i Civil Rights Commission would have none of that. It devised a novel interpretation of state law that protects the autonomy of citizens who rent rooms in their own homes "long term," but deprives citizens who rent rooms "short term." After intervening on the private plaintiffs' side and aligning with them so strongly that they filed joint briefs, the Commission convinced state courts to accept that unprecedented reading of Hawai`i law for the first time.

The Hawai`i Court of Appeals subsequently deemed Mrs. Young's family home a place of public accommodation. The court held her liable for sexual-orientation discrimination under Hawai`i's public-accommodation law, agreeing with the Commission's reinterpretation of the Mrs. Murphy law.

Mrs. Young contended that penalizing her for failing to foresee a change in law 10 years later was fundamentally unfair. Her pleas fell on deaf ears. To the contrary, the Commission did everything in its power to ensure that Mrs. Young was punished for referring Ms. Cervelli and Ms. Bufford to another private home, including holding her personally liable for compensatory, treble, and punitive damages, statutory fines, and ruinous attorney fees and costs.

The Commission and lower courts erred and conflicted with this Court's precedents and that of several federal circuits in so holding. Procedural due process requires that citizens have fair warning of the law's requirements. Mrs. Young undeniably lacked fair warning that Hawai`i's Mrs. Murphy exemption would not protect her. Nonetheless, the Commission assured the Hawai`i courts that fair notice was not required to deprive Mrs. Young of her primary source of income and likely bankrupt her by imposing punitive damages, penal fines, and ruinous attorney fees and costs. The only plausible explanation for this unjust treatment is the Commission's hostility towards Mrs. Young's religious beliefs.

This Court's review is needed to ensure that the government respects the basic tenets of procedural due process and ceases punishing citizens simply for living out religious beliefs in their own homes.

STATEMENT OF THE CASE

A. Factual Background

1. Mrs. Young and her home

The material facts of this case are undisputed. Phyllis Young has lived in the same family home in the Hawai`i Kai area of Honolulu for 40 years. She forged her married life in that home, raised her children there, and now hosts her children and grandchildren there for family gatherings and other visits. For many years, Mrs. Young has rented out three spare bedrooms in her home to paying guests when her family is not in residence. She does this using the name Aloha Bed & Breakfast. Aloha is not a separate corporate entity; it is merely the trade name Mrs. Young uses for her sole proprietorship. Aloha has no independent existence, bank account, or staff. App.78a, 85a, 116a–18a.

The family home is most Americans' main asset, which is certainly true for Mrs. Young. She uses that asset to make ends meet in her retirement. Renting out three spare bedrooms when her family is not using them often provides the bulk of Mrs. Young's income. Without these rental profits, Mrs. Young could not afford her monthly mortgage payments and would likely be forced to leave the home in which she has lived for four decades. App.95a, 116a.

Mrs. Young's home sits on a quiet residential street. Its 1,926 square feet consist of four bedrooms, two and a half bathrooms, a family room, dining room, living room, and kitchen. Guests are not confined to a separate wing of the house but share all of the main

living spaces with Mrs. Young and her family. Given the home's layout, there is no other option. The three guest bedrooms contain Mrs. Young's personal items and are also where her children and grandchildren sleep on visits. App.85a, 95a.

Given the above, it was only natural for Mrs. Young to treat her guests like family. Guests often have meals with Mrs. Young and her husband, watch movies with them, and go to the store with them. Some guests even choose to participate in the weekly Bible study that Mrs. Young hosts in her home. Guests often use the personal computer located in Mrs. Young's bedroom to print boarding passes and other documents. And guests' children regularly play with her grandchildren's books and toys. App.95a.

Mrs. Young applies the same house rules to family members and guests alike. Smoking is forbidden for health reasons, and the only romantic partners allowed to share a bedroom are a married man and woman. Mrs. Young is a devout Christian who believes that she is morally responsible for the sexual activity that takes place under her roof. She will not host anyone in a manner that violates her Catholic faith. When her daughter came for overnights, Mrs. Young required her to sleep in a separate bedroom from her live-in boyfriend. App.82a–84a, 95a–96a.

Guests willing to abide by these house rules and who can handle the stairs are welcome to stay with Mrs. Young if they make a reservation of no less than three days and send a deposit in advance. Mrs. Young does not take walk-in guests. She meets scheduled guests on arrival and provides them a key that grants access to her entire home. App.78a, 83a, 95a–96a.

Mrs. Young hosts roughly between 100 and 200 guests each year. The vast majority are from out-of-state. Many guests stay for weeks at a time. Although nearly all of Mrs. Young's guests stay less than a month, a few have stayed five weeks or more. App.83a–84a, 117a.

2. Mrs. Young's Interaction with Ms. Cervelli and Ms. Bufford

In 2007, Diane Cervelli and Taeko Bufford—two women from California—contacted Mrs. Young about renting a bedroom in her home for about a week to visit a friend who lives nearby. Mrs. Young believes in the Catholic Church's teaching about sexuality and marriage. So when Mrs. Young determined that Ms. Cervelli and Ms. Bufford were romantic partners, she explained that renting a bedroom to them would violate her sincerely-held religious beliefs. Mrs. Young made the couple aware that she applied the same house rules to her own daughter and had no animosity against them. She then called a nearby friend who also rents rooms, found out the friend had availability and would gladly host Ms. Cervelli and Ms. Bufford, and referred the couple to her. App.75a, 81a–83a.

Mrs. Young is a licensed real-estate agent. She was aware of Hawai`i's "Mrs. Murphy exemption," which recognizes that those who rent up to four rooms in their own home have the discretion to select renters

compatible with the owner's lifestyle.[1] Haw. Rev. Stat. § 515-4(a)(2) (2007). The Mrs. Murphy exemption specifically provides that those who rent "up to four rooms in a housing accommodation by an individual if the individual resides therein" are excluded from the real-property-transaction law, App.65a, which prohibits certain types of discrimination in "real estate transaction[s]," App.64a. Mrs. Young explained to the couple that the Mrs. Murphy exemption allowed her to rent bedrooms in her own home in accordance with her religious beliefs. App.70a–71a, 81a–82a. Nonetheless, Ms. Cervelli and Ms. Bufford filed complaints with the Hawai`i Civil Rights Commission that alleged Mrs. Young violated Hawai`i's public-accommodation law, which bars "a place of public accommodation" from discriminating based on "sexual orientation." Haw. Rev. Stat. § 489-3 (2007); App.61a.

B. Procedural Background

1. The Commission Proceedings

The Hawai`i Civil Rights Commission opened an investigation and interviewed Mrs. Young in 2009. Mrs. Young described how she referred Ms. Cervelli and Ms. Bufford to a friend who also rents rooms in her home nearby. The reason Mrs. Young gave was purely religious: she testified that if her faith deems activity sinful and she allows that activity to happen in her home, she participates in the sin. Mrs. Young

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[1] For an explanation of the origins of the term "Mrs. Murphy exemption," see *United States* v. *Space Hunters, Inc.*, 429 F.3d 416, 425 (2d Cir. 2005).

clarified that she applied the same moral standard to her own daughter and that she had nothing against the couple. She simply could not violate her faith and explained her rationale, as well as the Mrs. Murphy exemption's safe harbor, to Ms. Bufford in detail. Mrs. Young believed that after a long conversation airing their views, she and the couple could agree to disagree. App.81a–83a.

The Commission representative asked Mrs. Young to describe the religious beliefs that motivated her decision. Mrs. Young cited scripture in support of her belief that she is morally responsible for the activity that takes place in her family home. When the Commission representative questioned whether she still holds the religious beliefs that lead her to rent a bedroom only to romantic partners consisting of a married man and woman, Mrs. Young replied that she hoped those beliefs were now stronger. App.84a.

In 2010, the Commission found reasonable cause to believe that Mrs. Young violated Hawai`i's public-accommodation law by discriminating based on sexual orientation. It predicated this finding on the fact that Mrs. Young "and her husband are strong Christians and that it would be against their belief system to allow Complainant and her partner to stay at their [home] as a couple." App.86a. For this "crime," the Commission sought (a) actual, compensatory, and punitive damages, (b) statutory penalties, (c) a cease and desist order, (d) the development and implementation of a written non-discrimination policy posted on the walls of Mrs. Young's home, and (e) publishing the results of the Commission's investigation in the newspaper. App.86a–87a.

2. Trial Court Proceedings

Before the Commission proceedings went any further, Ms. Cervelli and Ms. Bufford sought and received from the Commission a right to sue letter. In 2011, they filed the present state-court action in Hawai`i Circuit Court alleging that Mrs. Young violated Hawai`i's public-accommodation law and seeking (1) a declaratory judgment, (2) a permanent injunction, (3) actual compensatory, statutory, treble, special, and punitive damages, (4) pre-judgment and post-judgment interest, and (5) attorney fees and costs. App.66a. The same day the couple filed their Complaint, and before it was even served on Mrs. Young, the Commission moved to intervene as a plaintiff. The Circuit Court granted the Commission's motion and allowed it to adopt Ms. Cervelli's and Ms. Bufford's complaint wholesale. App.53a–54a. The Commission and the private plaintiffs afterward filed combined briefs at every stage of the state proceedings.

In 2013, the Circuit Court heard oral arguments on the parties' cross motions for summary judgment. The Circuit Court refused to consider Mrs. Young's constitutional defenses, which she raised in her interrogatory responses, Amended Answer, and briefing. App.67a–69a, 72a–74a, 79a–80a, 88a–94a, 111a–15a, 119a–21a. Although Mrs. Young argued that applying Hawai`i's public-accommodation law to her in these circumstances would violate her rights to due process, equal protection, freedom of intimate association, privacy, and free exercise, the Circuit Court stated that it would rule on purely statutory grounds, which it did. App.122a–23a.

Subsequently, the Circuit Court found no genuine dispute of material fact, ruled that Hawai`i's public-accommodation law—not its real-property-transaction law—applied to Mrs. Young, determined that Mrs. Young's family home was a place of public accommodation, and held that Mrs. Young violated Hawai`i's public-accommodation law by discriminating based on sexual orientation. The court ordered Mrs. Young to rent bedrooms in her home to same-sex couples immediately but put off awarding damages until a later date. App.41a–44a.

The parties agreed that an interlocutory appeal of the Circuit Court's liability ruling was appropriate and filed a stipulated application for appeal. Because the Circuit Court agreed "that the question of whether Chapter 489 or Chapter 515 of Hawaii Revised Statutes applies is a controlling question of law," it granted the application and stayed the case. App.47a–49a. On the parties' stipulated motion, the Circuit Court also stayed the deadline for the Commission and the private plaintiffs to seek attorney fees and costs awards against Mrs. Young until all appeals were exhausted. App.51a–52a.

3. Appellate Court Proceedings

In 2013, Mrs. Young timely appealed the Circuit Court's ruling to the Hawai`i Court of Appeals and argued—among other things—that (a) her family home was not a place of public accommodation; (b) the Mrs. Murphy exemption in the real-property transaction law controlled; (c) applying Hawai`i's public-accommodation law would violate her rights to due process, equal protection, freedom of intimate

association, privacy, and free exercise; and (d) the Commission and private plaintiffs could not justify applying the public-accommodation law under strict scrutiny. App.124a–38a.

Four *years* after briefing was completed, the Hawai`i Court of Appeals notified the parties that it would decide the case without argument, despite the weighty constitutional issues. Roughly 5 years after Mrs. Young appealed the Circuit Court's ruling, and 11 years after Mrs. Young spoke with Ms. Cervelli and Ms. Bufford, the Hawai`i Court of Appeals issued a published decision affirming the Circuit Court.

The Hawai`i Court of Appeals first held that Mrs. Young's family home of 40 years was a place of public accommodation. App.15a–17a. Next, the court reconciled Hawai`i's public-accommodation law with the Mrs. Murphy exemption in its real-property-transaction law by holding—for the first time—that the latter applied "only to longer-term living arrangements" even though the term "rental" was "not specifically defined." App.21a. The court justified this holding by reasoning that the sweeping public-accommodation law was more "specific" than the Mrs. Murphy exemption, even though that exception speaks specifically to homeowners who rent a few rooms in their private homes. App.23a. It did so based on the fact that the Mrs. Murphy exemption did not "specify[] the time period involved" for a rental "or whether the provision of lodging to transient guests is covered." *Id.*

Despite admitting that the scope of Hawai`i's Mrs. Murphy exemption was unclear, App. 13a–24a, the Hawai`i Court of Appeals refused to address Mrs.

Young's due process or equal protection claims. Although the court considered her remaining constitutional arguments, it strangely required Mrs. Young to prove them "beyond a reasonable doubt." App.25a (cleaned up). The court subsequently rejected Mrs. Young's privacy and intimate-association arguments based primarily on its previous conclusion that her family home of 40 years was a place of public accommodation. App.25a–31a. It then rebuffed Mrs. Young's free-exercise claim via a strict-scrutiny analysis that would uphold nearly any application of Hawai`i's public-accommodation law. App.31a–36a.

In 2018, Mrs. Young filed an application for writ of certiorari with the Hawai`i Supreme Court asking it to enforce the Mrs. Murphy exemption's plain text and reject the Hawai`i Court of Appeal's unprecedented reading of the real-property-transaction statute, which is based on a new, non-textual, and untenable distinction between short and long-term stays. Mrs. Young continued to maintain that leaving the ruling in place would violate her rights to due process, equal protection, privacy, intimate association, and free exercise. App.139a–50a. But the Hawai`i Supreme Court denied review without comment. App.38a–40a.

REASONS FOR GRANTING THE WRIT

Hawai`i's Mrs. Murphy exemption has long protected those, like Mrs. Young, who rent a few bedrooms in their own homes to make ends meet. Mrs. Young explicitly relied on that provision in referring Ms. Cervelli and Ms. Bufford to a friend because

allowing them to share a bedroom in her family home was not compatible with her faith. Yet, at the Commission's urging, the Hawai`i Court of Appeals reinterpreted the Mrs. Murphy exemption's scope, rendered it inapplicable to Mrs. Young and any "short-term" renter (despite the lack of any basis for that interpretation in the statutory text), and subjected her to severe punishment, including compensatory, treble, and punitive damages, statutory fines, and ruinous attorney fees and costs.

This Court should grant the petition for two reasons. First, Hawai`i law in 2007 gave Mrs. Young no fair warning that her actions fell outside of the Mrs. Murphy exemption's scope. The Hawai`i Court of Appeals did not reach that conclusion until 2018, some 11 years later, and its holding was not foreshadowed by prior Hawai`i precedent. An essential element of procedural due process is fair notice of the law's demands.

This mandate is not limited to criminal laws but applies strongly here because Hawai`i's application of its public-accommodation law to Mrs. Young's home, where she lives, is quasi-criminal, prohibitory, and stigmatizing, and inhibits Mrs. Young's exercise of her constitutional rights to privacy, intimate association, and free exercise. Hawai`i's decision to subject Mrs. Young to extreme punishment without fair warning that her actions could violate state law conflicts directly with this Court's precedent, including *F.C.C.* v. *Fox Television Stations, Inc.*, 567 U.S. 239 (2012), and *Gentile* v. *State Bar of Nevada*, 501 U.S. 1030 (1991). It also conflicts with decisions by the Second, Third, Fourth, Fifth, and D.C. Circuits.

Second, Hawai`i has construed and applied its law in a manner that is hostile towards Mrs. Young's religious beliefs. The Commission led a state-sponsored campaign to narrow the Mrs. Murphy exemption, declare Mrs. Young's family dwelling a place of public accommodation, and punish Mrs. Young for living out her Catholic faith in her own home. Doing so required the Commission to devise an interpretation of state law that is neither neutral nor generally applicable and which leaves no room for the protection of free-exercise rights. For almost 10 years, the Commission has worked hand-in-hand with the private plaintiffs to ensure that its view of Mrs. Young's religious beliefs prevailed, and that she would be excluded from the public sphere. Such state-sponsored religious hostility directly conflicts with this Court's rulings in *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993), and *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018). Certiorari is warranted.

I. The Hawai`i Court of Appeals narrowed the Mrs. Murphy exemption's scope and applied that novel reading to Mrs. Young without fair warning, violating the Fourteenth Amendment's Due Process Clause.

As this Court has frequently held, fair warning of the law's requirements is the most basic element of procedural due process. Justice requires that citizens have notice of what violates the law so that they can avoid potential landmines that will deprive them of life, liberty, or property. This notice requirement is so fundamental to the rule of law that it applies to all

statutes. This principle takes on special force when the government applies a public-accommodation law to someone's home—particularly when that law is quasi-criminal, prohibitory, stigmatizing, and inhibits its citizens' exercise of their constitutional rights.

When Mrs. Young referred Ms. Cervelli and Ms. Bufford to a friend over 10 years ago, she did so in good-faith reliance on the Mrs. Murphy exemption. Nothing in Hawai`i law at the time gave Mrs. Young the slightest hint that her actions could be illegal. The Hawai`i Court of Appeals even admitted that the Mrs. Murphy exemption's plain text could apply to Mrs. Young. App.14a, 21a–24a. But the court then chose to interpret that exception "narrowly" as covering only "longer-term living arrangements"—a full decade after the events underlying this case. App.21a. The court then enforced this unprecedented reading of Hawai`i law against Mrs. Young without any (let alone fair) warning in violation of the Due Process Clause and this Court's precedent. App.22a–24a.

The Hawai`i Court of Appeals' ruling will (1) cause Mrs. Young to stop renting rooms and likely force her to leave her home of 40 years, and it will also (2) subject her to compensatory, statutory, treble, special, and punitive damages awards, and (3) force her to pay ruinous attorney fees and costs for roughly 7 years of litigation. App.95a, 116a. It will, quite likely, ruin Mrs. Young's life. This Court should grant review to enforce the Due Process Clause's fair-notice guarantee.

A. Due process requires that citizens have fair warning of the law's demands.

The Due Process Clause ensures that laws are reasonably clear to everyday people. *Fox Television*, 567 U.S. at 253. Its central role is ensuring that citizens have "fair notice of conduct that is forbidden or required." *Id.* The rule of law depends on the State informing citizens "what [it] commands or forbids." *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1972) (cleaned up). Accordingly, this Court has long barred a state from banning acts in vague terms that force citizens to guess at their meaning. *Connally* v. *Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

Our legal system is based on the premise that citizens have the ability "to steer between lawful and unlawful conduct." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). But no such capacity exists when citizens lack a reasonable opportunity to know what is unlawful in advance. *Connally*, 269 U.S. at 393. In that circumstance, a vague law is no more than "a trap for those who act in good faith." *United States* v. *Ragen*, 314 U.S. 513, 524 (1942). Punishing a citizen so ensnared is unjust for at least three reasons. *Grayned*, 408 U.S. at 108.

First, it is unfair to punish a citizen when she has no way to know what the law demands. *Kolender* v. *Lawson*, 461 U.S. 352, 361 (1983). Government must tell regulated parties "what is required of them so they may act accordingly." *Fox Television*, 567 U.S. at 253. Otherwise, citizens are left to guess at the law's "contours," *Gentile*, 501 U.S. at 1048, because no one can identify with reasonable certainty "the

incriminating fact," *United States* v. *Williams*, 553 U.S. 285, 306 (2008).

Here, Mrs. Young had no way to know that declining to allow Ms. Cervelli and Ms. Bufford to share a bedroom in her home and referring them to a friend who was willing to do so would be judged—10 years later—to violate state law. Private family homes are not places of "public accommodation." And Hawai`i's Mrs. Murphy exemption specifically grants those who rent a few rooms in their own homes legal protection. Nonetheless, the State seeks to punish Mrs. Young severely for relying on that exception.

Second, statutes open to widely different interpretations allow citizens to act on one understanding of the law and courts on another. *Connally*, 269 U.S. at 393. Courts may then apply an unprecedented reading of the statute that citizens cannot reasonably predict from the law's text. *United States* v. *Lanier*, 520 U.S. 259, 266 (1997). This lulls citizens into a "false sense of security," because they have no reason to expect that conduct seemingly outside of a law's scope will be "retroactively brought within it." *Bouie* v. *City of Columbia*, 378 U.S. 347, 352 (1964).

Mrs. Young based her actions on a plain reading of the Mrs. Murphy exemption's text in 2007. She could not have guessed that the Hawai`i Court of Appeals would construe that protection as applying only to those who rent rooms for "longer term stays" and label her rentals "short term" in 2018. App.21a–22a. Yet the court applied this new reading to Mrs. Young despite the fact that it was impossible for her to predict the invention or result of such a novel (and vague) test. *Id.* at 21a–24a.

Third, vague laws encourage arbitrary and discriminatory enforcement. *Fox Television*, 567 U.S. at 253. Because a vague law's scope turns not on words of "fixed meaning" but personal "impressions," *Connally*, 269 U.S. at 395, prosecutors and courts have the opportunity to make things up, *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1223-24 (2018) (Gorsuch, J., concurring in part and concurring in the judgment). This opens the door to officials interpreting laws to condemn those they disapprove without the legislature ever balancing competing social values in an intentional and highly-public way. *Id.* at 1227-28; *Whisenhunt* v. *Spradlin*, 464 U.S. 965, 969 (1983) (Brennan, J., dissenting from the denial of cert.).

The Commission vigorously pursued and the Hawai`i Court of Appeals adopted an unprecedented reading of Hawai`i law to deprive Mrs. Young of legal protection without any clear guidance from the Legislature as to how to reconcile the competing social values at stake. And they did so based on the unpopular nature of Mrs. Young's religious beliefs. Otherwise, the Commission and the Hawai`i Court of Appeals would have recognized the injustice of punishing Mrs. Young when she had no fair warning that her actions could be unlawful. Neither did even though both are state actors charged with fairly and impartially administering the law.

B. The fair-warning requirement applies to all laws but it has special force in regards to the application of a quasi-criminal, public-accommodations law to a person's home that is prohibitory and stigmatizing, or which inhibits citizens' exercise of their constitutional rights.

Some of this Court's precedent addresses the Due Process Clause's fair-warning requirement exclusively in reference to criminal statutes. *E.g.*, *Williams*, 553 U.S. at 304. But as Justice Gorsuch has explained, this Court has long recognized "that a stringent vagueness test should apply to at least some civil laws," *Dimaya*, 138 S. Ct. at 1228 (Gorsuch, J., concurring in part and concurring in the judgment) (cleaned up), and that principle comports with English and early American courts' common practice, *id.* at 1224-28.

This Court started applying vagueness doctrine to civil laws at least 90 years ago. *A.B. Small Co.* v. *Am. Sugar Refining Co.*, 267 U.S. 233, 239 (1925). It has not backtracked. *E.g.*, *Red Lion Broad. Co.* v. *F.C.C.*, 395 U.S. 367, 395-96 (1969) (vagueness concerns apply even to civil administrative regulations and that agencies cannot impose sanctions without fair warning); *In re Ruffalo*, 390 U.S. 544, 550-51 (1968) (lack of fair warning that employing a particular individual "would be considered a disbarment offense" violated procedural due process and "would never pass muster in any normal civil or criminal litigation") (cleaned up); *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402 (1966) (civil law that allowed "the collection of costs" was subject to "challenge that it is

unconstitutionally vague" regardless of whether it was labeled "'penal'").

The reason for requiring all statutes to give citizens' fair warning is simple: "Both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute." *Giaccio*, 382 U.S. at 402. Exactly how much warning this Court requires depends not on the law's civil or criminal character, but on "the nature of the enactment." *Barclays Bank PLC* v. *Franchise Tax Bd. of Cal.*, 512 U.S. 298, 316 (1994) (cleaned up).

Perhaps this Court's most thorough explanation of the vagueness standard applicable to civil laws arose in *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982). That case concerned a village ordinance that, among other things, made it illegal to sell drug paraphernalia without a license. *Id.* at 491-92. In the course of rejecting a store's argument that the ordinance was unconstitutionally vague, this Court recognized at least two scenarios in which an ordinance that "nominally imposes only civil penalties" is subject to a strict vagueness test. *Id.* at 499.

First, a heightened vagueness standard applies when civil laws are quasi-criminal, and have a prohibitory and stigmatizing effect. *Id.*; *accord Nat'l Endowment for the Arts* v. *Finley*, 524 U.S. 569, 589 (1998) ("prohibitory and stigmatizing effect of a quasi-criminal ordinance [is] relevant to the vagueness analysis") (cleaned up).

Second, a stringent vagueness test applies when civil laws impede citizens' exercise of their constitutional rights. *Vill. of Hoffman Estates*, 455 U.S. at 499; *accord Colautti* v. *Franklin*, 439 U.S. 379, 391 (1979) (fair warning is especially important "where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights"); *Grayned*, 408 U.S. at 109 (fair warning is critical when a law effects citizens' exercise of their "basic First Amendment freedoms").

C. Hawai`i's novel application of its public-accommodation law to Mrs. Young merits a strict vagueness test.

Hawai`i's novel application of its public-accommodation law to Mrs. Young's home merits a strict vagueness test for both reasons stated in *Village of Hoffman Estates*. The law is quasi-criminal and its effects on Mrs. Young are prohibitory and stigmatizing. Just as important, Hawai`i's unprecedented application of its public-accommodation law to force Mrs. Young to rent bedrooms in her home against Catholic teachings inhibits the exercise of her rights to privacy, intimate association, and free exercise.

1. Hawai`i's public-accommodation law is quasi-criminal and its effects on Mrs. Young are both prohibitory and stigmatizing.

Because Hawai`i's application of its public-accommodation law to Mrs. Young is quasi-criminal and has prohibitory and stigmatizing effects, it

warrants a strict vagueness test. *Village of Hoffman Estates*, 455 U.S. at 500. Yet the Hawai`i Courts refused to conduct any vagueness inquiry at all.

Hawai`i law empowers the Commission to regulate businesses and bring enforcement actions on behalf of private citizens. Haw. Rev. Stat. § 368-3; *see also Finley*, 524 U.S. at 588 (recognizing that vagueness in "regulatory scheme[s]" is especially concerning). The Commission exercises many traditional powers of a court and has the authority—alongside courts—to award "punitive damages." Haw. Rev. Stat. § 368-17(a); *see* Haw. Rev. Stat. § 368-5 (interfering with the Commission or intentionally violating its orders can result in imprisonment for 90 days). Notably, Respondents seek punitive damages in this case, App.66a, 87a, in addition to "threefold damages" that litigants recover via statute, Haw. Rev. Stat. § 489-7.5. Anyone Hawai`i deems to have run afoul of its public-accommodations law must further pay severe fines to the state of "not less than $500 nor more than $10,000 for each violation." Haw. Rev. Stat. § 489-8(b). Under this provision, "[e]ach day of violation" constitutes "a separate violation." *Id.*

It is difficult to imagine a state enforcement scheme more quasi-criminal in nature. This Court has long recognized that punitive damages and other "'private fines' intended to punish the defendant and to deter future wrongdoing" are quasi-criminal. *Cooper Indus., Inc.* v. *Leatherman Tool Gr., Inc.*, 532 U.S. 424, 432 (2001). Hawai`i imposes such punitive and three-fold damages awards and punitive fines against people like Mrs. Young specifically for purposes of "retribution and deterrence." *Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 19 (1991). These

punitive measures signal to society at large that Mrs. Young is guilty of a particularly "malicious deprivation[ ]" of Ms. Cervelli's and Ms. Bufford's rights. *Carey* v. *Piphus*, 435 U.S. 247, 266 (1978).

Few people will risk renting bedrooms in their family homes with such a Sword of Damocles. If Respondents are successful, the judgments against Mrs. Young will likely force her to sell her home of 40 years, and she will no longer have a dwelling large enough to accommodate even her own family. Hawai`i's application of its public-accommodation law to Mrs. Young thus has a strong prohibitory effect.

It is heavily stigmatizing too. Punitive damages generally mean that a defendant engaged in "intentional or malicious" wrongdoing or some other form of "extreme conduct." *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981). When the State forces a person pay punitive damages, the public assumes they intentionally committed a grave wrong. *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 306 n.9 (1986) ("The purpose of punitive damages is to punish the defendant for his willful or malicious conduct and to deter others from similar behavior.")

Additionally, when the State declares someone a "discriminator," heavy social stigma attaches regardless of the legal punishment. Most people assume that "discriminators" harbor animus towards members of a protected class. Mijha Butcher, *Using Mediation to Remedy Civil Rights Violations When the Defendant is Not an Intentional Perpetrator*, 24 Hamline J. Pub. L. & Pol'y 225, 226 (2003).

2. Hawai`i's application of its public-accommodation law to Mrs. Young inhibits the exercise of her rights to privacy, intimate association, and the free exercise of religion.

Hawai`i's application of its public-accommodation law also inhibits Mrs. Young's exercise of her constitutional rights to privacy, intimate association, and the free exercise of religion. *Vill. of Hoffman Estates*, 455 U.S. at 499 ("[T]he most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights.").

"[O]ne of the most essential branches of English liberty is the freedom of one's house," or "castle." *Payton* v. *New York*, 445 U.S. 573, 597 n.45 (1980) (cleaned up). The Founders specially protected this freedom from government intrusion in the Third, Fourth, and Fifth Amendments. *Griswold* v. *Connecticut*, 381 U.S. 479, 484 (1965). As a result, this Court is highly protective of the "privacy of the dwelling." *Wyman* v. *James*, 400 U.S. 309, 316 (1971). It has recognized that the home is a personal retreat where citizens go for "tranquility," *Carey* v. *Brown*, 447 U.S. 455, 471 (1980), and that citizens have the right to satisfy their "intellectual and emotional needs" at home without state interference, *Stanley* v. *Georgia*, 394 U.S. 557, 565 (1969).

Forcing Mrs. Young to rent bedrooms in violation of her religious beliefs destroys the peace and tranquility she enjoys at home. It transforms her family home of 40 years from a personal refuge into a fixed and unrelenting burden on her conscience.

Frisby v. *Schultz*, 487 U.S. 474, 484 (1988). That is precisely what Mrs. Young attempted to express to Ms. Cervelli. App.5a.

Mrs. Young's freedom of intimate association is designed to protect against such an intrusion into her private life. This Court has described "*all* details" in the home as "intimate details." *Kyllo* v. *United States*, 533 U.S. 27, 37 (2001). Mrs. Young's decisions about who shares all of the main living spaces of her home are among the most intimate a citizen can make. *Bd. of Dirs. of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U.S. 537, 545 (1987). Hawai`i seeks to strip away Mrs. Young's freedom to decide when to form such "highly personal relationships." *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 618 (1984).

But as the Ninth Circuit has explained, unique constitutional concerns arise when "two people [are] sharing the same living space." *Fair Hous. Council of San Fernando Valley* v. *Roommate.com, LLC*, 666 F.3d 1216, 1220 (9th Cir. 2012). "Aside from immediate family or a romantic partner, it's hard to imagine a relationship more intimate than that between roommates, who share living rooms, dining rooms, kitchens, [and] bathrooms . . . ." *Id.* at 1221. Yet Hawai`i seeks to take away Mrs. Young's right to set house rules compatible with her faith. The State's campaign to force Mrs. Young to rent bedrooms in her own home in a manner that conflicts with her religious beliefs is a serious violation of her "privacy, autonomy," and peace of mind. *Id.*

No less than Mrs. Young's right to live out her religious beliefs in her own home is at stake. If the Free Exercise Clause does not safeguard Mrs. Young's

faith-based decisions about sleeping arrangements in her family home, one wonders what it does protect. *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct 2751, 2785 (2014) (Kennedy, J., concurring) (free exercise is essential to the dignity of those who strive "for a self-definition shaped by their religious precepts").

In sum, Hawai`i has given Mrs. Young a stark choice between (1) remaining true to her faith, ceasing to rent three bedrooms in her home, and likely losing her home of 40 years, or (2) renting bedrooms in her home to make ends meet but in violation of her religious beliefs. Applying Hawai`i's public-accommodation law in this way seriously inhibits Mrs. Young's exercise of her free-exercise rights. *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2026 (2017) (Gorsuch, J., concurring) (the First Amendment "guarantees the free *exercise* of religion, not just the right to inward belief (or status)").

D. The Hawai`i Court of Appeals' ruling directly conflicts with this Court's fair-notice decisions and those of the Second, Third, Fourth, Fifth, and D.C. Circuits.

The Hawai`i Court of Appeals' decision to punish Mrs. Young under a new and unforeseeable interpretation of Hawai`i law—a decade after she spoke with Ms. Cervelli and Ms. Bufford—directly conflicts with this Court's fair-notice precedent and rulings by the federal courts of appeals.

1. The Hawai`i Court of Appeals' ruling conflicts with this Court's holdings in *Fox Television Stations* and *Gentile*.

In *Fox Television Stations*, this Court addressed the FCC's censure of Fox and ABC for broadcasting fleeting expletives and brief partial nudity. 567 U.S. at 247-52. When the broadcasts occurred, FCC guidance indicated that indecent material was sanctionable only when it was dwelled-on or repeated. *Id.* at 254. But, like Hawai`i, the FCC reinterpreted the law and censured the broadcasters under a never-previously-announced rule. *Id.* at 247-52. This Court explained that the FCC failed to provide persons of ordinary intelligence with fair notice of what was prohibited and held this application of the law invalid. *Id.* at 254. Because the FCC failed to give the networks "fair notice" prior to the broadcasts in question, the Commission's standards were vague as applied, necessitating that this Court set aside the Commission's orders. *Id.* at 258.

Similarly, *Gentile* involved Nevada's efforts to discipline an attorney who gave a press conference after his client was indicted. 501 U.S. at 1063. Nevada's professional-conduct rules forbid certain pre-trial publicity but contained an exception allowing attorneys to "state without elaboration the general nature of the defense." *Id.* at 1048 (cleaned up). In good faith, the attorney believed that his remarks complied with the exception. *Id.* at 1049-51. But the Nevada Supreme Court later held that his statements exceeded its safe harbor. *Id.* at 1050-51. Absent a state court's prior clarification of the exemption's scope, this Court held that the Nevada

rules failed to provide fair notice. *Id.* at 1048. "The fact that Gentile was found in violation of the Rules after studying them and making a conscious effort at compliance demonstrates that Rule 177 creates a trap for the wary as well as the unwary." *Id.* at 1051.

Mrs. Young is not a media conglomerate or a sophisticated lawyer. But she is a licensed real-estate agent familiar with Hawai`i's Mrs. Murphy exemption, which facially protects citizens who rent up to four rooms in their own homes. She referred Ms. Cervelli and Ms. Bufford to a friend in good-faith reliance on that exemption. Yet, just like in *Fox Television*, the Hawai`i Court of Appeals reinterpreted the law in Mrs. Young's case and then applied it to punish her with no forewarning. 567 U.S. at 258. It took this course despite the fact that, as in *Gentile*, Mrs. Young made a studied effort to comply with the law. 501 U.S. at 1048-51. What this shows is that Hawai`i's public-accommodations law, as applied to Mrs. Young, is a trap for the wary. *Id.* at 1051. The Due Process Clause prevents states from "unforeseeably and retroactively" narrowing an exemption "by judicial construction" as the Hawai`i Court of Appeals did here at the Commission's request. *Bouie*, 378 U.S. at 352.

2. The Hawai`i Court of Appeals' ruling conflicts with decisions by the Second, Third, Fourth, Fifth, and D.C. Circuits.

Hawai`i courts apparently subject only criminal statutes to fair-notice inquiries, which is presumably why they refused to even address Mrs. Young's due-process argument below. *E.g.*, *State* v. *Kalama*, 8 P.3d

1224, 1228 (Haw. 2000) (due process requires "that a *penal* statute state with reasonable clarity the act it proscribes" and that "*penal* statutes . . . inform a person of ordinary intelligence of what conduct is prohibited") (emphasis added).

This reasoning conflicts with decisions by the Second, Third, Fourth, Fifth, and D.C. Circuits, which recognize that a strict vagueness test applies when civil laws exact significant penalties. *E.g.*, *Cnty. of Suffolk* v. *First Am. Real Estate Sols.*, 261 F.3d 179, 195 (2d Cir. 2001) ("fair warning" is required "before a criminal sanction or significant civil or administrative penalty attaches"); *F.T.C.* v. *Wyndham Worldwide Corp.*, 799 F.3d 236, 250 (3d Cir. 2015) ("The fair notice doctrine extends to civil cases, particularly where a penalty is imposed."); *United States* v. *Hoechst Celanese Corp.*, 128 F.3d 216, 224 (4th Cir. 1997) ("clear notice" is required when "civil penalties are quasi-criminal" in nature) (cleaned up); *Ford Motor Co.* v. *Tex. Dep't of Transp.*, 264 F.3d 493, 508 (5th Cir. 2001) ("Civil statutes . . . that contain quasi-criminal penalties may be subject to the more stringent review afforded criminal statutes."); *Gen. Elec. Co.* v. *U.S. E.P.A.*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995) ("[W]here the regulation is not sufficiently clear to warn a party about what is expected of it[] an agency may not . . . impos[e] civil or criminal liability.").

In a case indistinguishable from this one, the Fourth Circuit invalidated penalties the EPA imposed under the Clean Air Act because a company "had reason to believe that its interpretation of [an] exemption" would shield it from liability. *Hoechst*, 128 F.3d at 226. The company thus lacked "fair notice of

EPA's broader interpretation" of its regulations. *Id.* The D.C. Circuit likewise overruled fines the EPA levied on a company under the Toxic Substances Control Act because the agency's interpretation of its regulations was "so far from a reasonable person's understanding . . . that they could not have fairly informed GE of the agency's perspective." *Gen. Elec.*, 53 F.3d at 1330.

If this case had been brought in federal court, Mrs. Young would likely not be liable for punitive and treble damages, statutory fines, and attorney fees and costs regardless of the fact that Hawai`i's public-accommodation law is civil in nature. But Hawai`i courts ignore such fair-notice violations altogether.

II. The Commission's campaign against Mrs. Young violates the Free Exercise Clause under *Lukumi* and *Masterpiece Cakeshop*.

The Commission is charged with rooting out discrimination based on religion as well as sexual orientation. Haw. Rev. Stat. § 489-3. But it has long prioritized the latter and opposed measures to protect free-exercise rights. App.105a–10a. That led to the Commission working in concert with private plaintiffs in this case to ignore or constrict the Mrs. Murphy exemption, label Mrs. Young's family home of 40 years a place of public accommodation, and penalize her severely. Such a state-sponsored campaign to punish Mrs. Young for her religious beliefs about sex and marriage conflicts directly with this Court's rulings in *Lukumi* and *Masterpiece Cakeshop*.

A. *Lukumi* bars the Commission from gerrymandering Hawai`i law to punish Mrs. Young for her religious beliefs.

The Free Exercise Clause's purpose is to avoid religious persecution and intolerance like that Hawai`i has inflicted on Mrs. Young. *Lukumi*, 508 U.S. at 532. It forbids the State from gerrymandering its law to "restrict practices because of their religious motivation." *Id.* at 533. But that is exactly what the Commission has done by (1) working alongside private plaintiffs to advance an unprecedented interpretation of the Mrs. Murphy exemption that leaves Mrs. Young vulnerable to attack, (2) convincing state courts to adopt it, and (3) advocating for state courts to punish Mrs. Young based on her religious beliefs without any prior warning that her actions could be illegal.

There is nothing "subtle" or "covert" about the Commission's 10-year campaign to suppress Mrs. Young's religious beliefs about sex and marriage. *Id.* at 534. The Commission officially labeled her religious beliefs unlawful "discrimination" despite the fact that Mrs. Young declines to rent bedrooms in her family home to any romantic partners other than a married man and women—Hawai`i's only recognized form of marriage in 2007. For this "crime" of being a faithful Catholic, the Commission sought punitive damages and statutory penalties that could cause Mrs. Young to lose her home. App.86a–87a.

Brushing aside any concern that Mrs. Young lacked fair notice, the Commission sought to penalize her to the maximum extent of Hawai`i law. And it did so despite the fact that a fair reading of the Mrs.

Murphy exemption protected Mrs. Young's conduct and she explicitly cited that provision in referring Ms. Cervelli and Ms. Bufford to a friend who was happy to host them in her home. App.70a–71a, 75a, 81a–82a. Such "gratuitous restrictions" on Mrs. Young's ability to live out her faith demonstrates that Hawai`i's application of its public-accommodation law is not religiously neutral. *Lukumi*, 508 U.S. at 538 (cleaned up).

The Commission's novel interpretation of state law also fails the generally-applicability test. Unable to erase the Mrs. Murphy exemption from Hawai`i's statute books entirely, the Commission argued—and the Hawai`i Court of Appeals agreed—that it applies only to "longer-term" stays. App.21a. What this means is that those like Mrs. Young who the State deems to rent rooms in their home "short term" have no right to select renters compatible with their lifestyle, but those who rent rooms in their home "long-term" do. Yet no relevant statute's text contains this short-vs.-long-term-stay distinction.

Such parsing is irrational in any case because same-sex couples have a much stronger (not weaker) interest in obtaining long-term housing close to work, a sick relative, or college than they do accessing short-term vacation rentals near a desirable beach. It also treats homeowners who rent rooms long-versus-short term differently for no particular reason.

What is certain is that Hawai`i "fail[s] to prohibit nonreligious conduct that endangers" its interest in preventing discrimination against same-sex couples to a greater degree than Mrs. Young's polite and apologetic referral of Ms. Cervelli and Ms. Bufford to

a friend happy to host them. *Lukumi*, 508 U.S. at 543. In fact, the only real-world benefit of the Commission's strained reading of Hawai`i law is that it allows the State to selectively punish Mrs. Young based "on conduct motivated" by her religious beliefs while still letting others off scot-free. *Id.*; *see also id.* at 542 ("[t]he Free Exercise Clause protects religious observers against unequal treatment") (cleaned up).

The State's strict-scrutiny arguments are wrong for similar reasons. The Commission and Hawai`i Court of Appeals both argued that applying the public-accommodation law to Mrs. Young (and practically anyone else) satisfied strict scrutiny. App.33a–36a. But laws that leave "appreciable damage" to a supposedly vital interest do not serve a compelling government interest. *Lukumi*, 508 U.S. at 547 (cleaned up). Hawai`i law does just that by allowing those who rent rooms in their own homes "longer term" to do whatever they like.

More narrowly-tailored options for guarding same-sex couples also exist. The State could readily protect the autonomy of all those who rent a few rooms in their own homes under the Mrs. Murphy exemption, which leaves hundreds of other rooms in hotels, motels, and non-owner-occupied dwellings available. At a bare minimum, the State could protect religious objectors like Mrs. Young who show they harbor no animosity towards same-sex couples by volunteering to find them a room elsewhere.

B. *Masterpiece Cakeshop* demonstrates that the Commission's palpable hostility towards Mrs. Young's religious beliefs violates her free-exercise rights.

The Commission's nearly 10-year campaign to punish Mrs. Young for her religious beliefs violates the Free Exercise Clause. *Masterpiece Cakeshop*, 138 S. Ct. at 1724 ("religious hostility on the part of the State itself" cannot factor into the balancing of free exercise and LGBT rights). During this case Respondents interrogated Mrs. Young about her religious beliefs, criticized the Catholic Church's teaching about sex and marriage, and cited Mrs. Young's religious beliefs as a basis for punishing her under an unprecedented reading of Hawai'i law. *Id.* at 1729 ("inappropriate and dismissive comments" from the Colorado Civil Rights Commission showed a First Amendment violation); App.84a–86a, 96a–104a. The Commission also encouraged state courts to ignore or narrow the Mrs. Murphy exemption to deprive Mrs. Young of legal protection. And it persuaded those courts to disregard this case's ramifications for Mr. Young's primary source of income (*i.e.*, renting rooms) and ability to keep her family home of 40 years. App.95a, 116a. If that were not enough, the Commission assured the Hawai`i Supreme Court there was no need to ensure Mrs. Young had fair warning that her actions could violate state public-accommodations law.

Just as in *Masterpiece Cakeshop*, Mrs. Young's interaction with Ms. Cervelli and Ms. Bufford occurred years before Hawai'i legalized same-sex marriage or this Court ruled in either *United States*

v. *Windsor*, 570 U.S. 744 (2013), or *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015). 138 S. Ct. at 1728. The Hawai`i Court of Appeals refused to resolve her case until the cultural and legal winds shifted. After waiting for roughly 5 years, it followed the Commission's lead, construed the Mrs. Murphy exemption to deprive Mrs. Young of legal protection, and ruled against her without oral argument. The court did so even though Mrs. Young had no way of anticipating such a radical change in law.

If this history shows anything, it is that the Commission and Hawai'i courts gave insufficient "consideration for [Mrs. Young's] free exercise rights and the dilemma [s]he faced." *Masterpiece Cakeshop*, 138 S. Ct. at 1729. Mrs. Young believes that she is spiritually accountable for what happens under her roof, including sexual conduct. *Hobby Lobby*, 134 S. Ct. at 2778 (recognizing such beliefs entail "a difficult and important question of religion and moral philosophy"); App.84a. A grandmother's moral concerns about the sexual relations taking place in her home is a religious exercise "that gay persons could recognize and accept without serious diminishment to their own dignity and worth." *Masterpiece Cakeshop*, 138 S. Ct. at 1727. That is particularly true here because Mrs. Young explained to Ms. Cervelli and Ms. Bufford that she had nothing against them personally and applied the same "house rules" to her own family members. App.82a.

Yet the Commission invented an unprecedented reading of Hawai'i law that permitted it to ignore the Mrs. Murphy exemption and sit in judgment of Mrs. Young's religious beliefs. *Id.* at 1730. It then applied a "negative normative" view of Mrs. Young's faith-

based referral of Ms. Cervelli and Ms. Bufford to a friend who rents rooms in the same area. *Id.* at 1731. In so doing, the Commission told Mrs. Young that Catholic teaching about sex and marriage is wrong, although the State has no business declaring such articles of faith "illegitimate." *Id.* In the following 8 years the Commission has worked tirelessly to ensure that Mrs. Young's religious beliefs have no place in the "public sphere or commercial domain" and that she is "less than fully welcome" in the Hawai'i community. *Id.* at 1729. This is precisely the sort of religious hostility that *Masterpiece Cakeshop* forbids.

Nonetheless, the Commission cited this Court's *Masterpiece Cakeshop* decision to the Hawai`i Supreme Court in support of its 10-year campaign to punish Mrs. Young. It continues to discount the harassment and hate mail that she has experienced as a result of this case, or the real harm that facilitating sex outside of marriage between a man and a woman would do to Mrs. Young's conscious, personal integrity, and self-worth. App.104a The Hawai`i Court of Appeals similarly failed to "carefully consider [Mrs. Young's] objections and to treat respectfully the expression of [her] sincerely-held religious beliefs" as *Masterpiece Cakeshop* requires. *Adorers of the Blood of Christ* v. *F.E.R.C.*, 897 F.3d 187, 197 n.10 (3d Cir. 2018); *see* App.14a–15a. Such blatant disregard for Mrs. Young's free exercise rights is not fitting for state actors charged with the "solemn responsibility of fair and neutral enforcement" of Hawai`i law, including the protection of its religious citizens. *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

In sum, *Masterpiece Cakeshop* bars "subtle departures from neutrality" and the State raising

"even slight suspicion" of religious hostility. *Id.* at 1731 (cleaned up). Yet the Commission's actions show outright hostility towards Mrs. Young's religious beliefs.

These circumstances warrant this Court's review or summary reversal. At a minimum, the Court should grant, vacate, and remand for the Hawai`i Court of Appeals court to reconsider its free-exercise holding in light of *Masterpiece Cakeshop*, which this Court handed down over three months after the Court of Appeals ruled.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 9, 2018

APPENDIX

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[1] ROA stands for the Record on Appeal, the original imaged record of the First Circuit State of Hawai`i electronically filed in the Intermediate Court of Appeals on July 11, 2013. ROA citations reflect the PDF page numbers in this combined PDF document.

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IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

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DIANE CERVELLI and TAEKO BUFFORD,
Plaintiffs-Appellees,
vs.
ALOHA BED & BREAKFAST,
a Hawaiʻi sole proprietorship,
Defendant-Appellant,
and
WILLIAM D. HOSHIJO, as Executive Director
of the Hawaiʻi Civil Rights Commission,
Plaintiff-Intervenor-Appellee.

NO. CAAP-13-0000806

APPEAL FROM THE CIRCUIT COURT
OF THE FIRST CIRCUIT

(CIVIL NO. 11-1-3103)

FEBRUARY 23, 2018

NAKAMURA, CHIEF JUDGE, and FUJISE and REIFURTH, JJ.

OPINION OF THE COURT BY NAKAMURA, C.J.

Defendant-Appellant Aloha Bed & Breakfast (Aloha B&B) is owned and operated by Phyllis Young (Young) as a sole proprietorship. Aloha B&B provides lodging to transient guests, averaging between one hundred and two hundred customers per year. Plaintiffs-Appellees Diane Cervelli (Cervelli) and Taeko Bufford (Bufford) (collectively, Plaintiffs), lesbian women in a committed relationship, planned a trip to Hawai‘i and sought lodging with Aloha B&B. Aloha B&B and Young refused to accommodate Plaintiffs' request for lodging based solely on their sexual orientation.

Plaintiffs filed a Complaint in the Circuit Court of the First Circuit (Circuit Court)[1/] against Aloha B&B, alleging discriminatory denial of public accommodations in violation of Hawaii Revised Statutes (HRS) Chapter 489.[2/] The Hawai‘i Civil Rights Commission (HCRC) intervened in the case as a plaintiff, after it had determined that there was reasonable cause to believe that unlawful discriminatory practices had occurred.

[1/] The Honorable Edwin C. Nacino presided.

[2/] HRS Chapter 489 is entitled "Discrimination in Public Accommodations." HRS § 489-3 (2008) provides:

> **Discriminatory practices prohibition.** Unfair discriminatory practices that deny, or attempt to deny, a person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation on the basis of race, sex, including gender identity or expression, sexual orientation, color, religion, ancestry, or disability are prohibited.

Plaintiffs and the HCRC filed a partial motion for summary judgment on the issues of liability and injunctive relief, and Aloha B&B filed a competing cross-motion for summary judgment. The Circuit Court granted Plaintiffs and the HCRC's motion and denied Aloha B&B's motion. The Circuit Court ruled that Aloha B&B violated HRS § 489-3 by discriminating against the Plaintiffs on the basis of their sexual orientation. The Circuit Court also enjoined Aloha B&B from "engaging in any practices that operate to discriminate against same-sex couples as customers."

On appeal, Aloha B&B argues that the Circuit Court erred in ruling that it is liable for discriminatory practices under HRS Chapter 489. Aloha B&B maintains that because Aloha B&B operates its business out of Young's residence, the Circuit Court should have applied an exemption from prohibited discriminatory practices in real property transactions set forth in HRS Chapter 515 for the rental of rooms by a resident. Alternatively, Aloha B&B argues that the application of HRS Chapter 489 to prohibit discriminatory practices under the circumstances of this case would violate Young's constitutional rights. Based on these arguments, Aloha B&B contends that the Circuit Court erred in granting Plaintiffs and the HCRC's motion for partial summary judgment and in denying Aloha B&B's motion for summary judgment. We affirm.

BACKGROUND

I.

Aloha B&B operates out of a four bedroom home in the Mariner's Ridge section of Hawai‘i Kai, where

Young and her husband reside. Young operates Aloha B&B as a sole proprietorship and offers three rooms in her residence to guests for overnight lodging. Rooms at Aloha B&B are offered at a nightly rate of $80 to $100, and there is a three-night minimum booking requirement. In addition to the nightly rate, Aloha B&B charges and collects general excise taxes from its customers as well as transient accommodation taxes, which only providers of transient accommodations are required to pay. Aloha B&B remits these taxes to the State of Hawai‘i.

Aloha B&B does not offer rooms to customers for use as a permanent residence, and Young never describes herself as a landlord to her guests. Aloha B&B averages one hundred to two hundred customers per year. The median length of stay for Aloha B&B customers is four to five days. The majority of customers stay for less than a week, about 95 percent or more stay for less than two weeks, and more than 99 percent stay for less than a month. In addition to overnight lodging, customers at Aloha B&B are provided breakfast, pool access, wireless internet access, and other amenities. Almost all of Aloha B&B customers, an estimated 99 percent, are travelers who do not live in Hawai‘i.

Aloha B&B advertises its services to the general public through its own website as well as through multiple third-party websites. Aloha B&B's website, freely accessible through the internet, provides a phone number and email address for potential customers to contact Aloha B&B, and it contains graphics stating "Best Choice Hawaii Hotel" and "Best Choice Oahu Hotels." Aloha B&B also advertises through various bed-and-breakfast-related

websites to generate more business for itself, including paying an annual fee of between $400 to $500 to BedandBreakfast.com.

II.

Plaintiffs Cervelli and Bufford, two lesbian women in a committed relationship, began planning a trip to Hawai'i to visit a friend. Plaintiffs, who resided in California, wanted to stay near their friend, who lived in Hawai'i Kai. Cervelli emailed Aloha B&B to inquire if a room was available for their planned trip. Young responded by email the same day, stating that a room was available for six days and providing instructions on how to complete the reservation.

Two weeks later, Cervelli called Aloha B&B to book the reservation and spoke with Young, who indicated that the room was still available. While Young was writing up the reservation, Cervelli mentioned that she would be accompanied by another woman named "Taeko." Young stopped and asked whether Cervelli and her companion were lesbians. When Cervelli said "yes," Young responded, "[W]e're strong Christians. I'm very uncomfortable in accepting the reservation from you." Young refused to accept the reservation from Cervelli and terminated the phone call by hanging up.

Cervelli called Bufford in tears and explained what had happened. Bufford then called Young and attempted to reserve a room, but Young again refused to accept the reservation. Bufford asked Young if her refusal was because Bufford and Cervelli were lesbians, to which Young responded "yes." Bufford had two phone conversations with Young that day. Young referred to her religious beliefs in discussing

her refusal to provide a room to Plaintiffs. Apart from Plaintiffs' sexual orientation, there was no other reason for Young's refusal to accept Plaintiffs' request for a room.

III.

Cervelli and Bufford each filed a complaint against Aloha B&B with the HCRC alleging discrimination in public accommodations on the basis of sexual orientation. Young was interviewed during the HCRC's investigation and was asked to describe the religious beliefs that she claimed precluded her from accepting Cervelli and Bufford's reservation. Young stated that she is Catholic; that she believes that homosexuality is wrong; that she believes that sexual relations between same-sex couples (regardless of whether they are legally married) are immoral; and that she therefore refused to provide Cervelli and Bufford with a room. The HCRC found that there was reasonable cause to believe that Aloha B&B had committed an unlawful discriminatory practice against Cervelli and Bufford in violation of HRS § 489-3. The HCRC subsequently closed its cases based on Cervelli's and Bufford's election to pursue a court action, and it issued "right to sue" notices to Cervelli and Bufford.

IV.

Plaintiffs subsequently filed in the Circuit Court a Complaint for injunctive relief, declaratory relief, and damages against Aloha B&B, alleging discrimination on the basis of sexual orientation in violation of HRS Chapter 489. The HCRC filed a motion to intervene in the case as a plaintiff because it found the case was one of "general importance" given the HCRC's mission

to eliminate discrimination. The Circuit Court granted the HCRC's motion to intervene as a plaintiff.

Plaintiffs and the HCRC filed a motion for partial summary judgment with respect to liability and injunctive relief.[3/] Aloha B&B filed a cross-motion for summary judgment.

The Circuit Court held a hearing on the parties competing motions for summary judgment. At the hearing, counsel for Aloha B&B acknowledged that "discrimination is a horrible evil" and that "in places of public accommodation discrimination is a horrible evil." Aloha B&B's counsel also acknowledged that Aloha B&B admits that it "does provide lodging to transient guests."[4/] However, Aloha B&B's counsel argued that the law prohibiting discrimination in public accommodations, HRS Chapter 489, does not apply to Aloha B&B because it uses Young's residence to provide lodging to transient guests. Aloha B&B's counsel argued that Aloha B&B's use of a residence means that it is not a "place of public accommodation" subject to the requirements of Chapter 489, but instead is governed by HRS Chapter 515.

The Circuit Court granted Plaintiffs and the HCRC's motion for partial summary judgment with respect to liability and declaratory and injunctive relief, and it denied Aloha B&B's cross-motion for

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[3/] The only claim for which Plaintiffs and the HCRC did not seek summary judgment was the claim for damages in the Complaint.

[4/] As discussed infra, HRS § 489-2 defines "place of public accommodation" to include "[a]n inn, hotel, motel, or other establishment that provides lodging to transient guests[.]"

summary judgment as moot. In its Summary Judgment Order,[5] the Circuit Court found that:

> [Aloha B&B] is governed by Chapter 489, HRS, not Chapter 5151 HRS, and [Aloha B&B] constitutes a place of public accommodation under HRS § 489-2, because its goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the general public as customers, clients, or visitors. [Aloha B&B] also constitutes "[a]n inn, hotel, motel, or other establishment that provides lodging to transient guests" and "[a] facility providing services relating to travel or transportation." HRS § 489-2. [Aloha B&B] violated HRS § 489-3 by discriminating against Plaintiffs Diane Cervelli and Taeko Bufford on the basis of their sexual orientation as lesbians.

(Certain brackets in original.) The Circuit Court enjoined and prohibited "Defendant Aloha Bed & Breakfast, a Hawai‘i sole proprietorship of Phyllis Young," and its officers, agents, and employees "from engaging in any practices that operate to discriminate against same-sex couples as customers of Aloha Bed & Breakfast[.]"

The Circuit Court entered its Summary Judgment Order on April 15, 2013. The parties subsequently submitted a stipulated application to file an

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[5] The Circuit Court's Order was entitled "Order Granting Plaintiffs' and (the HCRC's) Motion for Partial Summary Judgment for Declaratory and Injunctive Relief and Denying [Aloha B&B's] Motion for Summary Judgment," which we will refer to as the "Summary Judgment Order."

interlocutory appeal from the Summary Judgment Order, which the Circuit Court granted.

DISCUSSION

I.

Aloha B&B argues that the Circuit Court erred in ruling that it is liable for discriminatory practices under HRS Chapter 489. Aloha B&B argues that it is not subject to HRS Chapter 489, but that its activities are governed by HRS Chapter 515. In particular, Aloha B&B asserts that an exemption from prohibited discriminatory practices in real property transactions set forth in HRS § 515-4(a)(2) protects it from liability in this case.

Plaintiffs and the HCRC, on the other hand, argue that Aloha B&B is clearly a place of public accommodation that is subject to HRS Chapter 489. Plaintiffs and the HCRC argue that Aloha B&B cannot "borrow" an exemption applicable to a different law (HRS Chapter 515) to avoid liability for violating the public accommodations law (HRS Chapter 489) on which Plaintiffs seek relief. They also argue that the HRS Chapter 515 exemption relied upon by Aloha B&B only applies to long-term living arrangements in which tenants are seeking permanent housing, and not to the short-term transient lodging provided by Aloha B&B to its customers.

As explained below, we conclude that the Circuit Court properly granted partial summary judgment in favor of Plaintiffs and the HCRC.

A.

The statutory provisions relevant to this appeal are as follows.

Plaintiffs' Complaint against Aloha B&B alleged discrimination on the basis of sexual orientation in public accommodations, in violation of HRS Chapter 489. HRS § 489-3 provides:

> Unfair discriminatory practices that deny, or attempt to deny, a person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation on the basis of race, sex, including gender identity or expression, sexual orientation, color, religion, ancestry, or disability are prohibited.

HRS § 489-2 (2008) defines the terms "place of public accommodation" and “sexual orientation" for purposes of HRS Chapter 489, in relevant part, as follows:

> "Place of public accommodation" means a business accommodation, refreshment, entertainment, recreation, or transportation facility of any kind whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the general public as customers, clients, or visitors. By way of example, but not of limitation, place of public accommodation includes facilities of the following types:
>
> (1) A facility providing services relating to travel or transportation; [or]

> (2) An inn, hotel, motel, or other establishment that provides lodging to transient guests;
>
> . . . .
>
> "Sexual orientation" means having a preference for heterosexuality, homosexuality, or bisexuality, having a history of any one or more of these preferences, or being identified with any one or more of these preferences.

Aloha B&B argues that its activities are governed by HRS Chapter 515 and that it falls within the exemption from prohibited discriminatory practices set forth in HRS § 515- 4(a)(2). HRS § 515-3 (2006), provides in relevant part:

> It is a discriminatory practice for an owner or any other person engaging in a real estate transaction, or for a real estate broker or salesperson, because of race, sex, including gender identity or expression, sexual orientation, color, religion, marital status, familial status, ancestry disability, age, or human immunodeficiency virus infection:
>
> (1) To refuse to engage in a real estate transaction with a person;
>
> . . . .[6/]

[6/] HRS § 515-3 identifies numerous other actions related to real estate transactions that 6onstitute "discriminatory practice[s]."

HRS § 515-4(a)(2) (Supp. 2011) provides:

> (a) Section 515-3 does not apply:
>
> . . .
>
> (2) To 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 accommodation.[7]

HRS § 515-2 (2006) defines the terms "housing accommodation," "real estate transaction" and "real property" for purposes of HRS Chapter 515, in relevant part, as follows:

> "Housing accommodation" includes any improved or unimproved real property, or part thereof, which is used or occupied, or is intended, arranged, or designed to be used or occupied, as the home or residence of one or more individuals.

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[7] At the time that Plaintiffs attempted to secure lodging with Aloha B&B, HRS § Section 515-4(a)(2) (2006) provided:

> (a) Section 515-3 does not apply:
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> . . .
>
> (2) To the rental of a room or up to four rooms in a housing accommodation by an individual if the individual resides therein.

Although HRS § 515-4(a)(2) (2006) was subsequently amended, the differences between the pre-amended and post-amended statute are not material to our analysis in this case because Young was an owner/resident. For simplicity, we refer to the current version of the statute in our analysis.

. . . .

> "Real estate transaction" includes the sale, exchange rental, or lease of real property.
>
> "Real property" includes buildings, structures, real estate, lands, tenements, leaseholds, interests in real estate cooperatives, condominiums, and hereditaments, corporeal and incorporeal, or any interest therein.

The definition of "sexual orientation" in HRS § 515-2 is identical to the definition in HRS § 489-2.

B.

In rendering its decision, the Circuit Court construed provisions of HRS Chapter 489 and HRS Chapter 515. Statutory construction is a question of law, which we review *de novo* under the right/wrong standard. Lingle v. Hawai‘i Gov't Empls. Ass'n, AFSCME, Local 152, AFL-CIO, 107 Hawai‘i 178, 183, 111 P.3d 587, 592 (2005). In interpreting a statute, we are guided by the following well-established principles:

> When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.

> When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in statute, an ambiguity exists.
>
> In construing an ambiguous statute, the meaning of the ambiguous words may be sought by examining the context with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning. Moreover, the courts may resort to extrinsic aids in determining legislative intent. One avenue is the use of legislative history as an interpretive tool.
>
> This court may also consider the reason and spirit of the law, and the cause which induced the legislature to enact it to discover its true meaning. Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called upon in aid to explain what is doubtful in another.

Haole v. State, 111 Hawai'i 144, 149-50, 140 P.3d 377, 382-83 (2006) (block quote format altered; citation and brackets omitted).

C.

Having identified the statutory provisions at issue and the established principles for statutory interpretation, we proceed to consider the parties' statutory interpretation claims. We conclude that the Circuit Court properly ruled that there are no material facts in dispute and that Aloha B&B violated HRS § 489-3 by discriminating against Plaintiffs on the basis of their sexual orientation.

HRS § 489-3 prohibits "[u]nfair discriminatory practices that deny, or attempt to deny, a person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation on the basis of . . . sexual orientation . . . ." Aloha B&B admitted that the sole reason it refused to provide lodging to Plaintiffs was because of their sexual orientation. Young testified in her deposition that there was no other reason for Aloha B&B's refusal.

It is also clear based on the plain statutory language that Aloha B&B is a "place of public accommodation." That term is defined by HRS § 489-2 to mean "a business, accommodation, . . . recreation, or transportation facility of any kind whose goods, services, facilities, . . . or accommodations are extended, offered, sold, or otherwise made available to the general public as customers, clients, or visitors." Aloha B&B admitted in its responsive pretrial statement that "it offers bed and breakfast services to the general public." The evidence presented by Plaintiffs and the HCRC supports this admission. The evidence showed that Aloha B&B advertises and offers its services to the general public through its own website as well as through multiple third-party websites that are freely accessible over the internet; it makes its services available to a large number of customers, an average of between one hundred and two hundred per year; and aside from same-sex couples and smokers, it generally accepts anyone as a customer as long as the person is willing to pay and a room is available.

More importantly, the statutory definition of "place of public accommodation" specifically includes,

"[b]y way of example, but not of limitation," "[a]n inn, hotel, motel, or other establishment that provides lodging to transient guests [.]" HRS § 489-2 (emphasis added). Aloha B&B admitted that it "does provide lodging to transient guests." The undisputed evidence showed that Aloha B&B customers only stay for short periods of time -- the majority for less than a week and about 95 percent for less than two weeks. Aloha B&B does not offer rooms to customers for permanent housing or for use as a residence, and Young does not view herself as the landlord of the guests. In addition, Aloha B&B collects from its customers, and pays to the State, a transient accommodation tax, which only providers of transient accommodations are required to pay.

Based on Aloha B&B's own admissions as well as the undisputed evidence, we conclude that Aloha B&B falls squarely within the statutory definition of "place of public accommodation" as an "establishment that provides lodging to transient guests[.]" Our conclusion is bolstered by the stated purpose of HRS Chapter 489 and the Legislature's directive on how it should be construed. HRS § 489-l(a) (2006) states that the purpose of HRS Chapter 489 "is to protect the interests, rights, and privileges of all persons within the State with regard to access and use of public accommodations by prohibiting unfair discrimination." HRS § 489-1(b) (2006) then directs that HRS Chapter 489 "shall be liberally construed to further" these purposes.

When the plain language of the statutory definition of "place of public accommodation" is liberally construed to further the anti-discrimination purposes of HRS Chapter 489, it reinforces our firm

conclusion that Aloha B&B is a place of public accommodation. We conclude that the Circuit Court correctly ruled that Aloha B&B constitutes a place of public accommodation that is subject to HRS Chapter 489. It is undisputed that Aloha B&B refused to provide Plaintiffs with lodging on the basis of their sexual orientation. Therefore, we affirm the Circuit Court's determination that Aloha B&B violated HRS § 489-3 by discriminating against Plaintiffs on the basis of their sexual orientation.[8/]

D.

In arguing that its actions were not prohibited by HRS 489-3, Aloha B&B relies on an exemption applicable to a different law, HRS Chapter 515, a law which generally prohibits discrimination in real property transactions. In particular, Aloha B&B relies on the exemption set forth in HRS § 515-4(a)(i), a so-called "Mrs. Murphy" exemption.[9/] HRS § 515-4(a)(2) provides that the prohibitions in HRS § 515-3 against discrimination in real estate transactions do not apply "[t]o the rental of up to four rooms in a housing accommodation by an owner or lessor if the

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[8/] Because we conclude that Aloha B&B falls within the statutory definition of "place of public accommodation" as "an establishment that provides lodging to transient guests," we need not address whether the Circuit Court was correct in determining that Aloha B&B also constitutes a place of public accommodation as "[a] facility providing services relating to travel or transportation." See HRS § 489-2.

[9/] "Mrs. Murphy" was a hypothetical widow running a boarding house, whose circumstances were first cited in the 1960s to argue that a person renting a small number of rooms in the person's residence should be exempted from laws prohibiting discrimination.

owner or lessor resides in the housing accommodation." Aloha B&B argues that the HRS § 515-4(a)(2) exemption supersedes the prohibition against discrimination set forth in HRS § 489-3 and therefore authorized its discriminatory conduct in this case. We disagree.

1.

In analyzing Aloha B&B's argument, we begin by focusing on our "foremost obligation . . . to ascertain and give effect" to the Legislature's intent in enacting the statutory provisions. As noted, through HRS § 489-1, the Legislature mandated that HRS Chapter 489 shall be liberally construed to further its purposes of protecting people's rights to access and to use public accommodations by prohibiting unfair discrimination. HRS Chapter 515 is also directed at prohibiting discrimination and "shall be construed according to the fair import of its terms and shall be liberally construed." HRS § 515-1 (2006).

By providing remedies for discrimination and the injuries caused by discrimination, HRS Chapter 489 and HRS Chapter 515 are remedial statutes.[10/] Remedial statutes are liberally construed to suppress the perceived evil and advance the enacted remedy." Flores v. United Air Lines. Inc., 70 Haw. 1, 12, 757 P.2d 641, 647 (1988) (internal quotation marks, citation, and brackets omitted). In addition, "exceptions to a remedial statue should be narrowly

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[10/] See Flores v. United Air Lines, Inc., 70 Haw. 1, 12 n.8, 757 P.2d 641, 647 n.8 (1988) ("Generally, remedial statutes are those which provide a remedy, or improve or facilitate remedies already existing for the enforcement of rights and the redress of injuries." (internal quotation marks and citation omitted)).

construed[.]" EEOC v. Borden's. Inc., 551 F.Supp. 1095, 1110 (D. Ariz. 1982); see State v. Russell, 62 Haw. 474, 479-80, 617 P.2d 84, 88 (1980) ("The importation of exceptions into statutes properly affected with a public interest is not lightly to be made. . . . It is a well settled rule of statutory construction that exceptions to legislative enactments must be strictly construed."); United States v. Columbus Country Club, 915 F.2d 877, 883 (1990) (construing exemptions to federal Fair Housing Act narrowly). Accordingly, we liberally construe the scope of the protection against discrimination provided by HRS Chapter 489, and we narrowly or strictly construe the scope of the exemption from prohibited discrimination provided by HRS § 515-4(a)(2).

The Hawai‘i Legislature's actions in omitting a "Mrs. Murphy" exemption when it enacted HRS Chapter 489 indicates its intent that no such exemption would apply to discrimination in public accommodations and the type of conduct engaged in by Aloha B&B in this case. The "Mrs. Murphy" exemption in HRS Chapter 515 was enacted in 1967. See 1967 Haw. Sess. Laws Act 193, § 4 at 196. Almost twenty years later, the Hawai‘i Legislature enacted HRS Chapter 489, which was patterned after the public accommodation provisions of the federal 1964 Civil Rights Act. See State v. Hoshijo ex rel. White, 102 Hawai‘i 307, 317-18, 76 P.3d 550, 560 (2003). The federal public accommodation provisions contain the "Mrs. Murphy" exemption in the provision defining a "place of public accommodation" to include an "establishment which provides lodging to transient guests[.]" See 42 U.S.C. § 2000a(b)(1). Although the

corresponding Hawai‘i provision adopts portions of the federal provision word for word, the "Mrs. Murphy" exemption is conspicuously omitted from the Hawai‘i provision.

A side by side comparison of the two provisions is a follows:

Hawai‘i Public Accommodations Law	Federal Public Accommodation Law
HRS § 489-2 defines a “place of public accommodation” to include:	42 U.S.C § 2000a(b)(1) defines a “place of public accommodation” to include:
“An inn, hotel, motel, or other establishment that provides lodging to transient guests [.]”	“[A]ny inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence [.]”

We conclude that the Hawai‘i Legislature's omission of the "Mrs. Murphy" exemption in enacting HRS Chapter 489 provides persuasive evidence that it did not intend such an exemption to apply to establishments, like Aloha B&B, that provide lodging

to transient guests. We also conclude that Congress' inclusion of the "Mrs. Murphy" exemption is instructive, for it demonstrates that Congress believed that a person's residence may constitute a "place of public accommodation" as an "establishment which provides lodging to transient guests." If a person's residence could not constitute a place of public accommodation, then the "Mrs. Murphy" exemption would not be necessary in the federal public accommodation provision. Congress' inclusion of the "Mrs. Murphy" exemption in the federal public accommodation law supports our conclusion that a place of public accommodation includes a bed and breakfast business, like Aloha B&B, that uses the proprietor's residence to provide lodging to transient guests.

2.

Contrary to Aloha B&B, we do not view HRS Chapter 489 and HRS § 515-4(a)(2) to be in irreconcilable conflict. In this regard, we note that the term "rental" as used in HRS § 515-4(a)(2) is not specifically defined. Also, because HRS § 515-4(a)(2) is an exception to a remedial statute, we construe it narrowly. We conclude that it is possible to reconcile HRS Chapter 489 and HRS § 515-4(a)(2) by construing the phrase "rental of a room" for purposes of HRS § 515-4(a)(2) to exclude short-term lodging provided to transient guests covered by HRS Chapter 489 and as applying only to longer-term living arrangements where more permanent housing is sought. Such a construction would be consistent with the manner in which the Legislature h.as characterized the "Mrs. Murphy" exemption set forth in HRS § 515-4(a)(2).

In enacting the HRS § 515-4(a)(2) exemption in 1967, the Legislature referred to it as the "tight living" exemption. See H. Stand. Comm. Rep. No. 874, in 1967 House Journal, at 819. Furthermore, in amending HRS Chapter 515 in 2005 to add sexual orientation to the types of discrimination precluded by HRS § 515-3, the Legislature described the "Mrs. Murphy" exemption set forth in HRS 515-4(a)(2) as follows: "Housing laws presently permit landlords to follow their individual value systems in selecting tenants to live in the landlords' own homes[.]" 2005 Haw. Sess. Laws Act 214, § 1 at 688 (emphasis added). This characterization of the "Mrs. Murphy" exemption indicates that the Legislature understood the exemption to apply to longer-term living or housing arrangements -- where a landlord-tenant relationship would be established. See State v. Sullivan, 97 Hawai'i 259, 266, 36 P.3d 803, 810 (2001) ("'[S]ubsequent legislative history or amendments' may be examined in order to confirm our interpretation of statutory provisions." (citation omitted)).

Here, Aloha B&B admitted that it provides lodging to transient guests and that no landlord-tenant relationship is established during the guests' short-term stays. Construing the phrase "rental of a room" for purposes of HRS § 515-4(a)(2) to exclude short-term lodging provided to transient guests and as applying only to longer-term living arrangements would serve the Legislature's purposes for enacting both HRS Chapter 489 and HRS § 515-4(a)(2). It would advance the Legislature's goal of prohibiting discrimination in public accommodations, while permitting landlords "to follow their individual value

systems" in selecting a tenant who will reside with them on a longer-term basis in their own homes. This construction would also avoid any irreconcilable conflict between HRS Chapter 489 and HRS § 515-4(a)(2). See State v. Vallesteros, 84 Hawai‘i 295, 303, 933 P.2d 632, 640 (1997) ("[W]here the statutes simply overlap in their application, effect will be given to both if possible, as repeal by implication is disfavored." (block quote format and citation omitted)).

3.

But even if there were an irreconcilable conflict between HRS Chapter 489 and HRS § 515-4(a)(2), we conclude that Chapter 489 would control as it is the more specific statute with respect to Aloha B&B and Aloha B&B's actions that are at issue in this case. See id. ("[W]here there is a 'plainly irreconcilable' conflict between a general and a specific statute concerning the same subject matter, the specific will be favored." (block quote format and citation omitted)). The plain language of HRS Chapter 489 specifically applies to and governs an "establishment that provides lodging to transient guests." See HRS § 489-2. This language perfectly describes Aloha B&B. HRS Chapter 489 also directly addresses the precise conduct at issue in this case -- the discriminatory refusal by a public accommodation establishment to provide lodging to transient guests based on their sexual orientation. See HRS § 489-3. HRS § 515-4(a)(2), on the other hand, applies more generally to the "rental of rooms," without specifying the time period involved or whether the provision of lodging to transient guests is covered. We conclude that HRS Chapter 489 is the

more specific statute regarding the subject matter of this case.[11/]

II.

We now turn to address Aloha B&B's constitutional claims. Aloha B&B contends that the application of HRS Chapter 489 to its conduct in this case would violate Young's constitutional rights to privacy, intimate association, and free exercise of religion. We disagree.

We review "questions of constitutional law *de novo*, under the right/wrong standard," and we

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[11/] Contrary to Aloha B&B's contention, the doctrine of *ejusdem generis* does not support its claim that it falls outside the definition of a "place of public accommodation." See Richardson v. City and County of Honolulu, 76 Hawai'i 46, 74, 868 P.2d 1193, 1221 (1994) (Klein, J., dissenting) (describing the doctrine of *ejusdem generis* to mean: "[W]here words of general description follow the enumeration of certain things, those words are restricted in their meaning to objects of like kind and character with those specified."). The doctrine is inapplicable where the statute's plain meaning is apparent or where applying the *ejusdem generis* rule would conflict with other, clearer indications of the Legislature's intent. United States v. West, 671 F.3d 1195, 1199 (10th Cir. 2012); Leslie Salt Co. v. United States, 896 F.2d 354, 359 (9th Cir. 1990). As we have concluded, the plain language of HRS Chapter 489 and the Legislature's directive that it be liberally construed to further its anti-discrimination purposes clearly establishes that Aloha B&B falls within the definition of a "place of public accommodation." In any event, Aloha B&B's claim that the *ejusdem generis* doctrine supports its claim because a bed and breakfast operates out of a residence while an inn, hotel, and motel do not is without merit. The trait that unifies the items in the list is set forth in the statutory definition itself -- establishments "that provide[] lodging to transient guest." It is undisputed that Aloha B&B possesses this unifying trait.

"answer questions of constitutional law by exercising [our] own independent judgment based on the facts of the case. Malahoff v. Saito, 111 Hawai'i 168, 181, 140 P.3d 401, 414 (2006) (citation and brackets omitted). "[E]very enactment of the [Hawai'i] [L]egislature is presumptively constitutional, and a party challenging the statute has the burden of showing [the alleged] unconstitutionality beyond a reasonable doubt." State v. Mueller, 66 Haw. 616, 627, 671 P.2d 1351, 1358 (1983). The alleged constitutional violation "should be plain, clear, manifest, and unmistakable." Kaho'ohanohano v. State, 114 Hawai'i 302, 339, 162 P.3d 696, 733 (2007).

A.

Aloha B&B argues that applying HRS Chapter 489 to prohibit it from discriminating against Plaintiffs and others based on their sexual orientation violates Young's right to privacy. We disagree.

The "evil of unequal treatment, which is the injury to an individual's sense of self-worth and personal integrity" is "the chief harm resulting from the practice of discrimination by establishments serving the general public." King v. Greyhound Lines Inc., 656 P.2d 349, 352 (Or. Ct. App. 1982), cited in Hoshijo ex rel. White, 102 Hawai'i at 317 n.22, 76 P.3d at 560 n.22. Unfair discriminatory practices in general, and such practices in places of public accommodation in particular, "deprive[ ] persons of their individual dignity and den[y] society the benefits of wide participation in political, economic, and cultural life." Roberts v. United States Jaycees, 468 U.S. 609, 625 (1984).

Hawai‘i has a compelling state interest in prohibiting discrimination in public accommodations. "[A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent[.]" Id. at 628. A State's interest in assuring equal access is not "limited to the provision of purely tangible goods and services," and a State has broad authority to create rights of public access. Id. at 625.

Aloha B&B argues that the right to privacy is "the right to be left alone." However, to the extent that Young has chosen to operate her bed and breakfast business from her home, she has voluntarily given up the right to be left alone. In choosing to operate Aloha B&B from her home, Young, for commercial purposes, has opened up her home to over one hundred customers per year, charging them money for access to her home. Indeed, the success of Aloha B&B's business and its profits depend on members of the general public entering Young's home as customers. In other words, the success of Aloha B&B's business requires that Young not be left alone.

Aloha B&B also argues that the right to privacy has special force in a person's own home. However, given Young's choice to use her home for business purposes as a place of public accommodation, it is no longer a purely private home. "The more an owner, for [her] advantage, opens [her] property for use by the public in general, the more do [her] rights become circumscribed by the statutory and constitutional rights of those who use it." State v. Viglielmo, 105 Hawai‘i 197, 206, 95 P.3d 952, 961 (2004) (internal quotation marks and citation omitted). In addition,

the State retains the right to regulate activities occurring in a home where others are harmed or likely to be harmed. See State v. Kam, 69 Haw. 483, 492, 748 P.2d 372, 378 (1988); Mueller, 66 Haw. at 618-19, 628, 671 P.2d at 1353-54, 1359 (finding no privacy right to engage in prostitution in one's home). Aloha B&B's discriminatory conduct caused direct harm to Plaintiffs and threatens to harm other members of the general public.

The privacy right implicated by this case is not the right to exclude others from a purely private home, but rather the right of a business owner using her home as a place of public accommodation to use invidious discrimination to choose which customers the business will serve. "The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State." Roberts, 468 U.S. at 634 (O'Connor, J., concurring). We conclude that Young's asserted right to privacy did not entitle her to refuse to provide Plaintiffs with lodging based on their sexual orientation and that the application of HRS Chapter 489 to prohibit such discriminatory conduct does not violate her right to privacy. See Mueller, 66 Haw. at 618-19, 628, 671 P.2d at 1353-54, 1359.

B.

Aloha B&B claims that applying HRS Chapter 489 to prohibit it from denying accommodations to Plaintiffs and others based on their sexual orientation violates Young's constitutionally protected right to intimate association. We disagree.

In recognizing the constitutional right of intimate association, the Supreme Court "has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." Roberts, 468 U.S. at 617-18. "[C]ertain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs[.]" Id. at 618-19. The right of intimate association protects family relationships and similar highly personal relationships, which "by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." Id. at 619-20. The protected relationships "are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." Id. at 620. Conversely, an association lacking these qualities, "such as a large business enterprise," are not protected. Id.

The Supreme Court specifically referred to family relationships to exemplify and to suggest limitations on the kinds of relationships entitled to constitutional protection. Id. at 619. The factors relevant for a court to consider in determining whether a particular relationship is entitled to protection are "the group's size, its congeniality, its duration, the purposes for which it was formed, and the selectivity in choosing

participants." IDK, Inc. v. Clark County, 836 F.2d 1185, 1193 (9th Cir. 1988) .

Considering these factors, we conclude that applying HRS Chapter 489 to Aloha B&B does not violate Young's right to intimate association. The relationship between Aloha B&B and the customers to whom it provides transient lodging is not the type of intimate relationship that is entitled to constitutional protection against a law designed to prohibit discrimination in public accommodations.

With respect to the group's size, Aloha B&B provides transient lodging to between one hundred and two hundred customers per year. Aloha B&B has accommodated customers in up to three rooms at a time for twenty years. The hundreds of customer relationships Aloha B&B forms through its business is far from the "necessarily few" family-type relationships that are subject to constitutional protection. See Roberts, 468 U.S. at 620-21 (holding that relationships formed through membership in business groups with 400 and 430 members were not protected); IDK, 836 F.2d at 1193 (concluding that while an escort and a client "are the smallest possible association[,]" this relationship was not protected because, among other reasons, an escort may have many other clients, and the relationship "lasts for a short period and only as long as the client is willing to pay the fee").

With respect to the purpose for which the relationship is formed, Aloha B&B forms relationships with its customers for commercial, business purposes, and it is only the commercial

aspects of the relationship that HRS Chapter 489 regulates.

Young testified that the primary purpose of Aloha B&B is to "make money." She also admitted that if she could not make money by running Aloha B&B, she "wouldn't operate it." Young does not operate Aloha B&B for the purpose of developing "deep attachments and commitments" to its customers. See id. at 620.

With respect to selectivity, duration, and congeniality, Aloha B&B generally is not selective about whom it will accept as customers, provides short-term, transient lodging, and does not form lasting relationships with customers. With narrow exceptions such as same-sex couples and smokers, Aloha B&B basically provides lodging to "any member of the public who is willing to pay." Aloha B&B does not inquire into the background of its prospective customers, such as their political or religious beliefs, before allowing them to book a reservation.[12/] Aloha B&B's customers only stay for short periods of time. The majority stay for less than a week, about 95 percent less than two weeks, and over 99 percent less

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[12/] While Young stated that she will not accept reservations from smokers, same-sex couples, unmarried couples, and disabled people who cannot climb the stairs, Young stated that the standard questions she asks people in processing a reservation consists of the dates they want, whether they are smokers, what room they are asking about, requesting their names, addresses, and contact information, asking if they have any dietary needs, and asking about the deposit. Therefore, based on her standard questions, Young would not be able to determine the customers' marital status or whether they are able to climb stairs.

than a month. While Young stated that "people come as guests and leave as friends," she acknowledged that she had difficulty putting customers' "faces to the name" a month after they left.

Aloha B&B and Young's relationship with customers arising from the commercial operation of Aloha B&B does not constitute an intimate, family-type relationship that involves "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." Roberts, 468 U.S. at 620. Applying HRS Chapter 489 to prohibit the discriminatory conduct engaged in by Aloha B&B in this case does not violate Young's right to intimate association.

C.

Aloha B&B contends that application of HRS Chapter 489 to its conduct in this case violates Young's constitutional right to free exercise of religion. We disagree.

The Free Exercise Clause of the First Amendment, which is applicable to the States through the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const., amend. I. (emphasis added). The protections of the Free Exercise Clause apply to laws that target religious beliefs or religiously motivated conduct. Church of the Lukumi Babalu Aye. Inc. v. City of Hialeah, 508 U.S. 520, 532-34 (1993). However, the Supreme Court has held that "the right of free exercise does not relieve an individual of the

obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872, 879 (1990) (citation omitted). In Smith, the Supreme Court further held that neutral laws of general applicability need not be justified by a compelling governmental interest even when they have the incidental effect of burdening a particular religious practice. Id. at 882-85.[13/]

Under Smith, to withstand a challenge based on the Free Exercise Clause of the First Amendment, a neutral state law of general applicability that has the incidental effect of burdening a particular religious practice need not be justified by a compelling state interest, but need only satisfy the rational basis test.[14/] Aloha B&B does not dispute that HRS Chapter

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[13/] The Supreme Court explained:

> The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling" -- permitting him, by virtue of his beliefs, "to become a law unto himself," -- contradicts both constitutional tradition and common sense.

Smith, 494 U.S. at 885 (citations and footnote omitted).

[14/] In response to the Supreme Court's decision in Smith, Congress passed the Religious Freedom Restoration Act of 1993 (RFRA), which prohibits government from substantially burdening the exercise of religion, even through a neutral law of

489 is a neutral law of general applicability. However, it argues that we should depart from Smith, impose a compelling state interest requirement, and apply strict scrutiny in deciding its free exercise claim under the Hawai'i Constitution.[15]

We need not decide whether a higher level of scrutiny should be applied to a free exercise claim under the Hawai'i Constitution than the United States Constitution. This is because we conclude that HRS Chapter 489 satisfies even strict scrutiny as applied to Aloha B&B's free exercise claim. To satisfy strict scrutiny, a statute must further a compelling state interest and be narrowly tailored to achieve that interest. Nagle v. Board of Education, 63 Haw. 389, 392, 629 P.2d 109, 111 (1981) ("Under the strict scrutiny standard . . . [a] court will carefully examine a statute to determine whether it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgment of constitutional rights."); Kolbe v. Hogan, 849 F.3d 114, 133 (4th Cir. 2017) (en

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general applicability, unless the government can show that the law was in furtherance of a compelling government interest and was the least restrictive means of furthering that interest. See City of Boerne v. Flores, 521 U.S. 507, 515-16 (1997}. In City of Boerne, however, the Supreme Court invalidated the RFRA as it applied to the States. Id. at 511, 536. Thus, with respect to state laws, the Smith standard generally applies to claims under the Free Exercise Clause of the First Amendment. See Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan, 87 Hawai'i 217, 246 & n.31, 953 P.2d 1315, 1344 & n.31 (1998).

[15/] Similar to the United States Constitution, the Hawai'i Constitution provides: "No law shall be enacted respecting the establishment of religion, or prohibiting the free exercise thereof . . . ." Haw. Const. art I, § 4 (emphasis added).

banc) ("To satisfy strict scrutiny, . . . the challenged law [must be] 'narrowly tailored to achieve a compelling governmental interest.'" (citation omitted)).

In evaluating Aloha B&B's free exercise claim under the Hawai‘i Constitution, we balance the burden HRS Chapter 489 imposes on Young's free exercise of religion against the State's interest in prohibiting discrimination in public accommodations. See Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan, 87 Hawai‘i 217, 246, 953 P.2d 1315, 1344 (1998). To establish a prima facie case for its free exercise claim, Aloha B&B must show that HRS Chapter 489 interferes with a religious belief that is sincerely held by Young and imposes a substantial burden on Young's religious interests. See id. at 247, 953 P.2d at 1345.

Aloha B&B asserts that based on Young's religion, she believes that sexual relations between individuals of the same sex are immoral; that providing a room to a same-sex couple would serve to facilitate conduct she believes is immoral; and thus requiring her to provide lodging to Plaintiffs and other same-sex couples would impose substantial burdens on her free exercise of religion. Plaintiffs have not challenged the sincerity of Young's religious beliefs, but argue that Aloha B&B cannot show a substantial burden on Young's religion. Plaintiffs argue that Young's religious beliefs do not compel her to operate a bed and breakfast business. They also assert that Young can still use her home to generate income without any alleged conflict between her religious beliefs and the law by relying on the "Mrs. Murphy" exemption in

HRS Chapter 515 and renting out rooms to tenants seeking long-term housing.

Assuming, without deciding, that Aloha B&B established a prima facie case of substantial burden to Young's exercise of religion, we conclude that the application of HRS Chapter 489 to Aloha B&B's conduct in this case satisfies the strict scrutiny standard. As previously discussed, Hawai‘i has a compelling state interest in prohibiting discrimination in public accommodations. The Hawai‘i Legislature has specifically found and declared that "the practice of discrimination because of sexual orientation . . . in . . . public accommodations . . . is against public policy." HRS § 368-1 (2015).

Discrimination in public accommodations results in a "stigmatizing injury" that "deprives persons of their individual dignity" and injures their "sense of self-worth and personal integrity." Roberts, 468 U.S. at 625; King, 656 P.2d at 352, cited in Hoshijo ex rel. White, 102 Hawai‘i at 317 n.22, 76 P.3d at 560 n.22. Aloha B&B itself has acknowledged that "in places of public accommodation discrimination is a horrible evil."

HRS Chapter 489 is narrowly tailored to achieve Hawai‘i's compelling interest in prohibiting discrimination in public accommodations. See Roberts, 468 U.S. at 626 (holding that Minnesota, in applying its public accommodations statute to prohibit the Jaycees from discriminating against women, advanced its interest "through the least restrictive means of achieving its ends"). HRS Chapter 489 "responds precisely to the substantive problem [of discrimination in public accommodations]

which legitimately concerns the State." Id. at 629 (internal quotation marks and citation omitted). Because the application of HRS Chapter 489 to Aloha B&B's discriminatory conduct in this case satisfies even strict scrutiny, Aloha B&B is not entitled to relief on its free exercise claim.[16/]

[16/] We reject Aloha B&B's claim that Plaintiffs' Complaint should have been dismissed for failing to name Young, who it maintains is an indispensable party, as a defendant. Aloha B&B is operated as a sole proprietorship with Young as its sole proprietor. "[I]n the case of a sole proprietorship, the firm name and the sole proprietor's name are but two names for one person." Credit Assocs. of Maui, Ltd. v. Carlbom, 98 Hawai‘i 462, 466, 50 P.3d 431, 435 (App. 2002) (block quote format and citation omitted).

CONCLUSION

Based on the foregoing, we affirm the Circuit Court's Summary Judgment Order.

On the briefs:

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James Hochberg
for Defendant-Appellant

Joseph P. Infranco
Joseph E. La Rue
(Alliance Defending Freedom)
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Robin Wurtzel
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IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

DIANE CERVELLI and TAEKO BUFFORD,
Respondent/Plaintiffs-Appellees,

vs.

ALOHA BED & BREAKFAST,
a Hawaiʻi sole proprietorship,
Petitioner/Defendant-Appellant,

and

WILLIAM D. HOSHIJO, as Executive Director
of the Hawaiʻi Civil Rights Commission,
Respondent/Plaintiff-Intervenor-Appellee.

CERTIORARI TO THE
INTERMEDIATE COURT OF APPEALS
(CAAP-13-0000806; CIVIL NO. 11-1-3103)

ORDER REJECTING APPLICATION
FOR WRIT OF CERTIORARI

(By: Recktenwald, C.J., Nakayama, McKenna, Pollack, and Wilson, JJ.)

Petitioner/Defendant-Appellant Aloha Bed & Breakfast's application for writ of certiorari filed on May 18, 2018, is hereby rejected.

DATED: Honolulu, Hawai'i, July 10, 2018.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Sabrina S. McKenna

/s/ Richard W. Pollack

/s/ Michael D. Wilson

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WILLIAM D. HOSHIJO,
Executive Director

IN THE CIRCUIT COURT
OF THE FIRST CIRCUIT

STATE OF HAWAIʻI

DIANE CERVELLI and TAEKO BUFFORD, Plaintiffs, and WILLIAM D. HOSHIJO, as Executive Director of the Hawaiʻi Civil Rights Commission, Plaintiff-Intervenor, vs. ALOHA BED & BREAKFAST, a Hawaiʻi sole proprietorship, Defendant.	CIVIL NO. 11-1-3103-12 ECN (Other Civil Action) **ORDER GRANTING PLAINTIFFS' AND PLAINTIFF-INTERVENOR'S MOTION FOR PARTIAL SUMMARY JUDGMENT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** *HEARING MOTION* JUDGE: Edwin C. Nacino HEARING DATE: Mar. 28, 2013 HEARING TIME: 9:00 a.m. TRIAL: Nov. 4, 2013

ORDER GRANTING PLAINTIFFS' AND PLAINTIFF-INTERVENOR'S MOTION FOR PARTIAL SUMMARY JUDGMENT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pending before the Court are two motions. First, on February 13, 2013, Plaintiffs Diane Cervelli and Taeko Bufford and Plaintiff-Intervenor William D. Hoshijo as Executive Director of the Hawai'i Civil Rights Commission (collectively, "Plaintiffs") filed a Motion for Partial Summary Judgment. Defendant Aloha Bed & Breakfast ("Defendant") filed its opposition on March 19, 2013. Plaintiffs filed a reply on March 22, 2013. Second, on February 20, 2013, Defendant filed a Motion for Summary Judgment. Plaintiffs filed their opposition on March 19, 2013. Defendant filed a reply on March 22, 2013.

The Court held a hearing on both Plaintiffs' and Defendant's motions on March 28, 2013, at which Peter Renn, Jay Handlin, and Lindsay McAneeley appeared for Plaintiffs Diane Cervelli and Taeko Bufford, Robin Wurtzel appeared for Plaintiff-Intervenor, and Joseph LaRue, Shawn Luiz, and James Hochberg appeared for Defendant.

Having considered the pleadings in this matter, all papers filed in support of and in opposition to the motions, and the argument presented by counsel at the hearing on the motions, the Court finds that there is no genuine dispute of material fact that Defendant violated Hawai'i Revised Statutes ("HRS") § 489-3. Pursuant to HRS § 489-7.5 and Hawai'i Rule of Civil Procedure 65(d), the Court also finds that injunctive

relief is appropriate. Defendant is governed by Chapter 489, HRS, not Chapter 515, HRS, and Defendant constitutes a place of public accommodation under HRS § 489-2, because its goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the general public as customers, clients, or visitors. Defendant also constitutes "[a]n inn, hotel, motel or other establishment that provides lodging to transient guests" and "[a] facility providing services relating to travel or transportation." HRS § 489-2. Defendant violated HRS § 489-3 by discriminating against Plaintiffs Diane Cervelli and Taeko Bufford on the basis of their sexual orientation as lesbians.

Accordingly, the Court hereby ORDERS as follows:

1. Plaintiffs' motion for partial summary judgment with regard to liability and declaratory and injunctive relief is hereby GRANTED in full. Defendant Aloha Bed & Breakfast, a Hawai'i sole proprietorship of Phyllis Young, and its officers, agents, servants, employees, attorneys, and those in active concert or participation with them who receive actual notice of this order by personal service or otherwise, are hereby prohibited from engaging in any practices that operate to discriminate against same-sex couples as customers of Aloha Bed & Breakfast; and

2. Defendant's motion for summary judgment is DENIED as moot.

DATED: Honolulu, Hawai'i, APR 11 2013.

JUDGE OF THE ABOVE ENTITLED COURT

APPROVED AS TO FORM:

JAMES HOCHBERG
SHAWN LUIZ
JOSEPH LA RUE
JOSEPH INFRANCO
HOLLY CARMICHAEL
Attorneys for Defendant

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, Plaintiff-Intervenor, v. ALOHA BED & BREAKFAST, a Hawai'i sole proprietorship, Defendant.	CIVIL NO. 11-1-3103-12 ECN (Other Civil Action) **ORDER GRANTING THE PARTIES' STIPULATED APPLICATION FOR APPEAL FROM INTERLOCUTORY ORDER** JUDGE: Edwin C. Nacino Trial Date: November 4, 2013

ORDER GRANTING THE PARTIES' STIPULATED APPLICATION FOR APPEAL FROM INTERLOCUTORY ORDER

The parties made application, by way of stipulation, for appeal from the interlocutory order "ORDER GRANTING PLAINTIFFS' AND PLAINTIFF-INTERVENOR'S MOTION FOR PARTIAL SUMMARY JUDGMENT FOR DECLARATORY AND INJUNCTIVE RELIEF AND

DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT", filed April 15, 2013.

Because Defendant contends that it is not subject to liability under HRS 489, is afforded complete immunity under HRS Chapter 515, and is entitled to a constitutional defense to liability, the granting of an interlocutory appeal may put an end to the action, rather than merely saving the litigants time and litigation expenses.

Defendant raises questions of law that could substantially affect the final result of the case. Defendant further contends that the appeal may put an end to the action.

Pursuant to HRS § 641-1(b), "Upon application made within the time provided by the rules of court, an appeal in a civil matter may be allowed by a circuit court in its discretion from an order denying a motion to dismiss or from any interlocutory judgment, order, or decree whenever the circuit court may think the same advisable for the speedy termination of litigation before it."

Defendant made an application within the time provided by the rules of court, and an appeal in a civil matter may therefore be allowed by a circuit court in its discretion from an order granting a plaintiff's motion for partial summary judgment and denying a defendant's motion for summary judgment or from any interlocutory judgment, order, or decree whenever the circuit court may think the same advisable for the speedy termination of litigation before it.

Accordingly, the Court, having reviewed and considered the Stipulated Application, HEREBY FINDS as follows:

1) that pursuant to Hawaii Revised Statutes § 641(b) it is within the Court's discretion whether or not to allow an immediate interlocutory appeal of its Order Granting Plaintiffs' and Plaintiff-Intervenor's Motion for Partial Summary Judgment For Declaratory and Injunctive Relief and Denying Defendant's Motion for Summary Judgment ("Plaintiffs Motion"), entered April 15, 2013 ("Order");

2) that the Court has considered whether granting an appeal of its Order would be advisable for the speedy termination of this litigation;

3) that Plaintiffs' motion sought partial summary judgment in its favor because Defendant allegedly discriminated against Plaintiffs in violation of Chapter 489, Hawaii Revised Statutes;

4) that Defendant opposed Plaintiffs' Motion on the grounds that (1) Defendant is not subject to liability under Chapter 489, Hawaii Revised Statutes; (2) Defendant's conduct is protected under Chapter 515, Hawaii Revised Statutes; and (3) Defendant has a Constitutional defense to liability under Chapter 489, Hawaii Revised Statutes;

5) that the Court granted Plaintiff's Motion;

6) that the question of whether Chapter 489 or Chapter 515 of Hawaii Revised Statutes applies is a controlling question of law;

7) that the question of whether Defendant is entitled to a constitutional defense to liability under

Chapter 489, Hawaii Revised Statutes is a controlling question of law;

8) that Defendant contends that there is substantial ground for difference of opinion on the issue of whether Chapter 489, Hawaii Revised Statutes or Chapter 515, Hawaii Revised Statutes applies to Defendant;

9) that Defendant contends that there is a substantial ground for difference of opinion on the issue of whether Defendant is entitled to a constitutional defense to liability under Chapter 489, Hawaii Revised Statutes;

10) that if Defendant prevails on appeal, this litigation will be terminated;

11) that, given the nature of Defendant's defenses, granting an appeal of the Order would be advisable for the speedy termination of this litigation in accordance with Hawaii Revised Statutes § 641-1(b); and

12) that the Court adopts and incorporates herein by reference all additional findings and reasons stated on the record by the Court at the Hearing.

Based on the above findings, the Court HEREBY GRANTS the Stipulated Application for Appeal from Interlocutory Order in its entirety.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant may immediately appeal the Court's Order granting Plaintiffs' Motion, and IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this action shall be stayed in its

entirety, including enforcement of the injunction, until conclusion of the appeal.

IT IS SO ORDERED

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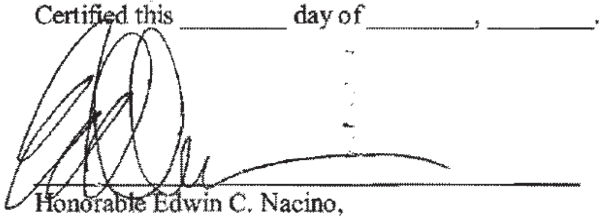
Certified this _____ day of _____, _____.



Honorable Edwin C. Nacino,

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IN THE CIRCUIT COURT
OF THE FIRST CIRCUIT

STATE OF HAWAIʻI

DIANE CERVELLI and TAEKO BUFFORD, Plaintiffs, and WILLIAM D. HOSHIJO, as Executive Director of the Hawaiʻi Civil Rights Commission, Plaintiff-Intervenor, vs. ALOHA BED & BREAKFAST, a Hawaiʻi sole proprietorship, Defendant.	CIVIL NO. 11-1-3103-12 ECN (Other Civil Action) **STIPULATION AND ORDER RE TIME TO FILE MOTION FOR ATTORNEYS' FEES; CERTIFICATE OF SERVICE**

STIPULATION AND ORDER RE TIME TO FILE MOTION FOR ATTORNEYS' FEES

On April 15, 2013, the Court issued an order granting the motion for partial summary judgment filed by Plaintiffs Diane Cervelli and Taeko Bufford ("Plaintiffs") and Plaintiff Intervenor William Hoshijo, as Executive Director of the Hawaiʻi Civil Rights Commission. Defendant Aloha Bed & Breakfast ("Defendant") intends to request leave to take an interlocutory appeal of that order.

Hawaiʻi Rule of Civil Procedure 56(d) provides that "[u]nless otherwise provided by statute or order of the

court, [a] motion [for attorneys' fees] must be filed and served no later than 14 days after entry of an appealable order or judgment." To the extent the Court's April 15, 2013 order constitutes an "appealable order" within the meaning of Rule 56(d), Plaintiffs and Defendant agree, subject to the Court's approval, that no party is required to file a motion for attorneys' fees or bill of costs any earlier than 14 days after the conclusion of this case, including the conclusion of any and all appeals.

DATED: Honolulu, HI, April 19, 2013.

PETER C. RENN (Admitted Pro Hac Vice)
JAY S. HANDLIN
LINDSAY N. MCANEELEY

Attorneys for Plaintiffs

DATED: Honolulu, HI, April 18, 2013.

SHAWN LUIZ
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JOSEPH LA RUE (Admitted Pro Hac Vice)
HOLLY CARMICHAEL (Admitted Pro Hac Vice)

Attorneys for Defendant

SO ORDERED.

DATED: Honolulu, HI, APR 22 2013.

JUDGE OF THE ABOVE ENTITLED COURT

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INDUSTRIAL RELATIONS
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Executive Director

IN THE CIRCUIT COURT
OF THE FIRST CIRCUIT

STATE OF HAWAI'I

DIANE CERVELLI and TAEKO BUFFORD, Plaintiffs, And WILLIAM D. HOSHIJO, as Executive Director of the Hawai'i Civil Rights Commission, Plaintiff-Intervenor,	CIVIL NO. 11-1-3103-12 ECN (Other Civil Action) **ORDER GRANTING MOTION TO INTERVENE** Non-Hearing Motion

vs.	)	JUDGE: The Honorable Edwin C. Nacino
ALOHA BED & BREAKFAST, a Hawai'i sole proprietorship,	)	TRIAL: Not Set
Defendant.	)	

ORDER GRANTING MOTION TO INTERVENE

William D. Hoshijo, as Executive Director of the Hawai'i Civil Rights Commission, filed a Non-Hearing Motion to Intervene as a Plaintiff on December 19, 2011, pursuant to Hawai'i Revised Statutes §368-12, and no opposition to said Motion was filed. The proposed Intervener adopts the Complaint alleged by Plaintiffs Cervelli and Bufford. The Motion is hereby GRANTED, and WILLIAM D. HOSHIJO, as Executive Director of the Hawai'i Civil Rights Commission is granted leave to intervene as a Plaintiff in this matter.

DATED: HONOLULU, HAWAI'I, JAN 27 2012.

JUDGE OF THE ABOVE ENTITLED COURT

APPROVED AS TO FORM

JAMES HOCHBERG, #3686
Attorney for Defendant

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NO. CAAP-13-0000806

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI‘I

DIANE CERVELLI and TAEKO BUFFORD,
Plaintiffs-Appellees,
vs.
ALOHA BED & BREAKFAST,
a Hawai‘i sole proprietorship,
Defendant-Appellant,
and
WILLIAM D. HOSHIJO, as Executive Director
of the Hawai‘i Civil Rights Commission,
Plaintiff-Intervenor-Appellee.

APPEAL FROM THE CIRCUIT COURT
OF THE FIRST CIRCUIT
(CIVIL NO. 11-1-3103)

JUDGMENT ON APPEAL
(By: Fujise, Acting Chief Judge, for the court[1/])

[1/] Fujise, Acting Chief Judge, and Reifurth, J. Chief Judge Craig H. Nakamura was a member of the merit panel when the Opinion was filed, but he retired effective March 1, 2018.

Pursuant to the Opinion of the Intermediate Court of Appeals of the State of Hawai‘i entered on February 23, 2018, the "Order Granting Plaintiffs' and Plaintiff-Intervenor's Motion for Partial Summary Judgment for Declaratory and Injunctive Relief and Denying Defendant's Motion for Summary Judgment" that was entered by the Circuit Court of the First Circuit on April 15, 2013, is affirmed, and the case is remanded for further proceedings.

DATED: Honolulu, Hawai‘i, March 20, 2018.

FOR THE COURT:

Acting Chief Judge

U.S. CONST. AMEND I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. AMEND XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

HRS § 368-17
Remedies

(a) The remedies ordered by the commission or the court under this chapter may include compensatory and punitive damages and legal and equitable relief, including, but not limited to:

(1) Hiring, reinstatement, or upgrading of employees with or without back pay;

(2) Admission or restoration of individuals to labor organization membership, admission to or participation in a guidance program, apprenticeship training program, on-the-job training program, or other occupational training or retraining program, with the utilization of objective criteria in the admission of persons to those programs;

(3) Admission of persons to a public accommodation or an educational institution;

(4) Sale, exchange, lease, rental, assignment, or sublease of real property to a person;

(5) Extension to all persons of the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of the respondent;

(6) Reporting as to the manner of compliance;

(7) Requiring the posting of notices in a conspicuous place that the commission may publish or cause to be published setting forth requirements for compliance with civil rights law or other relevant information that the

commission determines necessary to explain those laws;

(8) Payment to the complainant of damages for an injury or loss caused by a violation of part I of chapter 489, chapter 515, part I of chapter 378, or this chapter, including a reasonable attorney's fee;

(9) Payment to the complainant of all or a portion of the costs of maintaining the action before the commission, including reasonable attorney's fees and expert witness fees, when the commission determines that award to be appropriate; and

(10) Other relief the commission or the court deems appropriate.

(b) Section 386-5 notwithstanding, a workers' compensation claim or remedy does not bar relief on complaints filed with the commission.

Excerpts from HRS § 489-2 (2007) Definitions

* * * * *

"Place of public accommodation" means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the general public as customers, clients, or visitors. By way of example, but not of limitation, place of public accommodation includes facilities of the following types:

(1) A facility providing services relating to travel or transportation;

(2) An inn, hotel, motel, or other establishment that provides lodging to transient guests;

* * * * *

HRS § 489-3 (2007)
Discriminatory practices prohibition

Unfair discriminatory practices that deny, or attempt to deny, a person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation on the basis of race, sex, including gender identity or expression, sexual orientation, color, religion, ancestry, or disability are prohibited.

HRS § 489-8
Civil penalty

(a) It shall be unlawful for a person to discriminate unfairly in public accommodations.

(b) Any person, firm, company, association, or corporation who violates this part shall be fined a sum of not less than $500 nor more than $10,000 for each violation, which sum shall be collected in a civil action brought by the attorney general or the civil rights commission on behalf of the State. The penalties provided in this section shall be cumulative to the remedies or penalties available under all other laws of this State. Each day of violation under this part shall be a separate violation.

(c) This section shall not apply to violations of part II of this chapter.

Excerpts from HRS § 515-2 (2007) Definitions

* * * * *

"Housing accommodation" includes any improved or unimproved real property, or part thereof, which is used or occupied, or is intended, arranged, or designed to be used or occupied, as the home or residence of one or more individuals.

* * * * *

"Real estate transaction" includes the sale, exchange, rental, or lease of real property.

"Real property" includes buildings, structures, real estate, lands, tenements, leaseholds, interests in real estate cooperatives, condominiums, and hereditaments, corporeal and incorporeal, or any interest therein.

* * * * *

Excerpt from HRS § 515-3 (2007) Discriminatory practices

It is a discriminatory practice for an owner or any other person engaging in a real estate transaction, or for a real estate broker or salesperson, because of race, sex, including gender identity or expression, sexual orientation, color, religion, marital status, familial status, ancestry, disability, age, or human immunodeficiency virus infection:

(1) To refuse to engage in a real estate transaction with a person;

* * * * *

Excerpts from HRS § 515-4 (a)(2) (2007) Exemptions

(a) Section 515-3 does not apply:

* * *

(2) To the rental of a room or up to four rooms in a housing accommodation by an individual if the individual resides therein.

* * * * *

EXCERPTS FROM COMPLAINT FOR INJUNCTIVE RELIEF, DECLARATORY RELIEF, AND DAMAGES

* * * * *

[ROA 33]

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment as follows:

* * * * *

[ROA 34]

C. Awarding Plaintiffs damages in an amount to be proven at trial including actual, compensatory, statutory, treble, special, and punitive damages pursuant to HRS §§ 368-17 & 489-7.5;

D. Awarding Plaintiffs pre-judgment and post-judgment interest;

E. Awarding reasonable attorneys' fees, costs, and other expenditures incurred as a result of bringing this action, pursuant to all applicable laws and doctrines; and

F. Awarding Plaintiffs further relief as this Court may deem just and equitable.

* * * * *

EXCERPTS FROM FIRST AMENDED ANSWER AND AFFIRMATIVE DEFENSES TO COMPLAINT FILED DECEMBER 19, 2011

* * * * *

[ROA 361-363]

FIRST AFFIRMATIVE DEFENSE

Aloha is not a place of "public accommodation" for purposes of Hawai'i Revised Statutes chapter 489, but instead is the rental of an interest in real estate that is used as a residence in which Ms. Young resides, where three or fewer rooms are made available to others for a fee.

SECOND AFFIRMATIVE DEFENSE

Application of Hawai'i Revised Statutes chapter 489 to Aloha violates its owner's rights under the Free Exercise Clause of the First Amendment of the United States Constitution.

THIRD AFFIRMATIVE DEFENSE

Application of Hawai'i Revised Statutes chapter 489 to Aloha violates its owner's rights under Article I, Section 4 of the Hawai'i Constitution.

FOURTH AFFIRMATIVE DEFENSE

Application of Hawai'i Revised Statutes chapter 489 to Aloha violates its owner's Free Speech rights under the First Amendment of the United States Constitution.

FIFTH AFFIRMATIVE DEFENSE

Application of Hawai'i Revised Statutes chapter 489 to Aloha violates its owner's Free Speech rights under Article I, Section 4 of the Hawai'i Constitution.

SIXTH AFFIRMATIVE DEFENSE

Application of Hawai'i Revised Statutes chapter 489 to Aloha violates its owner's rights of Expressive Association under the First Amendment of the United States Constitution.

SEVENTH AFFIRMATIVE DEFENSE

Application of Hawai'i Revised Statutes chapter 489 to Aloha violates its owner's rights of Expressive Association under Article I, Section 4 of the Hawai'i Constitution.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs have failed to state a claim upon which relief can be granted.

NINTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred by the applicable statute of limitations.

TENTH AFFIRMATIVE DEFENSE

The court lacks personal jurisdiction over the named Defendant under Hawai'i Revised Statutes chapter 489.

ELEVENTH AFFIRMATIVE DEFENSE

Defendant Aloha intends to rely on defenses as contained in Chapter 515 of the Hawaii Revised Statutes (Discrimination in Real Estate Transactions).

TWELFTH AFFIRMATIVE DEFENSE

Defendant Aloha gives notice of her intent to rely upon any other applicable affirmative defense or defenses subject to Rule 8(c) of the Hawai'i Rules of Civil Procedure.

THIRTEENTH AFFIRMATIVE DEFENSE

Application of Hawai‘i Revised Statutes chapter 489 to Aloha violates its owner's rights of Intimate Association under the Bill of Rights of the United States Constitution and the Bill of Rights of the Hawai'i Constitution.

FOURTEENTH AFFIRMATIVE DEFENSE

Application of Hawai‘i Revised Statutes chapter 489 to Aloha violates its owner's rights to Privacy under the Bill of Rights of the United States Constitution and under Article I, Section 6 of the Hawai‘i Constitution.

FIFTEENTH AFFIRMATIVE DEFENSE

Application of Hawai‘i Revised Statutes chapter 489 to Aloha violates its owner's rights under the Takings Clause and Due Process Clause of the Fifth Amendment to the United States Constitution and under Article I, Section 20 and the Due Process Clause of Article I, Section 5 of the Hawai‘i Constitution.

* * * * *

EXCERPTS FROM EXHIBITS ATTACHED TO DECLARATION OF SHAWN A. LUIZ IN SUPPORT OF DEFENDANT'S MOTION TO COMPEL PLAINTIFFS CERVELLI AND BUFFORD'S RESPONSES TO DEFENDANT'S DISCOVERY REQUESTS

EXHIBIT 6
PLAINTIFF'S RESPONSES AND SPECIFIC OBJECTIONS TO DEFENDANT'S FIRST SET OF INTERROGATORIES TO PLAINTIFF TAEKO BUFFORD

* * * * *

[ROA 543]

7. Are you aware of a so-called "Mrs. Murphy's exemption"? If so, describe your understanding of that rule; how you obtained that knowledge; the name, address, and telephone number for any person who you obtained that knowledge from; and the date on which you learned about that exemption.

Answer:

Plaintiff objects that this interrogatory seeks information that is not relevant to the subject matter of this litigation and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving these objections, Plaintiff responds as follows:

Ms. Bufford first heard the phrase "Mrs. Murphy's exemption" when Ms. Phyllis Young used that phrase during their telephone conversation on November 5, 2007. Ms. Bufford does not have a full or clear

understanding of that so-called exemption, its scope, or its application, if any, here in this case; she believes that it has something to do with who one can choose to live in a home if only a certain number of rooms are rented out. She came to this understanding by reading about the so-called exemption on the internet after her telephone conversation with Ms. Phyllis Young on November 5, 2007 and from her exposure to the proceedings before the HCRC.

* * * * *

EXHIBIT 14
DEFENDANT'S RESPONSIVE PRETRIAL STATEMENT

* * * * *

[ROA 623-625]

III. Defenses

FIRST AFFIRMATIVE DEFENSE

Aloha is not place of "public accommodation" for purposes of Hawai'i Revised Statutes chapter 489, but instead is the rental of an interest in real estate that is used as a residence in which Ms. Young resides, where three or fewer rooms are made available to others for a fee.

SECOND AFFIRMATIVE DEFENSE

Application of Hawai'i Revised Statutes chapter 489 to Aloha violates its owner's rights under the Free Exercise Clause of the First Amendment of the United States Constitution.

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SEVENTH AFFIRMATIVE DEFENSE

Application of Hawai‘i Revised Statutes chapter 489 to Aloha violates its owner's rights of Expressive Association under Article I, Section 4 of the Hawai‘i Constitution.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs have failed to state a claim upon which relief can be granted.

NINTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred by the applicable statute of limitations.

TENTH AFFIRMATIVE DEFENSE

The court lacks personal jurisdiction over the named Defendant under Hawai‘i Revised Statutes chapter 489.

ELEVENTH AFFIRMATIVE DEFENSE

Defendant Aloha intends to rely on defenses as contained in Chapter 515 of the Hawaii Revised Statutes (Discrimination in Real Estate Transactions).

TWELFTH AFFIRMATIVE DEFENSE

Defendant Aloha gives notice of her intent to rely upon any other applicable affirmative defense or defenses subject to Rule 8(c) of the Hawai'i Rules of Civil Procedure.

* * * * *

EXCERPTS FROM DECLARATIONS ATTACHED TO MEMORANDUM IN SUPPORT OF PLAINTIFFS AND PLAINTIFF-INTERVENOR'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND EXHIBITS ATTACHED THERETO

DECLARATION OF TAEKO BUFFORD

* * * * *

[ROA 715]

5. During this second conversation, Ms. Young also stated that, while she was unwilling to accept our business, she could provide the name of a friend with whom we could reserve a room. But due to the preceding interaction with Ms. Young—in which Ms. Young had made clear her strong discomfort of same-sex couples on religious grounds—I felt distrustful of Ms. Young and did not feel I could trust Ms. Young's friend. I later learned that Ms. Young and her friend attend the same church and previously participated in the same Bible study group.

* * * * *

EXHIBIT B TO DECLARATION OF PETER C. RENN

DEFENDANT'S RESPONSES AND OBJECTIONS TO PLAINTIFFS' AND PLAINTIFF-INTERVENOR'S FIRST SET OF INTERROGATORIES

* * * * *

[ROA 837-838]

3. Please state the name, address, email address, and telephone number of every individual who has been denied the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of the bed and breakfast at 909 Kahauloa Place, Honolulu, HI 96825 on the basis of that individual's sexual orientation or relationship to a person of the same sex, in whole or in part, for every year that a bed and breakfast has operated at that address.

Answer: Objection. This interrogatory is not reasonably calculated to lead to the discovery of admissible evidence, in violation of Haw. R. Civ. P. 26(b)(1), because there are no allegations of denials to non-parties nor would denials to non-parties be justicable in this action. Aloha further objects that this discovery request lacks sufficient precision to permit a response because it is not clear what might constitute a denial of "full and equal enjoyment . . . on the basis of that individual's sexual orientation or relationship to a person of the same sex." This request also violates the privacy rights of non-parties, which are protected by Article I, section 6 of the Hawai'i

Constitution. *State v. Kam*, 69 Haw. 483, 491, 748 P.2d 372, 377 (Haw. 1988) ("The Hawaii Constitution article I, section 6 . . . affords much greater privacy rights than the federal right to privacy."); *Hawaii Org. of Police Officers v. Soc'y of Prof'l Journalists-Univ. of Haw. Chapter*, 83 Haw. 378, 398, 927 P.2d 386, 406 (Haw. 1996) ("[T]he privacy right protected by the 'informational privacy' prong of article I, section 6 is the right to keep confidential information which is 'highly personal and intimate.'") (quoting Comm. Whole Rep. No. 15 in *Proceedings of the Constitutional Convention of Hawaii of 1978*, Vol. I, at 1024); Stand. Comm. Rep. No. 69, in *Proceedings of the Constitutional Convention of Hawaii of 1978*, Vol. I, at 674 (explaining that the article I, section 6 "right of privacy encompasses the common law right of privacy or tort privacy. . . . For example, the right can be used to protect an individual from invasion of [the individual's] private affairs, public disclosure of embarrassing fact . . . In short, this right of privacy includes the right of an individual to tell the world to 'mind your own business.'"). Aloha has a policy of protecting the privacy of its guests. Any probative value of guest information is outweighed by the prejudice caused to the guests' privacy interests and Aloha's business interest in maintaining the confidentiality of its guests' information.

Subject to and without waiving those objections, Aloha responds as follows.

Aloha has never denied a reservation to anyone based on their sexual orientation. The denial to the Plaintiffs that is the subject of this case is the only instance where Aloha has denied a reservation due to the relationship that a potential guest had with a person of the same sex who sought to share a bed at Aloha.

* * * * *

[ROA 839]

5. Please state the date when a bed and breakfast began operation at 909 Kahauloa Place, Honolulu, HI 96825.

Answer:

Aloha has no record of the exact date when a bed and breakfast began operation at 909 Kahauloa Place, Honolulu, HI 96825, but Aloha recalls that it hosted its first guests in the last half of 1992.

* * * * *

[ROA 841-842]

11. If you contend that Aloha Bed & Breakfast did not violate Hawai'i Revised Statute § 489-3 when Aloha Bed & Breakfast interacted with Diane Cervelli and Taeko Bufford on November 5, 2007, please state every reason that supports your contention.

Answer: Aloha objects to this request to the extent that it seeks protected attorney work-product information regarding Aloha's litigation strategy, legal reasoning, and theories of Aloha's defenses. Legal conclusions are protected from discovery. *Save Sunset Beach Coalition v. City and County of*

Honolulu, 102 Haw. 465, 484 (Haw. 2003) (quoting Haw. R. Civ. P. 26(b)(3) to explain that "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.")

JAMES HOCHBERG, ESQ.

Subject to and without waiving those objections, Aloha responds as follows.

Aloha is not a place of "public accommodation" for purposes of Hawai'i Revised Statutes chapter 489, but instead is the rental of an interest in real estate that is used as a residence in which Ms. Young resides, where three or fewer rooms are made available to others for a fee.

Application of Hawai'i Revised Statutes chapter 489 to Aloha violates its owner's rights under the Free Exercise Clause of tile First Amendment of the United States Constitution.

Application of Hawai'i Revised Statutes chapter 489 to Aloha violates its owner's rights under Article I, Section 4 of the Hawai'i Constitution.

Application of Hawai'i Revised Statutes chapter 489 to Aloha violates its owner's Free Speech rights under the First Amendment of the United States Constitution.

Application of Hawai‘i Revised Statutes chapter 489 to Aloha violates its owner's Free Speech rights under Article I, Section 4 of the Hawai‘i Constitution.

Application of Hawai‘i Revised Statutes chapter 489 to Aloha violates its owner's rights of Expressive Association under the First Amendment of the United States Constitution.

Application of Hawai‘i Revised Statutes chapter 489 to Aloha violates its owner's rights of Expressive Association under Article I, Section 4 of the Hawai‘i Constitution.

Aloha intends to rely on defenses as contained in Chapter 515 of the Hawai‘i Revised Statutes (Discrimination in Real Estate Transactions).

* * * * *

EXHIBIT A TO DECLARATION OF ROBIN WURTZEL

INTERVIEW OF PHYLLIS YOUNG

[ROA 883]

CASE NAME:	Taeko Bufford vs. Aloha Bed and Breakfast
NUMBER:	PA-0-0564
BASIS:	Sexual Orientation
CASE NAME:	Diane Cervelli vs. Aloha Bed and Breakfast
NUMBER:	PA-0-0563
BASIS:	Sexual Orientation

* * *

INTERVIEW DATE: MARCH 5, 2009
BEGIN TIME: 10:14 am
END TIME: 11:19 am

* * * * *

[ROA 884-885]

Tell me about that. **So, in the interim, I called a friend who takes overflow from my bed & breakfast and asked her if she would be willing to take these 2 women, and if she had the dates available**. Did she? **Yes.** She agreed to take them? **Yes.** **So, I called Tae Bufford back because her number on my caller I.D.; and she returned my phone call.** **And I told her that I had 2 points I wanted to share with her. The first point was that I looked into it and the name of the law was Ms Murphy's law. And secondly, I had found**

someone that had those dates available and would accept her reservation; and her place was very nice and was on the waterfront. Her response to me was "Why should I believe you?" or something of a negative tone- "Why should I accept anything you tell us about?" That conversation was long. We went back and forth on our views on this point. She called me outdated and several things like that. I tried to explain to her I was not against her as a person. I explained that I would not even allow my own daughter to sleep in our home together before they were married. I explained that if I see something as a sin and allow it to happen in my home, then I participate in that sin. Anything else? **She told me, "You should have lied. You should have never said what you did."** How did you respond? **I said it is against my beliefs to lie.** Was anything else said? **It was a long conversation, but I don't remember all the details. But it was really my intent to make amends with her and to let her know that I had nothing against them personally, but this was our home.**

Was there any other contact after that? **Yes. She contacted me again. Tae sent me an email. You should have a copy of that. It was dated November 5, 2007. In that email, she used the words "that I used offensive and discriminatory comments on homosexuals." And I didn't! I did not. I used pronouns- I did not use any labeling. She was saying, "Please don't use your Christianity as an excuse to be prejudiced."** Did you respond to this email? **No, I did not. I prayed**

about it and decided to just let it go. What she was looking for I could not give her- and that was to satisfy her that they were not in sin in their relationship.

* * * * *

[ROA 886-887]

My question is this: If the law is meant to protect people such as minority groups in housing and things like that- if you refer them to another place that has housing and would take them- aren't you really fulfilling the requirement of the intent of the law? I am assuming that is a rhetorical question, because you probably realize that I am not in a position to answer that. **I know. It was rhetorical; but it is where I was coming from. I was shocked to get the lawsuit- I really was. Because I thought we had really a meaningful conversation and aired our views, and had agreed to disagree.**

* * * * *

On your website, do you indicate any restrictions as to who you will rent to? **No.** You mentioned a smoking restriction before. Do you list that restriction on your website? **Yes. We refer to it as a non-smoking home. And we have a 3-day minimum.** Do you have a maximum? **No.** Do you mention any restrictions as to unmarried couples or homosexual couples? **No.** Do you advertise that it is a Christian home? **No. I don't. I have thought about it, but haven't.**

How do you rent- by day, night, week, month? **A daily rate**. Do you charge tax? **Yes.** Have you ever rented

to someone for longer than 30 days? **Yes.** Did you require a rental agreement to be signed? **No**. Do you allow guests to rent out a room on a month-to-month basis? **No**. Do you offer permanent housing? **What do you mean?** Well, if I decided to move out of my home, could I move in with you, and use it as my residence? **No. And there are no cooking privileges.** Do you ever require any kind of contract or rental agreement? **No.**

* * *

Did you tell Cps it was against your religious beliefs to allow them to stay? **Yes.** I hate to get too personal, but could you please describe for me those religious beliefs that precluded you from allowing Cps to stay together in your home? ***R's attorney: It's okay. I think she's actually been waiting for you to ask that question.*** **R: Well, I am Catholic, and we believe that we are not responsible just for ourselves, but for those that are in our care. And the bible clearly says that homosexuality is not right. In Leviticus 18:22, it says do not lie with a man as one lies with a woman. That is detestable in my eyes and defiles our land. So, in my view, if I allow gays to be in my home and practice the sex acts, my home becomes defiled. A good analogy is drugs. If I allow someone to move into my home and they are making drugs, then I am responsible for those drugs, and the government can come in and take my home. I believe at spiritual level, the same accountability applies.**

* * * * *

By the way, we have lived in our home for 31 years, and raised our family in this home. Our children and grandchildren live in the Hawaii Kai area, and our home is a gathering place for our children and grandchildren. Our grandchildren sleep over frequently. Our home is sacred.

* * * * *

EXHIBIT B TO DECLARATION OF ROBIN WURTZEL

NOTICE OF FINDING OF REASONABLE CAUSE TO BELIEVE THAT UNLAWFUL DISCRIMINATORY PRACTICES HAVE BEEN COMMITTED [AGAINST COMPLAINANT DIANE CERVELLI]

* * * * *

[ROA 893]

PARTIES

5. Respondent ALOHA BED AND BREAKFAST is a "place of public accommodation" within the meaning of H.R.S. § 489-2, and is an entity conducting business in the City and County of Honolulu, State of Hawai‘i.

* * * * *

[ROA 894]

16. Mrs. Young explained that she and her husband are strong Christians and that it would be against their belief system to allow Complainant and her partner to stay at their bed and breakfast as a couple.

* * * * *

[ROA 895-96]

PRAYER FOR RELIEF

WHEREFORE, IT IS PRAYED THAT Respondent be ordered to do the following:

1. Make timely payment to the Complainant for actual, compensatory, and punitive damages as adjudged;

2. Immediately pay penalties for each violation as provided by H.R.S. § 489-8;

3. Immediately cease and desist from discriminating against individuals on the basis of disability, in violation of H.R.S. § 489-3;

4. Immediately develop and implement a written non-discrimination Customer Service Policy, including sexual orientation;

5. Disseminate the above-described non-discrimination policy to all employees;

6. Post in a conspicuous place notices that the Commission may publish or cause to be publish setting forth requirements for compliance with civil rights law or other relevant information that the Commission determines necessary to explain those laws;

7. Publish the results of the Commission's investigation in a press statement provided by the Commission in at least one newspaper published in the state of Hawai'i and having a general circulation in Honolulu, Hawai'i, in such manner and for such time as the Commission may order, but not less than once in the Sunday edition and once in that following week, in order to minimize or eliminate discrimination in employment.

8. Provide such other and further relief as is just and appropriate under the circumstances.

MEMORANDUM
IN SUPPORT OF DEFENDANT'S
SUMMARY JUDGMENT MOTION

* * * * *

[ROA 929-934]

C. Strict Scrutiny Applies To Burdens On Free Exercise Rights Under the Hawai'i Constitution.

Applying the Public Accommodations Law would substantially burden Mrs. Young's free exercise rights. A substantial burden on free exercise exists where the State pressures a person to violate her religious convictions by conditioning a benefit or right on faith-violating conduct. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Thomas v. Review Bd of Ind Emp't Sec. Div.*, 450 U.S. 707, 717-18 (1981). By forcing Mrs. Young "to choose between following the precepts of her religion and forfeiting [the right to rent rooms], on the one hand, and abandoning one of the precepts of her religion in order to [maintain that right], on the other hand," this application of the Public Accommodations Law would impose a substantial "burden upon the free exercise of religion." *See Sherbert*, 374 U.S. at 404; *see also Thomas*, 450 U.S. at 717-18 ("While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.")

Strict scrutiny should apply to this burden on free exercise rights under the Hawai'i Constitution. This was the standard that prevailed for both state and federal free exercise claims until 1990, when the U.S. Supreme Court limited the federal constitutional

protection in some cases, stating that "the right of free exercise [under the United States Constitution] does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the grounds that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Employment Div.* v. *Smith*, 494 U.S. 872, 879 (1990).

In response, twenty-nine States insisted that all laws burdening their citizens' free exercise of religion must survive heightened review. Eighteen States enacted Religious Freedom Restoration Acts, which restored strict scrutiny for laws burdening the free exercise of religion.[6] Another twelve States' supreme courts have interpreted their state constitutions' free exercise protections to require heightened constitutional scrutiny.[7] Hawai'i has not definitively

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[6] Ala. Const. art. I, § 3.01; Ariz. Rev. Stat. Ann. § 41-1493; Conn. Gen. Stat. Ann. § 52-571b; Fla. Stat. Ann. §§ 761.01-05; Idaho Code Ann. § 73-402; 775 Ill. Comp. Stat. Ann. 35/1-99; Mo. Rev. Stat. § 1.302; N.M. Stat. Ann. §§ 28-22-1 to -5; Okla. Stat. Ann. tit. 51, § 251; 71 Pa. Stat. Ann. § 2404; R.I. Gen. Laws §§ 42-80.1-1 to -4; S.C. Code Ann. §§ 1-32-10 to -60; Tex. Civ. Prac. & Rem. Code Ann. §§ 110.001 to .012; La. Rev. Stat. Ann. § 13:5233; Tenn. Code Ann. § 4-1-407; VA. Code Ann. § 57-2.02.

[7] *Fortin v. The Roman Catholic Bishop of Portland*, 871 A.2d 1208 (Me. 2005); *Larson v. Cooper,* 90 P.3d 125, 131 (Ala. 2004); *Valley Christian School v. Mont. High School Ass'n*, 86 P.3d 554 (Mont. 2004); *Odenthal v. Minnesota Conf. of Seventh-Day Adventists,* 649 N.W.2d 426, 442 (Minn. 2002); *City Chapel Evangelical Free Inc. v. City of South Bend ex rel. Dept. of Redevelopment,* 744 N.E.2d 443, 445-51 (Ind. 2001); *Humphrey v. lane,* 728 N.E.2d 1039 (Ohio *2000); Open Door Baptist Church v. Clark County,* 995 P.2d 33, 39 (Wa. 2000); *Catholic Charities of Diocese of Albany v. Serio,* 859 N.E.2d 459, 466 (N.Y. 2006); *McCready v. Hoffius,* 586 N.W.2d 723, 729 (Mich. 1998); *State v.*

decided whether it will follow *Smith*'s approach or the twenty-nine States that have adopted an approach more protective of religious liberty. But there are at least two reasons why this Court should find that strict scrutiny applies to a Free Exercise claim under the Hawai'i Constitution.

First, and most important, the Hawai'i Supreme Court has already indicated how it will proceed when the scrutiny question is presented to it. In *Korean Buddhist Dae Won Sa Temple of Hawai'i* v. *Sullivan*, 87 Haw. 217, 247, 953 P.2d 1315, 1345 (Haw. 1998), the Court said it would apply strict scrutiny to laws burdening free exercise rights. *Id.* Although the Court's statement is dicta, it provides explicit guidance to lower courts and should be followed here. Because the Public Accommodations Law, as applied to Aloha, burdens Mrs. Young's free exercise rights, and because the Hawai'i Supreme Court has given such clear guidance as to the level of scrutiny it would apply to laws burdening such rights, this Court should apply strict scrutiny.

Second, the Hawai'i Supreme Court has "long recognized" that it is "free to give broader protection under the Hawai'i Constitution than that given by the federal constitution." *State v. Viglielmo*, 105 Haw. 197, 211, 95 P.3d 952, 966 (Haw. 2004) (citations omitted). It has regularly done so with various state constitutional rights. *See, e.g.*, *Kam*, 69 Haw. at 491, 748 P.2d at 377 (privacy rights); *State v. Rogan*, 91 Haw. 405,423, 984 P.2d 1231, 1249 (Haw. 1999)

Miller, 549 N.W.2d 235, 238-42 (Wis. 1996)*; Attorney General v. Desilets,* 636 N.E.2d 233, 235-41 (Mass. 1994).

(double jeopardy rights); *State v. Santiago*, 53 Haw. 254,266,492 P.2d 657, 664 (Haw. 1971) (freedom from self-incrimination); *State v. Hoey*, 77 Haw. 17, 36, 881 P.2d 504, 523 (Haw. 1994) (custodial interrogation rights). And the Hawai'i Supreme Court has already signaled in *Korean Buddhist* that broader protection exists under the state Free Exercise Clause and that strict scrutiny applies to laws burdening those rights.[8]

D. Strict Scrutiny Applies To Burdens On Free Exercise Rights Under the United States Constitution Because Other Constitutional Rights Are Also Burdened.

In *Smith*, the U.S. Supreme Court explained that it applies strict scrutiny to laws burdening First Amendment free exercise rights when some other constitutional right is also burdened. *Smith*, 494 U.S. at 881. As discussed above, applying the Public Accommodations Law here would burden privacy and intimate association rights in addition to free exercise rights. Thus, strict scrutiny applies to the federal free exercise analysis.

Additionally, this application of the Public Accommodations Law will burden Mrs. Young's property rights under the Fifth Amendment to the

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[8] A departure under the Hawai'i Constitution from the federal free exercise standards adopted in *Smith* is additionally warranted because *Smith* is flawed and has been resoundingly criticized. *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1111 (1990); Douglas W. Kmiec, *The Original Understanding of the Free Exercise Clause and Religious Diversity*, 59 UMKC L. REV. 591, 592-93 (1991).

United States Constitution and Article 1, Section 5 of the Hawai'i Constitution, both of which prohibit the taking of property by the State.[9] Because of her religious beliefs, Mrs. Young will be forced to cease renting rooms if the Public Accommodations Law is applied to her. This amounts to a taking of her right to rent her property. Also, the Youngs may lose their home, since they cannot pay their mortgage without their rental income. This too will amount to a taking of the Youngs' property.

E. The Public Accommodations Law Fails Strict Scrutiny.

To survive strict scrutiny, the State must demonstrate that the law furthers a "compelling state interest" and is "narrowly tailored" to that interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). Narrow tailoring requires that the State employ "the least restrictive means" for achieving its compelling interest. *Thomas*, 450 U.S. at 718.

Strict scrutiny requires a particularized focus. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006) (discussing cases showing that strict scrutiny analysis demands a particularized focus on the parties and circumstances). The relevant government interest for strict scrutiny analysis thus is not the State's general interest in prohibiting discrimination, but its particular interest in forcing Mrs. Young to allow

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[9] These constitutional property rights not only bolster free exercise claims; they provide an independent constitutional reason why the Public Accommodations Law cannot apply here.

same-sex couples to rent a room in her home. *See Attorney Gen. v. Desilets*, 418 Mass. 316, 325-26, 636 N.E.2d 233, 238 (1994) ("The general objective of eliminating discrimination . . . cannot alone provide a compelling State interest that justifies the application of that section in disregard of the defendants' right to free exercise of their religion. The analysis must be more focused."). But *this*—forcing a homeowner to rent a room in her own home to a same-sex couple-would permit exactly what the constitutional rights of privacy and intimate association forbid. Overriding the Constitution in this manner is not even a legitimate interest, let alone a compelling one. The Public Accommodations Law, as applied to Mrs. Young and Aloha, must fail strict scrutiny.

Even if, contrary to U.S. Supreme Court guidance, the relevant interest is characterized more broadly-as ensuring that entities providing goods or services to the public treat same-sex couples the same as opposite-sex couples—the Plaintiffs cannot show that the State considers this to be a compelling government interest. "[A] law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (alterations omitted). Here, because same-sex couples may not marry each other in Hawai'i, *see* Haw. Rev. Stat. § 572-1, the State and its political subdivisions treat same-sex couples differently than opposite-sex couples for myriad marriage related purposes when providing services to the public. The State, quite plainly then, does not consider there to be a compelling government interest in eliminating a form

of differential treatment that it authorizes and practices in its own operations.

Furthermore, even if the relevant interest is characterized even more broadly—such as ensuring that everyone has a place to stay in public accommodations—applying the Public Accommodations Law to Mrs. Young is not the least restrictive means to achieve the interest. It is simply not necessary to force private homeowners to accept guests into their private homes to ensure that everyone has a place to stay in public accommodations. The State's interest is readily achieved through nondiscrimination laws applied to inns, hotels, and other establishments open to the general public. Applying the law to private homeowners and intruding into their choice of who to share their home with goes too far. It is not narrowly tailored and fails strict scrutiny.

Because the Public Accommodations Law as applied to Aloha cannot satisfy strict scrutiny review, it is unconstitutional as applied, thus warranting summary judgment for Aloha.

* * * * *

DECLARATION OF PHYLLIS YOUNG

* * * * *

[ROA 937]

18. I let children who stay in our home play with my children's and grandchildren's toys and books.

* * * * *

19. Sometimes I pray with our guests.

20. I also sometimes invite our guests to attend the Thursday night Bible study we host in our home.

* * * * *

26. Our guests share all the living space of our home with Don and me. They are free to use our family room, bathrooms and kitchen. We have close contact with our guests in our home. Sometimes we find ourselves in the family room relaxing at the same time.

27. Our guests use our washing machine and dryer. They also are allowed to use my personal computer, which is located in Don's and my bedroom.

* * * * *

[ROA 938]

34. I will cease renting rooms in my home if my home is subject to the Public Accommodations Law so that I have to rent to everybody, even when doing so violates my sincerely held religious beliefs. I will not compromise my faith or violate it.

35. Don and I will struggle to make our mortgage payments without the extra income we acquire by renting rooms in our home.

* * * * *

EXHIBIT 5 TO DECLARATION OF SHAWN A. LUIZ

DEPOSITION OF PHYLLIS A. YOUNG VOLUME 2

* * * * *

[ROA 1007]

Q. Do your religious beliefs prevent you from selling a house to a same sex couple?

A. No.

Q. Why not?

A. I have nothing against a same sex people. It is only the act that I object to.

Q. So, selling a house to a same sex couple would not in your mind be facilitating their intimate conduct; is that right?

A. That's correct.

* * * * *

[ROA 1010-1014]

Q. (BY MR. RENN) Ms. Young, have you had a chance to review Exhibit 14?

A. I have.

Q. Do you recognize this document?

A. Yes.

Q. What is this document?

A. I believe this is a document that I got things off the Internet from the Catholic catechism or Catholic Web site.

Q. Did you highlight the text that's highlighted in this document?

A. I don't remember.

Q. Does the text that is highlighted have any special meaning to you?

A. Yes.

Q. How so?

A. It confirms the -- my religious beliefs.

Q. So, the text that's highlighted accurately reflects your religious beliefs; is that right?

A. Yes.

Q. How about the text that isn't highlighted, do you agree with that text?

A. Yes, it's the Catholic catechism. I believe everything that the Catholic church teaches.

Q. And when was the first time that you reviewed the text that's been highlighted, not the actual highlighted text, but literally when was the first time that you read those words?

A. I believe that it was --

MR. HOCHBERG: You mean in her entire life or in connection with this case?

Q. (BY MR. RENN) In your entire life.

MR. HOCHBERG: Oh.

A. It's something that I've been taught from my childhood.

Q. (BY MR. RENN) So, you've reviewed this language that's been highlighted at some point in your childhood?

A. Not -- not this language, these teachings.

Q. When was the first time that you reviewed the language that's been highlighted?

A. I had a Catholic catechism at home, so I've -- we've looked up things like this before but I really can't say when was the first time but I would say that the first time that I looked at this particular printout was at the beginning of year 2012.

Q. Okay. Does the highlighted text reflect the religious belief that you claim would be violated by allowing a same sex couple to stay in one bed at the Bed & Breakfast?

A. Yes.

Q. Okay. I'd like to show you another exhibit that will be marked as Exhibit 15.

(Young Exhibit No. 15 marked.)

Q. (BY MR. RENN) Please, let me know when you've reviewed it.

A. Okay.

Q. Do you recognize this document?

A. Yes.

Q. What is it?

A. It's from Hebrews 13 from the New American Standard version of the Bible.

Q. Does the highlighted text accurately reflect your religious beliefs?

A. It does.

Q. And does the highlighted text reflect the religious belief that you claim would be violated by allowing same sex couples to stay in one bed at the Bed & Breakfast?

A. Please, repeat that question.

Q. Sure. Does the highlighted text reflect the religious belief that you claim would be violated by allowing same sex couples to stay in one bed at the Bed & Breakfast?

A. It does.

Q. Okay. I'd like to show you another document marked as Exhibit 16.

(Young Exhibit No. 16 marked.)

Q. (BY MR. RENN) Let me know when you've reviewed it.

A. I've read it.

Q. Do you recognize this document?

A. Yes, I do.

Q. What is it?

A. It's from 1 Corinthians 6, the New American Standard Bible version.

Q. And does the highlighted text accurately reflect your religious beliefs?

A. It does.

Q. Does it reflect the religious belief that you claim to be violated by allowing same sex couples to share a bed at the Bed & Breakfast?

A. It does.

Q. Okay. I'd like to show you a document marked as Exhibit 17.

(Young Exhibit No. 17 marked.)

Q. (BY MR. RENN) Please, let me know when you've reviewed it.

A. I've read it.

Q. Do you recognize this document?

A. I do.

Q. What is it?

A. It's from Romans 1 from the New American Standard Bible.

Q. And does the highlighted text accurately reflect your religious beliefs?

A. It does.

Q. Does it accurately reflect your religious beliefs that you claim would be violated by allowing same sex couples to stay in one bed at the Bed & Breakfast?

A. It does.

* * * * *

[ROA 1015-1017]

Q. Does the highlighted text accurately reflect your religious beliefs?

A. It does.

Q. At the bottom of the page marked Def.087 --

A. I'm sorry.

Q. I'm sorry. At the bottom of the first page --

A. Okay.

Q. -- which is Bates stamped Def.087 --

A. Okay.

Q. -- the last sentence on that page reads, "Although the particular inclination of the homosexual person is not a sin, it is a more or less strong" -- "it is a more or less strong tendency ordered toward an intrinsic moral evil."

Do you believe that a lesbian or gay person is ordered toward an intrinsic moral evil?

A. I'm not sure.

Q. Why aren't you sure?

A. Because there's speculation. A person can be a homosexual and if they're not practicing the act, then they're not -- they're not inclined to be evil.

Q. So, a non-celibate lesbian or gay person, is that person ordered toward an intrinsic moral evil?

A. I don't believe that any homosexual person is a bad person. I believe that the act of sexual immoral behavior is a bad act, that it is against what God is asking us to do.

Q. That wasn't my question. My question is: Is a non-celibate lesbian or gay person ordered toward an intrinsic moral evil in your religious belief?

MR. HOCHBERG: Objection. That misstates the sentence that you originally read.

Q. (BY MR. RENN) I'm not quoting the sentence. I'm actually just asking you for your religious belief.

MR. HOCHBERG: But you are asking her for part of the sentence. You left out the part that says "tendency."

Q. (BY MR. RENN) My question --

MR. HOCHBERG: That changes the -- that changes the meaning.

A. Could you repeat the question, please?

Q. (BY MR. RENN) Sure. Let me rephrase. Is a sexually active lesbian or gay person intrinsically -- pardon me -- ordered toward an intrinsic moral evil?

MR. HOCHBERG: Same objection. And just for the record, what the sentence says is "it is a more or less strong tendency ordered toward an intrinsic moral evil." So, if you want to include all those words in your question, you might get an appropriate answer.

MR. RENN: I'm just asking Ms. Young for her religious belief.

Q. (BY MR. RENN) Do you have the question in your mind?

A. I cannot answer this with a yes or a no.

Q. Why not?

A. Because it's confusing, and it tries to change what I believe. And I've said this before, that I believe that every person is good.

I believe that homosexual people, they may or may not be very good. It is the act of practicing

immoral sexual behavior that is considered a sin that I believe to be in my eyes and God's eyes.

* * * * *

[ROA 1018-1019]

Q. (BY MR. RENN) I'd like to show you another document marked as Exhibit 19.

(Young Exhibit No. 19 marked.)

A. I have reviewed it.

Q. (BY MR. RENN) Okay. Do you recognize this document?

A. Yes, I do.

Q. What is it?

A. It's 2 John 1 from the New American Standard Bible.

Q. And does this document accurately reflect your religious beliefs, including the highlighted text?

A. It does.

Q. You've highlighted a sentence that says, quote, "If anyone comes to you and does not bring this teaching, do not receive him in to your house and do not give . . . a greeting" --

A. Him.

Q. -- for the one who gives him a greeting participates in his evil deeds," end quote.

Do you agree with that statement?

A. Yes, I believe everything in the Bible.

* * * * *

[ROA 1023]

Q. Can you give me some examples of people who you consider continue to sin?

A. A person who does drugs and continues to harm their body which is a temple of Christ.

(Mr. James Hochberg is now present.)

Q. (BY MR. RENN) So, would you allow that type of person to be a guest at the Bed" Breakfast?

A. No, not knowingly.

MR. RENN: Okay. You wanted to take a break, Jim?

* * * * *

[ROA 1024]

A. I can't think of any specific situation, but I am sure that there are people who have discriminated against me because I am Catholic.

I have also -- what comes to mind now is the hate e-mails that were sent to me after Lambda Legal put out the news release, the phone calls, vicious phone calls. I would say that is discrimination.

* * * * *

EXHIBIT 9
TESTIMONY OF CORAL WONG PIETSCH,
ON HOUSE BILL 1715, H.D. 1
BEFORE THE SENATE COMMITTEE
ON JUDICIARY AND HAWAIIAN AFFAIRS
ON MARCH 23, 2005

[ROA 1092]

HAWAI'I CIVIL RIGHTS COMMISSION

830 Punchbowl Street, Room 411 • Honolulu, HI 96813-5095 • Phone: (808) 586-8636 • Fax: (808) 586-8655 • TDD: (808) 586-8692

LATE TESTIMONY March 23, 2005
Rm. 229, 9:30 a.m.

To: The Honorable Colleen Hanabusa, Chair, and Members of the Senate Committee on Judiciary and Hawaiian Affairs

From: Coral Wong Pietsch, Chair, and Commissioners of the Hawai`i Civil Rights Commission

* * * * *

[ROA 1094-1097]

The HCRC opposes the creation of the new and broader "religious" exemption to H.R.S. Chapter 515 created by H.B. No. 1715, H.D. 1.

H.B. No. 1715, H.D. 1 amends H.R.S. §515-4 by adding a new exemption:

> (b) Nothing in section 515-3 shall be deemed to prohibit refusal, because of sex, including sexual identity or expression, sexual orientation, or marital status, to rent or lease housing accommodations:

> (1) Owned or operated by a religious institution and used for church purposes as that term is used in applying exemptions for real property taxes; or
>
> (2) Which are part of a religiously affiliated institution of higher education housing program which is operated on property that the institution owns or controls, or which is operated for its students pursuant to Title IX of the Higher Education Act of 1972.

The reasons for HCRC concern and opposition to this overly broad exemption are five-fold:

1) A religious exception is already provided under the state's fair housing law. Both our fair employment practices statute, H.R.S. Chapter 378, Part 1, and fair housing statute, H.R.S. Chapter 515, already contain religious exceptions. The employment discrimination exception in §378-3(5) provides:

> §378-3 Exceptions. Nothing in this part shall be deemed to: …
>
> (5) Prohibit or prevent any religious organization or denominational institution or organization. or any organization operated fur charitable or educational purposes, that is operated, supervised, or controlled by or in connection with a religious organization, from giving preference to individuals of the same religion or denomination or from making a selection calculated to promote the religious principles for which the organization is established or maintained[.]

The religious exception in the housing discrimination law is found in §515-8:

> §515-8 Religious institutions. It is not discriminatory practice for a religious institution or organization or a charitable or educational organization operated, supervised, or controlled by a religious institution or organization to give preference to members of the same religion in a real property transaction, unless membership in such religion is restricted on account of race, color, or ancestry.

Under the housing exception, religious institutions can give preference to members of the same religion. It essentially allows religious institutions to exclude non-members from housing, even if membership in the religion is restricted on the basis of sexual orientation.

The proposed new and broader "religious" exemption allows covered landlords to discriminate on the basis of sex, including gender identity or expression, sexual orientation, and marital status. It goes beyond allowing selection of persons of the same religion and authorizes discriminatory treatment on the basis of sex, sexual orientation, and marital status, which are protected bases under the law.

(2) The H.B. No. 1715, H.D. 1 exemption may conflict with the protections afforded under H.R.S. Chapter 378, Part I. The "religious" exemption contained in the H.B. No. 1715, H.B. 1 permits discrimination by religious institutions and real property owners who are part of a housing program of a religiously affiliated institution for employees or students. Under H.R.S. §378-2 it is an

unlawful discriminatory practice for any employer to discriminate against any current employee on the basis of sexual orientation and other protected bases in the terms, conditions, or privileges of employment. The provision of faculty or staff housing may be a "term, condition, or privilege" of employment that cannot be denied on the basis of sexual orientation or any other protected basis under H.R.S. §378-2.[4]

(3) H.B. No. 1715, H.D. 1 provides an exemption for religious institutions as landlords whose property is held out for rent or lease for non-religious purposes, and extends that exemption to private landlords. H.B. No, 1715, H.D. 1, extends the scope of the new "religious" exemption to "the rental or leasing of housing accommodations that are owned or operated by a religious institution ..." regardless of whether the property is used for religious purpose. Under this exemption, a religious institution can discriminate in the rental or lease of property that it owns or operates and holds out to the general public for rental or lease.

This new exemption also extends to private landlords who are "part of a religiously affiliated institution of higher education housing program" for employees or students. In essence, it gives a private landlord the power to discriminate on par with that of a religious institution.

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[4] Again, the religious exception under H.R.S. §378-3(5) allows religious institutions to discriminate on the basis of religion, not other prohibited discriminatory bases.

(5) The creation of the exemption proposed in H.B. No. 1715, H.D. 1 undermines and diminishes the State's compelling interest in civil rights, fair housing, and fair employment laws, and is contrary to the State Constitutional provisions prohibiting discrimination on the basis of sex. In recent years, there have been constitutional attacks on civil rights laws through claims that discrimination based on sincerely-held religious belief should not be prohibited, based upon constitutional guarantees of free exercise of religion. The state of Hawai`i has argued that neutral state laws of general applicability should be upheld, including state civil rights laws.[5] Creation of a broad exemption like that provided for in H.B. No. 1715, H.D. 1 will arguably undermine the State's compelling interest in eliminating discrimination and protecting civil rights, creating a slippery slope that opens the door to other requests for exemptions[6] and making it more difficult to defend against

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[5] The Hawai`i Attorney General joined with other state attorneys general in an amicus brief urging the Ninth Circuit Court of Appeals to uphold laws of general applicability against such challenges, including those state laws prohibiting discrimination in housing. Thomas v. Anchorage Equal Rights Commission, 220 F.3d 1134 (9th Cir. 2000). Examples of laws of general applicability which have withstood constitutional challenges include: obligations to pay taxes, compulsory military service, health and safety regulations, drug and traffic laws, minimum wage, child labor, animal welfare, environmental protection, and laws providing for equal opportunity.

[6] Currently, discrimination on the basis of "sexual orientation" is prohibited under H.R.S. §378-2, without the kind of exception sought here. Creation of a broad exemption here will invite requests for a similar exception in H.R.S. Chapter 378, Part I.

constitutional attacks on state civil rights laws that prohibit discrimination on the basis of marital status, race, and sex.[7] And, the proposed exemption runs contrary to the State's compelling interest in eliminating sex discrimination, as delineated in Article 1, Section 3 (equal rights) and Section 5 (equal protection and civil rights clauses) of the State Constitution, and recognized by the Hawai`i Supreme Court in Baehr v. Lewin, 74 Haw. 530 (1993).

* * * * *

[ROA 1099]

CONCLUSION

The HCRC opposes the bill as drafted, particularly the creation of a new and broad "religious" exemption to H.R.S. §515-4. The HCRC will support H,B. No. 1715 if the provision creating an additional "religious" exemption to H.R.S. §515-4 is deleted.

* * * * *

[7] Historically, arguments in support of race and sex discrimination have been grounded in religious doctrine.

EXCERPTS FROM DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

* * * * *

[ROA 1267-1270]

III. Subjecting Mrs. Young to the Public Accommodations Law Burdens Her Free Exercise Rights And Fails the Required Strict Scrutiny Review.

The Plaintiffs wrongly argue that forcing Mrs. Young to rent to same-sex couples does not implicate the free exercise clause, because "Ms. Young holds no religious belief that compels her to operate a B&B." (PI. Mem. at 10.) This mischaracterizes Mrs. Young's defense. She does not assert that her faith requires her to rent rooms in her home. Rather, her faith requires that she not rent rooms to unmarried couples or same-sex couples. (Aloha Mem. at 4; *see also* Renn Decl., Ex. A, Young Dep., at 72:14-18.) Forcing her to do so burdens her free exercise rights.

The Plaintiffs also argue that the lower, *Employment Div. v. Smith*, 494 U.S. 872 (1990), standard of scrutiny applies for laws burdening free exercise of religion. (PI. Mem. at 8-9.) This ignores the Hawai'i Supreme Court's guidance, given eight years after *Smith* was decided, that it would apply the much higher, *pre-Smith* standard of strict scrutiny to laws burdening free exercise rights. *Korean Buddhist Dae Won Sa Temple of Hawai'i v. Sullivan*, 87 Haw. 217, 247, 953 P.2d 1315, 1345 (Haw. 1998). This case asked whether denying a variance to a Buddhist

temple to allow it to construct a taller building than allowed by local zoning laws violated free exercise rights. *Korean Buddhist*, 87 Haw. at 222 and 245-249. The state Supreme Court found that the temple had failed to demonstrate that the size of the temple's building directly implicated its religious faith. *Id.* at 249. Thus, there was no burden on free exercise rights in that *case. Id.*

The state Supreme Court explained, however, that had a free exercise burden been found, it would require the State to satisfy the strict scrutiny requirement. *Id.* at 247. This standard "is the most demanding test known to constitutional law[,]" *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997), requiring the State to prove that the law furthers a "compelling state interest" and is "narrowly tailored" to that interest, *Church of the Lukumi Babalu Aye*, *Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993). The *Buddhist Temple* court quoted one of its own *pre-Smith* decisions to articulate the strict scrutiny standard, and then cited to the United States Supreme Court's pre-*Smith* decision, *Wisc. v. Yoder*, 406 U.S. 205 (1972), which *Smith* implicitly overruled. 87 Haw. at 247. This clarified that in Hawai'i, free exercise rights would receive greater protection than what the United States Supreme Court said the federal First Amendment required. Coming on the heels of *Smith*, the *Buddhist Temple* decision offered clear instruction to the State and its courts that laws burdening free exercise rights must survive strict scrutiny.

Mrs. Young's sincerely held religious belief requires her to forgo renting rooms to cohabiting same-sex couples. If the Public Accommodations Law

is applied to her practice of renting rooms in her home, she will be forced to rent to such couples. Her free exercise rights will therefore be burdened by the application of the Public Accommodations Law. It is no solution to say, as the Plaintiffs do, (PI. Mem. at 10), that Mrs. Young can avoid the burden on her free exercise rights by changing her rental practices or ceasing to rent rooms in her home. The burden is not on Mrs. Young to avoid laws that restrict her free exercise rights, or change her practices so her ability to exercise her faith is not infringed. Rather, the burden is on the State to justify infringing Mrs. Young's free exercise rights by satisfying strict scrutiny review. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (noting that government pressure to follow law that violates one's religious beliefs is itself a free exercise burden).

The Plaintiffs also cite *U.S. v. Lee*, 455 U.S. 252 (1982), for the mistaken assertion that because Mrs. Young engages in commercial activity, she gives up her free exercise rights. (Pl. Mem. at 10.) *Lee* held that an Amish employer must pay the employers' portion of his employees' social security taxes as required by law, even though participation in social security violated his own sincerely held religious beliefs. The Court found Congress "has accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it a violation of their faith to participate in the social security system[ ]" by granting self-employed persons who object on religious grounds an exemption from paying their own share of the tax. *Id.* at 260-61. But the Court concluded that the free exercise clause did not prevent Amish employers from complying with

the law and paying the employers' portion of the tax for their employees. *Id.* The law required the employees to be subject to social security tax: the Amish employer could not "superimpose" the dictates of his faith on the federal taxing system for his employees. He had to comply with the law and pay the employers' portion of the tax. *Id.*

U.S. v. Lee is thus inapposite to Mrs. Young's situation. She is not seeking freedom from paying taxes. Rather, she is seeking the vindication of her right not to have to take people into her own home, when doing so would violate her religious faith. The *Lee* case turned on the fact that the law required the Amish man's employees to participate in the social security system. Unlike the situation in *Lee*, however, no law requires same-sex couples to stay in Mrs. Young's home. So Mrs. Young's decision to decline to rent to same-sex couples does not superimpose her faith's requirements on others' legal obligations.

Besides, neither the federal courts nor this state's courts have held that one surrenders her First Amendment, free exercise rights when she engages in commercial activity. Rather, as the Massachusetts high court said, "[t]he fact that the defendants' free exercise of religion claim arises in a commercial context, although relevant when engaging in a balancing of interests, does not mean that their constitutional rights are not substantially burdened." *Attorney Gen. v. Desilets*, 418 Mass. 316, 325, 636 N.E.2d 233, 238 (Mass. 1994). *See also Jimmy Swaggart Ministries v. Bd. of Equalization of California*, 493 U.S. 378, 387 (1990) (holding that commercial sale of religious publication protected by free exercise clause) *(quoting Murdock v. Com. of*

Pennsylvania, 319 U.S. 105, 113-14 (1943)); *U.S. v. Hugs*, 109 F.3d 1375, 1377 (9th Cir. 1997) (commercial nature of transaction did not deprive defendant of free exercise defense).

Applying the Public Accommodations Law to Mrs. Young's practice of renting of rooms in her own home burdens her free exercise rights, because it compels her to rent to those her religious beliefs commands her to decline. This application of the Public Accommodations Law cannot survive strict scrutiny. (Aloha Mem. at 18-20.) The law cannot constitutionally be applied to Mrs. Young's rental practice.

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EXCERPTS FROM EXHIBIT TO DECLARATION OF JAY S. HANDLIN IN SUPPORT OF PLAINTIFFS AND PLAINTIFF-INTERVENOR'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FILED MARCH 19, 2013

EXHIBIT A
DEPOSITION OF PHYLLIS A. YOUNG
VOLUME 1

* * * * *

[ROA 1362]

Q. And why do you choose to continue operating Aloha Bed & Breakfast?

A. Because we need the money to pay the mortgage.

Q. So, in other words, if you couldn't make any money from operating the B&B, you wouldn't operate it; is that right?

A. Would you repeat that, please?

Q. Sure. If you couldn't make any off running the B&B, you wouldn't operate it; is that right?

A. Yes, that's true.

Q. And does the B&B generate the majority of your house -- of your annual household income?

A. Yes.

* * * * *

[ROA 1388]

Q. (BY MR. RENN) Let's say over the last five years what's the average median stay for a customer at Aloha Bed & Breakfast?

A. I don't average them. So, for me to answer and give you a figure would not be accurate. I don't pay attention. Some guests stay three days. Some guests stay seven days. Some guests stay two weeks, some, you know, five, whatever.

Q. I understand that there's a range, and I understand you can't give me a mathematically precise answer but I'm not asking for that. I'm only asking for an estimate.

Is it, for example, a week or two weeks that constitutes the median stay of a customer in the last five years at Aloha Bed & Breakfast?

A. I would have to say between four and five days.

* * * * *

[ROA 1390]

At present who currently permanently lives in the establishment out of which the B&B operates?

MR. HOCHBERG: Can you repeat that? I'm not sure I understood what you said.

Q. (BY MR. RENN) At present who currently permanently lives at the establishment out of which the B&B operates?

A. I don't consider my home an establishment.

Q. Okay. Okay. So, who currently lives at the - -

A. At my home.

Q. -- house out of which the B&B operates?

A. My husband and I.

Q. And how long have you and your husband continuously resided there?

A. Since 1978.

* * * * *

**EXCERPTS FROM
DEFENDANT BED & BREAKFAST'S
REPLY MEMORANDUM TO PLAINTIFFS'
AND PLAINTIFF-INTERVENOR'S
OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT
FILED MARCH 19, 2013**

* * * * *

[ROA 1482-1483]

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]

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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

(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 15-16), and that

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scrutiny for federal, stand-alone free exercise claims. Mrs. Young preserves this argument for appeal.

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.)

* * * * *

EXCERPTS FROM TRANSCRIPT OF FIRST CIRCUIT COURT OF HAWAI'I'S MARCH 28, 2013 HEARING ON 1) PLAINTIFF'S AND PLAINTIFF-INTERVENOR'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND 2) DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

* * * * *

[Tr. 18]

I'm taking it purely as a statutory analysis --

MR. LA RUE: All right.

THE COURT: -- if that helps you.

MR. LA RUE: That helps me, Your Honor.

Thank you.

* * * * *

[Tr. 39]

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.

* * * * *

[Tr. 40-41]

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.

* * * * *

[Tr. 42]

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.

* * * * *

EXCERPTS FROM OPENING BRIEF OF DEFENDANT-APPELLANT ALOHA BED & BREAKFAST FILED IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI`I

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2. Applying HRS 489 Raises Grave and Doubtful Constitutional Questions About Due Process and Equal Protection.

Applying HRS 489 to the rental of rooms in Mrs. Young's home does not only raise "grave and doubtful constitutional questions" concerning the right to intimate association. *See In re Doe*, 96 Haw. at 81. It also raises such questions concerning due process and equal protection.

In *State v. Modica*, 58 Haw. 249, 567 P.2d 420 (Haw. 1977), the Hawai'i 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. 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 HRS 515, which regulates the rental of rooms in homes, applies to these rentals. If the Court finds that HRS 489 also applies, then the same act would be subject to two different statutes,

each with a different punishment. A "finding of liability" under HRS 489 would result in punishment. But a "finding of liability" under HRS 515 would not, because of its Mrs. Murphy exemption.

This is the very situation that the Hawai'i Supreme Court said in *Modica* violates due process and equal protection guarantees. The very same act—declining to rent rooms in a private home because of the sexual orientation of those who wished to rent—can be punished if charges are brought pursuant to one statute, but is protected if the charges are brought pursuant to another statute. In such cases, it violates due process and equal protection to impose the greater of the two possible punishments. *Modica*, 58 Haw. at 251. The court below should have applied the doctrine of constitutional avoidance, found that the rental of rooms in Mrs. Young's home must be subject to HRS 515 (not HRS 489), and granted Mrs. Young's motion for summary judgment.

* * * * *

4. Applying HRS 489 Impermissibly Burdens Federal Free Exercise and Other Rights.

In *Smith*, the U.S. Supreme Court explained that it applies strict scrutiny to laws burdening First Amendment free exercise rights when some other constitutional right is also burdened. *Smith*, 494 U.S. at 881. The Ninth Circuit has articulated the standard that a litigant must meet to assert a hybrid rights claim pursuant to *Smith*. The litigant must "make out a 'colorable claim' that a companion right has been violated-that is, a fair probability or a likelihood, but not a certitude, of success on the

merits." *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999) (internal quotation and citation omitted). Mrs. Young has done that. As discussed above, applying HRS 489 to the rental of rooms in Mrs. Young's home would burden privacy and intimate association rights in addition to free exercise rights. Thus, strict scrutiny applies to the federal free exercise analysis.

Additionally, this application of HRS 489 will burden Mrs. Young's property rights under the Fifth Amendment to the United States Constitution and Article 1, Section 5 of the Hawai'i Constitution, both of which prohibit the taking of property by the State. Because of her religious beliefs, Mrs. Young will be forced to cease renting rooms if HRS 489 is applied to her. This amounts to a taking of her property interest. Also, the Youngs may lose their home, since they cannot pay their mortgage without their rental income. This too will amount to a taking of the Youngs' property. These constitutional property rights not only bolster free exercise claims, they provide an independent constitutional reason why the application of HRS 489 to the rental of rooms in Mrs. Young's home must survive strict scrutiny review.

5. HRS 489, As Applied, Fails Strict Scrutiny Review.

As explained above, applying HRS 489 to the rental of rooms in Mrs. Young's home infringes constitutional guarantees of fundamental rights. Where "fundamental rights expressly or impliedly granted by the constitution" are infringed, they must satisfy strict scrutiny review under which "the laws are presumed to be unconstitutional unless the state shows compelling state interests which justify such

classifications, and that the laws are narrowly drawn to avoid unnecessary abridgments of constitutional rights." *Baehr v. Lewin*, 74 Haw. 530, 572, 852 P.2d 44, 64 (1993) (internal quotations and citations omitted). Strict scrutiny's narrow tailoring requirement compels the state to demonstrate that its law has used "the least restrictive means for accomplishing [its compelling interest]." *Doe v. Doe*, 116 Haw. 323,335, 172 P.3d 1067, 1079 (2007). The strict scrutiny test "is the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). The state cannot satisfy this strict scrutiny requirement when HRS 489 is applied to the rental of rooms in Mrs. Young's home.

The court below failed to consider the constitutional questions raised by applying HRS 489 to the rental of rooms in Mrs. Young's home, as well as the constitutional analysis briefed by both parties. *See* ROA, Order, at 1502-04 (order granting partial summary judgment to Plaintiffs-Appellees and denying summary judgment to Mrs. Young, which contains no consideration of constitutional issues); JEFS, Transcript, docket entry number 12, *generally* (transcript of oral argument hearing, in which the court asked no significant questions relating to the constitutional issues and no discussion of those issues was entertained); *id*. at 18 (the court directed counsel for both parties to focus on statutory analysis and not constitutional issues, because "I'm taking it purely as a statutory analysis."). As a result, the trial court did not apply strict scrutiny analysis to the application of HRS 489 to the rental of rooms in Mrs. Young's home, as it should have. *See id*. Appellants are left in the awkward position of being unable to explain why the

court below got the constitutional questions wrong, because the court below chose not to address the constitutional questions at all. That by itself should be reversible error.

Plaintiffs-Appellees, however, addressed the constitutional questions. They mistakenly argued below that applying HRS 489 to Mrs. Young, and so forcing her to accept into her home renters to whom she would prefer not to rent, is justified by an interest in ending discrimination against homosexuals. (ROA at 1342-1345). But even assuming (without conceding) that the state has such a general interest in ending sexual orientation discrimination so that everyone can find a place to stay, and that the interest is a compelling one, that does not end the analysis. Strict scrutiny requires not only a general, compelling interest but also a *particularized* focus on the party before the court. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006) (discussing cases showing that strict scrutiny analysis demands a particularized focus on the parties and circumstances before the court). The relevant government interest for strict scrutiny analysis thus is not the State's general interest in prohibiting discrimination, but its particular interest in forcing Mrs. Young to allow same-sex couples to rent a room in her home. *See Attorney Gen. v. Desilets*, 418 Mass. 316, 325-26, 636 N.E.2d 233, 238 (1994) ("The general objective of eliminating discrimination . . . cannot alone provide a compelling State interest that justifies the application of that section in disregard of the defendants' right to free exercise of their religion. The analysis must be more focused."). When the analysis is properly focused on Mrs. Young

and the rental of her three rooms in her home, it becomes obvious that the State does not have a compelling interest sufficiently great to infringe Mrs. Young's rights to privacy, intimate association, and free exercise of religion. Regardless of whether there is a compelling interest in requiring large places of public accommodation, like hotels, to take all corners 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.

Not only is there no particularized interest in forcing *Mrs. Young* to rent rooms in her own home, such a result is not narrowly tailored to the goal of eradicating discrimination in the rental of rooms and so ensuring that everyone has a place to stay. Simply put, the State can achieve its goal of providing all people a place to stay in less restrictive means. Indeed, it has done so with the combination of HRS 489, which bans discrimination in places of public accommodation like hotels, and HRS 515, which bans discrimination in the renting of real estate, but provides a Mrs. Murphy exemption for those who rent only a few rooms in their own homes. The balance between HRS 489 and HRS 515 provides the narrow tailoring called for by the second part of the test. To end discrimination and so ensure that everyone can rent a room, it is not necessary to compel Mrs. Young and others homeowners renting a few rooms in their homes to violate their religious beliefs and rent to same-sex couples. That abridges the freedom of more

people than necessary and so is not the least restrictive means to accomplish the State's purpose. This is why such homeowners are provided a Mrs. Murphy exemption, in order not to burden more freedom than absolutely necessary to accomplish the State's goals. It is sufficient to require the hotels, motels, and others renting large numbers of rooms to make such rentals.

Even if the relevant interest in the antidiscrimination law is characterized more broadly, such as "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[,]"as the Plaintiffs-Appellees claim, (ROA at 1343), the State cannot rely on this interest to justify its law. The *State itself* provides unequal treatment on the basis of sexual orientation in that it allows opposite-sex couples to marry but not same-sex ones. HRS 572-1.[6] The United States

[6] The State may have valid policy reasons for allowing only opposite-sex couples to marry. For instance, the State's policy might be a result of its recognition that men and women are naturally drawn to engage in sexual intercourse, and sexual intercourse between a man and woman is capable of producing children. The State might recognize that society is best served when moms and dads together raise the children they produce in stable homes, as this reduces the economic costs to society sometimes incurred as a result of single-parent homes, and so the State might want to channel the sexual activity of men and women into marriage relationships. Or, the State might have a policy interest in channeling human sexual activity into the only type of marital union that can procreate children in order to ensure humanity's survival. Or the State might restrict marriage to only opposite-sex couples because the best available social science indicates that, on average, children do best when

Supreme Court has explained that "a law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993). The State, quite plainly then, does not consider there to be a compelling government interest in eliminating the so-called "evil of unequal treatment" when it authorizes and practices such treatment in its own operations. So the State cannot 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 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.

For the foregoing reasons, applying HRS 489 to Mrs. Young's rental of rooms in her own homes does not survive strict scrutiny review. The court below should have found the application of HRS 489 in this situation to be unconstitutional. The court should then have granted Mrs. Young's motion for summary judgment and denied the Plaintiffs-Appellants' motion for partial summary judgment. The court's

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raised by their own 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 for purposes of marriage. Mrs. Young is not criticizing the State's choice, but is only making the point that the State has made this distinction between opposite-sex couples

contrary decision is error, and this Court should reverse.

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EXCERPTS FROM REPLY BRIEF OF DEFENDANT-APPELLANT ALOHA BED & BREAKFAST FILED IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

* * * * *

B. Appellees wrongly argue that the free exercise clause does not rise to the level of a valid defense.

Appellees wrongly argue that the free exercise clause does not provide a valid defense. See Ans. Brief at 23-27. Again, Appellees cite case law that is inapposite. Further, Appellees try to mischaracterize the burden imposed by the State in this case upon Mrs. Young's religious belief. A *substantial* burden on free exercise exists where the State pressures a person to violate her religious convictions by conditioning a benefit or right on faith-violating conduct. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717-18 (1981). By forcing Mrs. Young "to choose between following the precepts of her religion and forfeiting [the right to rent rooms], on the one hand, and abandoning one of the precepts of her religion in order to [maintain that right], on the other hand," the Public Accommodations Law would impose a substantial "burden upon the free exercise of religion." *See Sherbert*, 374 U.S. at 404; *see also Thomas*, 450 U.S. at 717-18 ("While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.").

Appellees wrongly argued that the free exercise clause is not implicated because "Ms. Young holds no religious belief that compels her to operate a B&B." (ROA at 684.) But this example of *reduction ad absurdum*, though quite clever, misses the point. That Mrs. Young's faith does not require her to operate a B&B does not mean that the free exercise clause is not implicated by a law that requires her to rent rooms in her home to those she believes are engaging in immoral behavior, when her religious belief is that it would be wrong for her to facilitate that behavior occurring in her home. Mrs. Young's faith requires that she not rent rooms to unmarried couples or same-sex couples. (ROA at 918; see also ROA at 743:14-18.) Forcing her to do so burdens her free exercise rights.

Strict scrutiny should apply to this burden on free exercise rights under the Hawai'i Constitution. This was the standard that prevailed for both state and federal free exercise claims until 1990, when the U.S. Supreme Court limited the federal constitutional protection in some cases, stating that "the right of free exercise [under the United States Constitution] does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the grounds that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990).

Hawai'i has not decided whether it will follow *Smith*'s approach or the twenty-nine States that have adopted an approach more protective of religious liberty. In *Korean Buddhist Dae Won Sa Temple of Hawai'i v. Sullivan*, 87 Haw. 217,953 P.2d 1315 (Haw. 1998), decided eight years after *Smith*, the

Court said it would apply strict scrutiny to laws burdening free exercise rights. *Korean Buddhist*, 87 Haw. at 247. This case asked whether not letting a Buddhist temple to construct a taller building than allowed by local zoning laws violated free exercise rights. *Id.* at 222 and 245-249. The state Supreme Court found the temple failed to show that the size of its building implicated its religious faith, so there was no burden on free exercise rights. *Id.* at 249. But the Court said that if there had been a free exercise burden, the State would have had to satisfy strict scrutiny. *Id.* at 247. The *Korean Buddhist* court quoted one of its own pre-*Smith* decisions to articulate the strict scrutiny standard, and then cited the United States Supreme Court's pre-*Smith* decision, *Wisc. v. Yoder*, 406 U.S. 205 (1972), which *Smith* implicitly overruled for federal free exercise jurisprudence. 87 Haw. at 247. This suggested that in Hawai'i, free exercise rights would receive greater protection than the federal First Amendment required. The Hawai'i Supreme Court has "long recognized" that it is "free to give broader protection under the Hawai'i Constitution than that given by the federal constitution." *State v. Viglielmo*, 105 Haw. 197, 211, 95 P.3d 952, 966 (Haw. 2004) (citations omitted). It has regularly done so. *See, e.g.*, *Kam*, 69 Haw. at 491, 748 P.2d at 377 (privacy rights); *State v. Rogan*, 91 Haw. 405,423,984 P.2d 1231, 1249 (Haw. 1999) (double jeopardy rights); *State v. Santiago*, 53 Haw. 254,266,492 P.2d 657, 664 (Haw. 1971) (freedom from self-incrimination); *State v. Hoey*, 77 Haw. 17, 36, 881 P.2d 504, 523 (Haw. 1994) (custodial interrogation rights). And the Court signaled in *Korean Buddhist* that broader protection exists under

the state Free Exercise Clause and that strict scrutiny applies to laws burdening those rights.

The court below did not consider in any detail whether the free exercise clause protects Mrs. Young. *See*, JEFS, docket entry number 12, generally (no significant discussion at oral argument of the constitutional issues raised by either party in their briefing). Indeed, the court seemed to suggest that, because Mrs. Young had started a business, her free exercise rights were diminished. Opening Brief Ex. C, Transcript, at 21. But one does not forfeit First Amendment rights by going into business. Neither the federal courts nor this state's courts have ever held that one surrenders free exercise rights when she engages in commercial activity. Rather, as the Massachusetts high court said, "[t]he fact that the defendants' free exercise of religion claim arises in a commercial context, although relevant when engaging in a balancing of interests, does not mean that their constitutional rights are not substantially burdened." *Attorney Gen. v. Desilets*, 418 Mass. 316, 325, 636 N.E.2d 233, 238 (Mass. 1994). *See also Jimmy Swaggart Ministries v. Bd. of Equalization of California*, 493 U.S. 378, 387 (1990) (holding that commercial sale of religious publication protected by free exercise clause) (*quoting Murdock v. Com. of Pennsylvania*, 319 U.S. 105, 113-14 (1943)); *U.S. v. Hugs*, 109 F.3d 1375, 1377 (9th Cir. 1997) (commercial nature of transaction did not deprive defendant of free exercise defense).

The Tenth Circuit Court of Appeals, sitting en banc, recently ruled that laws protecting religious freedom apply equally to businesses and their owners. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114

(10th Cir. 2013) (en banc). This case arose as one of the many challenges to the federal Patient Protection and Affordable Care Act ("ACA")'s requirement that certain businesses must offer their employees health insurance that includes coverage for contraceptives and abortifacients. *Id.* at 1122-23. The owners of Hobby Lobby, the Green family, are Christians who make decisions for their business according to the dictates of their faith. *Id*. at 1122. "[O]ne aspect of the Greens' religious commitment is a belief that human life begins when sperm fertilizes an egg. In addition, the Greens believe it is immoral for them to facilitate any act that causes the death of a human embryo." *Id.* Consequently, the Greens and their business, Hobby Lobby, objected to offering abortifacient coverage. *Id.* at 1125. Hobby Lobby and its owners faced the terrible choice of violating their faith or paying massive taxes imposed on businesses that refused to obey the dictates of the ACA. *Id*. The court held that "because the contraceptive-coverage requirement places substantial pressure on Hobby Lobby and Mardel [another business owned by the Green family] to violate their sincere religious beliefs, their exercise of religion is substantially burdened[.]" *Id*. at 1137-38.

The *Hobby Lobby* court rightly decided that business owners should not have to be forced to choose between engaging in business and following their faith. Mrs. Young should not be forced to choose between renting rooms in her home and following her faith, either. Mrs. Young's sincerely held religious beliefs require her to not rent rooms to unmarried cohabiting couples. If HRS 486 is applied to her rental of rooms in her home, she will be forced to rent to such couples. Her free exercise rights will therefore be

burdened. It is no solution to say that Mrs. Young can avoid the burden on her free exercise rights by changing her rental practices or ceasing to rent rooms in her home. The Constitution requires the State to justify infringing Mrs. Young's free exercise rights by satisfying strict scrutiny review. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (noting that government pressure to follow law that violates one's religious beliefs is itself a free exercise burden).[1]

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[1] Appellant sufficiently covered the takings clause and the hybrid rights theory in the opening brief and preserves these issues for oral argument.

EXCERPTS FROM 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

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II. The ICA's Interpretation of HRS § 515-4(a)(2) and HRS § 489-3 Violates Young's Right to Due Process and Equal Protection of the Laws.

Different punishment for the same act committed under the same circumstances violates citizen's rights to due process and equal protection. *State v. Hoang*, 86 Haw. 48, 58, 947 P.2d 360, 370 (1997) (citing *State v. Modica*, 58 Haw. 249, 251, 567 P.2d 420,422 (1977)). What the ICA's decision achieves is far worse. It imposes liability on Young that leads not only to an injunction, but also compensatory, statutory, treble, and punitive damages, and ruinous attorneys' fees and costs awards because she rents up to three bedrooms in her family home for a minimum of three days at a time and often for longer periods. But it grants absolute immunity from liability to those who do the same thing on what the lower court deems a more "long term" basis. And it does so even though (1) HRS § 515-4(a)(2)'s text makes no short or long-term distinction, (2) no court had previously interpreted the law that way, and (3) Young had no way of knowing that an ICA ruling (ten years later) would deem her outside of HRS § 515-4(a)(2)'s protection and liable for referring Cervelli and Bufford to another private homeowner under HRS § 489-3.

Modica and the federal due process precedent on which it is based demand that regulated parties have (a) advance notice of what the law requires so they have an opportunity to comply, and (b) that the law provide enough guidance to prevent enforcement officials—including judges and juries—from punishing citizens under it in an arbitrary or discriminatory way. *State v. Arceo*, 84 Haw. 1, 22-23, 928 P.2d 843, 864-65 (1996); *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Neither requirement is satisfied here. A decade ago, nothing in Hawai`i law gave Young the slightest hint that HRS § 489-3 applied to renting three bedrooms in her family home. HRS § 515-4(a)(2)'s text indicated that Young's private home was not a public accommodation. No court had ever construed Hawai`i law differently. And, as Young explained to the circuit court at the summary judgment hearing, neither had the Commission. Nothing in the Commission's administrative rules gave Young notice that a private home could fall within HRS § 489-3's reach. In fact, the Commission's own website (before Young's counsel mentioned it at oral argument) explained that public property—not private property like Young's family home—constitutes a place of public accommodation. Appendix C, transcript of hearing March 28, 2013, ICA Docket #12, pages 33-36. Punishing Young regardless is exactly the sort of arbitrary and unjust enforcement of the law that due process forbids. If Young—a licensed real estate agent—cited the Mrs. Murphy exemption and believed, in good faith, that her conduct was lawful (ROA PDF at 987, 988 and 990), no ordinary citizen would know that HRS § 489-3 applied instead. *State*

v. Beltran, 116 Haw. 146, 145, 172 P.3d 458, 465 (2007) (legal distinctions cannot be incomprehensible); *Fox Television*, 567 U.S. at 253 (the law must give fair notice to those of ordinary intelligence).

Penalizing Young but exempting other homeowners who do the very same thing for "long-term" renters also violates equal protection principles under *Modica* and underlying federal precedent. The law must treat similarly situated persons alike. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). When it fails to do so and impinges on personal rights protected by the state and federal constitution, strict scrutiny applies. *Id.* at 440. Forcing any private homeowner to rent rooms in violation of their beliefs implicates the same fundamental rights: personal privacy, freedom of association, and the free exercise of religion. It makes no difference if the rental is for three weeks or three months. Yet the ICA's reasoning safeguards homeowners who rent rooms "long-term" but offers those who rent room "short-term" no protection. *Engquist v. Or. Dep't of Agr.*, 553 U.S. 591, 603 (2008) (legal privileges and liabilities must apply equally); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (the law cannot lay an "unequal hand" on the same quality of offense). This distinction makes no sense. Same-sex couples have a much stronger (not weaker) interest in living "long-term" close to work, a sick relative, or college than they do in vacationing "short-term" near an attractive beach. *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 538 (1973) (classifications cannot be wholly without a rational basis). Because the ICA's legal theory is arbitrary and fails to sensibly advance the state's nondiscrimination

interests, it violates Young's equal protection rights under either strict scrutiny or rational-basis review. *Hasegawa v. Maui Pineapple Co.*, 52 Haw. 327, 329, 475 P.2d 679, 681 (1970) (classifications cannot be arbitrary and must relate to legislation's purpose); *Watson v. Maryland*, 218 U.S. 173, 179-80 (1910) (the choice of exempted classes cannot be arbitrary).

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IV. Free Exercise Protections Grant Young the Right to Make Faith-Based Decisions About the Morality of Sleeping Arrangements in Her Family Home.

Faith-based decisions about the morality of sleeping arrangements in one's family home are precisely the kind of personal choices that the state and federal Free Exercise Clauses were designed to protect. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring) (free exercise is essential to individual dignity and the realization of a self-definition shaped by religious precepts). This Court has not yet decided what standard generally applies under Article I, Section 4 of the Hawai`i Constitution. *Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan*, 87 Haw. 217, 247 n.31, 953 P.2d 1315, 1338 n.31 (1998). But particularly in this case, using the test laid down in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879 (1990), would be inappropriate. Not even the United States Supreme Court views the *Smith* standard as universally controlling. *Trinity Lutheran Church of Columbia, Inc. v. Camer*, 137 S. Ct. 2012, 2021 n.2 (2017) (distinguishing *Smith* and applying a different

standard). And as Young explained below, the *Smith* test has been deemed insufficiently protective of religious liberty by judges and legislators across the nation in a variety of contexts. That is particularly true when Young's right to express her beliefs and establish her religious identity in her own home is at stake. *Hobby Lobby*, 1345 S. Ct. at 2785 (Kennedy, J., concurring).

Under Article I, Section 4 of the Hawai`i Constitution, forcing Young to allow renters to engage in activity that violates her faith in her own home will substantially burden her religious beliefs. One archetypical substantial burden is a law that pressures citizens to violate their faith to make ends meet. *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 140-41 (1987) (forcing a citizen to choose between fidelity to religious belief or cessation of work is a substantial burden). In this case, Young may either (1) remain true to her faith, stop renting rooms to anyone, and lose her home of forty years, or (2) rent three bedrooms in her home to make ends meet and seriously violate the tenets of her faith. This pressure on Young to change her behavior and violate her beliefs is a classic substantial burden. *Id.* at 141; *Hobby Lobby*, 134 S. Ct. at 2778 (explaining that pressuring a believer to enable or facilitate what they view as an immoral act is a substantial burden on religion). It does not matter that Respondents view Young's religious beliefs as incorrect or unreasonable because the question is whether applying HRS § 489-3 would render it impossible for Young to select housemates "in accordance with [her] religious beliefs." *Hobby Lobby*, 134 S. Ct. at 2778; *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546

U.S. 418, 424 (2006) (explaining that the standard under the Religious Freedom Restoration Act and the pre-*Smith* are "comparable).

Strict scrutiny also applies under the U.S. Supreme Court's often-criticized ruling in *Smith*. If state law is not neutral or generally applicable, as here, the flexible standard for regulations that apply to everyone in the exact same way dissipates. *State v. Armitage*, 132 Haw. 36, 59, 319 P.3d 1044, 1067 (2014) (*Smith* applies when a generally applicable law is challenged); *Smith*, 494 U.S. at 884 (establishing a rule for generally applicable laws such as "an across-the-board criminal prohibition on a particular form of conduct"). Under the ICA's vision of Hawai`i law, some citizens may rent rooms in their family homes to whomever they like but Young is barred from exercising that freedom of choice. App. B at 16-18. In these circumstances, no "generally applicable prohibition[ ] of socially harmful conduct" exists. *Smith*, 494 U.S. at 885. Some conduct the state deems socially "harmful" is banned and some equally "harmful" conduct is not. That is one scenario in which *Smith* held that strict scrutiny applies.

Another reason to apply strict scrutiny under *Smith* is the hybrid rights doctrine. Even neutral and generally applicable laws receive strict scrutiny when they implicate the free exercise of religion and other fundamental rights, such as equal protection, privacy, or freedom of association. *State v. Sunderland*, 115 Haw. 396, 168 P.3d 526, 532 (2007) (recognizing the hybrid rights doctrine applies when free exercise is implicated along with other core constitutional concerns); *Smith*, 494 U.S. at 881-82 (establishing the hybrid rights doctrine and citing free exercise and free

association rights as an example). All that is necessary is for a claimant to show that free exercise interests are implicated alongside a colorable claim of the infringement of a companion right. *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999). Young's equal protection, privacy, and intimate association claims are more than colorable. *See supra* Parts II-IV. For this reason and those detailed above, the ICA's opinion rightly assumed that strict scrutiny applies, but then applied the standard in an incorrect manner. App. B at 25.[1]

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[1] In any case, *Smith* was wrongly decided and its framework should be reevaluated.

EXCERPTS FROM REPLY IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI TO REVIEW THE FEBRUARY 23, 2018 OPINION OF THE INTERMEDIATE COURT OF APPEALS

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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.

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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.

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