CAAP-13-0000806

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

DIANE CERVELLI and TAEKO BUFFORD, Plaintiffs-Appellees, v. 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,	CIVIL NO. 11-1-3103-12 ECN (Other Civil Action) APPEAL FROM THE (1) "ORDER GRANTING THE PARTIES' STIPULATED APPLICATION FOR APPEAL FROM INTERLOCUTORY ORDER", FILED MAY 9, 2013. (2) FROM 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", FILED APRIL 15, 2013 Circuit Court of the First Circuit State of Hawaii Honorable Edwin C. Nacino

OPENING BRIEF OF DEFENDANT-APPELLANT ALOHA BED & BREAKFAST

APPENDICES "A"-"D"

And

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Comes now Defendant -Appellant ALOHA BED & BREAKFAST, by and through local counsel of record, SHAWN A. LUIZ, ESQ., and JAMES HOCHBERG, ESQ., and *Pro Hac Vice* Counsel, JOSEPH P. INFRANCO (Admitted *Pro Hac Vice* by Order of this Honorable Court), and JOSEPH E. LA RUE (Admitted *Pro Hac Vice* by Order of this Honorable Court), and hereby submits its "Opening Brief" in accordance with Hawaii Rules of Appellate Procedure (hereinafter "HRAP"), Rules 28 and 32.

I. STATEMENT OF FACTS

Procedural History

On December 19, 2011, Plaintiffs-Appellees, Diane Cervelli and Taeko Bufford filed a complaint for injunctive relief, declaratory relief and damages against Defendant ALOHA BED & BREAKFAST alleging violations of Hawaii Revised Statutes, Chapter 489. *See* PDF Record on Appeal (hereinafter "ROA") at 22-35. That same day, WILLIAM D. HOSHIJO, as Executive Director of the Hawai'i Civil Rights Commission filed a motion to intervene as Plaintiff-Intervenor. See ROA at 36-43. The Motion was granted on January 12, 2012. *See* ROA at 5.

On February 13, 2013, Plaintiffs' and Plaintiff-Intervenor filed their "Motion for Partial Summary Judgment for Declaratory and Injunctive Relief" ("Motion for Partial Summary Judgment") *See* ROA at 668-906. On March 19, 2013, Defendant filed its "Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment." *See* ROA at 1245-1320. On March 22, 2013, Plaintiffs' and Plaintiff-Intervenor filed their Reply in support. *See* ROA at 1486-1501.

On February 20, 2013, Defendant filed its cross-motion entitled, "Motion for Summary Judgment." *See* ROA at 907-1239. On March 19, 2013, Plaintiffs' and Plaintiff-Intervenor filed their "Opposition to Defendant's Motion for Summary Judgment." *See* ROA at 1321-1469. On March 22, 2013, Defendant filed its "Reply Memorandum to Plaintiffs' and Plaintiff-Intervenor's Opposition to Defendant's Motion for Summary Judgment" in support of its Cross-Motion for Summary Judgment. *See* ROA at 1470-1485.

On March 28, 2013, "Plaintiffs' And Plaintiff-Intervenor's Motion for Partial Summary Judgment for Declaratory and Injunctive Relief" and "Defendant's Motion for Summary Judgment" was heard by The Honorable Edwin C. Nacino, judge presiding. *See* March 28, 2013, Transcript of Proceedings at page 2 ("Transcript") (attached as Exhibit C). The court first had the parties address "Plaintiffs' And Plaintiff-Intervenor's Motion for Partial Summary Judgment for Declaratory and Injunctive Relief." *Id.* at 3. During this hearing, a bench conference occurred

over a dispute as to Defendant's proposed Exhibit 42. *Id.* at 32-36. This proposed exhibit was a printout from the Plaintiff-Intervenor's website that described HRS Chapter 489 as applying to "public property." The court denied admission of Defendant's proposed Exhibit 42 despite the exhibit contradicting the Plaintiffs' and Plaintiff-Intevenor's position as to the applicability of HRS Chapter 489 to the case at bar. *Id.* at 36. The court then granted Plaintiffs' and Plaintiff-Intervenor's Motion and did not hear argument on Defendant's Motion, but denied it as moot. *Id.* at 39-42. The court then considered and granted Plaintiffs' and Plaintiff-Intervenor's request for injunctive relief. *Id.* at 42-45.

On April 15, 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," was filed. *See* ROA at 1502-1504.

On May 9, 2013, "The Parties' Stipulated Application For Appeal From Interlocutory Order; Proposed Order Granting The Parties' Stipulated Application For Appeal From Interlocutory Order" was filed. *See* ROA at 1509-1516. All parties signed the stipulation and proposed order. *Id.* The court filed its "Order Granting The Parties' Stipulated Application For Appeal From Interlocutory Order" that same day. *See* ROA at 1517-1520.

On May 13, 2013, Defendant-Appellant Aloha Bed & Breakfast timely filed a "Notice of Appeal" from the April 15, 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," attached as Appendix "B." This appeal was taken pursuant to the trial court's May 9, 2013 "Order Granting The Parties' Stipulated Application For Appeal From Interlocutory Order," attached as Appendix "A." *See* ROA at 1521-1531.

Because the requirements of HRS § 641-1(b), and Rules 3 and 4 of the Hawaii Rules of Appellant Procedure have been met, this Honorable Court has jurisdiction to hear this appeal pursuant to HRS § 602-57. *See* Jurisdictional Statement of Defendant-Appellant ALOHA BED & BREAKFAST, filed July 22, 2013.

Factual History

The defendant-appellant, Phyllis Young, is a Christian with sincerely held religious beliefs. (ROA at 984:5-8; 1005:4-7.) These beliefs are shaped by both the Bible and her Church's teaching. (ROA at 1005:23-25; 1013:1-2; 1019:14.) As part of her religious beliefs, Mrs. Young believes sexual intercourse is only proper in opposite-sex marriage, and so it is

immoral for opposite-sex, unmarried couples or same-sex couples to engage in sexual behavior. (ROA at 984:4-8; 986:20-23; 999:19-21; 1001:18-21; 1007:19-20.) Significantly for this case, Mrs. Young further believes that she should not allow such behavior to occur inside her home. (ROA at 986:20-23.) Mrs. Young explains, "I would be violating my faith in allowing unmarried or same sex couples to stay in our room in our house because that's my faith. My faith—*I have to be obedient to God.*" (*Id.*) (emphasis added.)

Mrs. Young resides with her husband in their family home at 909 Kahauloa Place, Honolulu, HI. (ROA at 935, ¶ 1.) It has 1,926 square feet and 10 ½ rooms—4 bedrooms, 2 ½ bathrooms, a family room, dining room, living room, and kitchen. (ROA at 935, ¶¶ 2-3.) The Youngs have owned this house for 35 years. (ROA at 935, ¶ 4.) It is their family home, where they raised their children and are visited by their grandchildren. (ROA at 935-936, ¶¶ 5-7.)

Mrs. Young sometimes rents a room, or two or three, of her family home, where she resides. (ROA at 936, ¶ 7.) Because of her sincerely held religious beliefs, she does not allow unmarried opposite-sex couples or same-sex couples to rent a room with a single bed together. (ROA at 984:5-8; 1001:5–1002:7.) Mrs. Young would not even allow her daughter to share a room with her live-in boyfriend when they visited. (ROA at 989:18-22.) This might seem old-fashioned. But Mrs. Young believes what the Bible and the Catholic Church teach about sexual morality. (ROA at 1005:23–1006:2; 1011:1-2; 1012:13–1017:17.) As Mrs. Young explains, "This is my religious belief." (ROA at 989:22.)

Mrs. Young calls her rental business "Aloha Bed & Breakfast." (ROA at 936, ¶ 8.) But Aloha has no checking account. (ROA at 936, ¶ 9.) All payments for rooms in Aloha are made payable to Mrs. Young. (ROA at 936, ¶ 9.) Unlike hotels, Aloha has no employees. (ROA at 936, ¶ 10.) There is no clerk, or office into which members of the public enter. (ROA at 936, ¶¶ 10-11.) In fact, people may not enter Mrs. Young's home without her permission. (ROA at 936, ¶ 12.) She generally keeps her door locked, just like other homeowners. (ROA at 936, ¶ 12.) No one has ever even knocked on her door and asked to stay in Aloha. (ROA at 936, ¶ 13.) "Aloha" is not listed in the phone book. (ROA at 936, ¶ 14.) The residence's listing is under the name of Don and Phyllis Young. (ROA at 936, ¶ 14.) When someone phones, Mrs. Young answers with some variation of, "Hello, this is Phyllis." (ROA at 936, ¶ 15.) She does not reference Aloha when answering the phone. (ROA at 936, ¶ 15.)

Mrs. Young tries to make each guest's visit to Aloha special. For instance, she and her

husband sometimes share dinner or wine with her guests. (ROA at 936-937, ¶¶ 17-18.) She allows children staying in Aloha to play with her own children's and grandchildren's toys and books. (ROA at 937, ¶ 18.) Mrs. Young sometimes prays with her guests. (ROA at 937, ¶ 19.) She has invited them to attend the Thursday night Bible study she and her husband host in their home. (ROA at 937, ¶ 20.) She has also shared Christian-themed movies with her guests. (ROA at 937, ¶ 21.) Sometimes Mrs. Young takes guests to Costco with her. (ROA at 937, ¶ 22.) Mrs. Young notes that "people come in as guests and leave as friends." (ROA at 937, ¶ 23.) Guests frequently hug her when their stay is finished. (ROA at 937, ¶ 24.) Guests also regularly invite Mrs. Young and her husband to visit them and stay for free. (ROA at 937, ¶ 25.)

At any given time, Mrs. Young will rent between one and three rooms in her home. (ROA at 937, ¶ 7.) She never has rented more than three rooms. (ROA at 937, ¶ 7.) Mrs. Young gives her guests a key that opens all doors to her home. (ROA at 937, ¶ 12.) Guests use Mrs. Young's personal washing machine and dryer. (ROA at 937, ¶ 27.) She, her husband, and her guests all share the living space of the house, including the family room, bathrooms and kitchen. (ROA at 937, ¶ 26.) The Youngs and their guests "rub shoulders" in the house. For instance, sometimes they find themselves relaxing in the family room at the same time. (ROA at 937, ¶ 26.) Mrs. Young stores some of her personal belongings in the closet of each room she rents to her guests. (ROA at 937, ¶ 28.) She also allows guests to use her personal computer, located in her own bedroom. (ROA at 937, ¶ 27.) Because of the intimate living arrangements Mrs. Young shares with her guests, she is selective in determining who she will welcome into her home. (ROA at 937, ¶ 29.) And she will not allow couples to stay in Aloha if allowing them to do so would violate her sincerely held religious convictions. (ROA at 937, ¶ 30.)

Plaintiffs-Appellees Diane Cervelli and Taeko Bufford (the "Appellees") asked to rent a room in Mrs. Young's home. (ROA at 938, ¶ 31.) Mrs. Young declined because allowing a lesbian couple to share a room with only one bed in her home violates Mrs. Young's sincerely held religious beliefs. (ROA at 938, ¶¶ 32-33.) The Appellees complained to the Civil Rights Commission that Mrs. Young violated Hawai'i Revised Statutes ("HRS"), Chapter 489, which regulates places of public accommodation, and then, more than three years later, filed this lawsuit also under HRS 489.[1] If Mrs. Young is subjected to HRS 489, she will cease renting

[1] As explained *infra*, HRS, Chapter 515, which regulates real estate transactions, including rentals, is the statute that actually applies to Mrs. Young's rental of rooms in her home.

rooms rather than violate her religious beliefs. (ROA at 938, ¶ 34.) The Youngs may then lose their home, as they cannot pay the mortgage without their rental income. (ROA at 938, ¶ 35.)

II. POINTS ON APPEAL

1. The trial court erred in granting "Plaintiffs' And Plaintiff-Intervenor's Motion for Partial Summary Judgment for Declaratory and Injunctive Relief." *See* Mar. 28, 2013, transcript, attached as Appendix "C" in accordance with HRAP, R. 28(b)(4).

2. The trial court erred in denying "Defendant's Motion for Summary Judgment" as moot. *See* Mar. 28, 2013, transcript, attached as Appendix "D" in accordance with HRAP, R. 28(b)(4).

III. STANDARD OF REVIEW

An appellate court reviews an award of summary judgment de novo under the same standard applied by the circuit court. *Fujimoto v. Au*, 95 Hawai'i 116, 136, 19 P.3d 699, 719 (2001) (citing *Amfac, Inc. v. Waikiki Beachcomber Inv. Co.*, 74 Hawai'i 85, 104, 839 P.2d 10, 22, *recons. denied*, 74 Hawai'i 650, 843 P.2d 144 (1992)). "Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Amfac, Inc. v. Waikiki Beachcomber Inv. Co.*, 74 Haw. 85, 104, 839 P.2d 10, 22, *recons. den.*, 74 Haw. 650, 843 P.2d 144 (Haw. 1992); *see also* Haw. R. of Civ. Pro. Rule 56(c). "A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties." *Hulsman v. Hemmeter Dev. Corp.*, 65 Haw. 58, 61, 647 P.2d 713, 716 (1982); *Foytik v. Chandler*, 88 Haw. 307, 314, 966 P.2d 619, 626 (1998). "The evidence must be viewed in the light most favorable to the non-moving party." *Coon v. City and County of Honolulu*, 98 Haw. 233, 244, 47 P.3d 348, 359 (Haw. 2004). The moving party bears the burden "to show the absence of any genuine issue as to all material facts, which, under applicable principles of substantive law, entitles the moving party to judgment as a matter of law." *French v. Hawai'i Pizza Hut, Inc.*, 105 Haw. 462, 470, 99 P.3d 1046, 1054 (Haw. 2004).

IV. QUESTIONS PRESENTED

1. Whether the trial court erred in granting "Plaintiffs' And Plaintiff-Intervenor's Motion for Partial Summary Judgment for Declaratory and Injunctive Relief"?

2. Whether the trial court erred in denying "Defendant's Motion for Summary Judgment" as moot?

V. ARGUMENT

A. Introduction

At the center of this appeal stands a private home. It sits on a quiet residential street and is a typical east Oahu residential family home. It contains 1,926 square feet and has four bedrooms, two and a half bathrooms, a family room, dining room, living room, and kitchen. To the casual observer there would not appear to be anything special about this house. But the house *is* special. It is *home* to Don and Phyllis Young. The Youngs have owned their home for 35 years. They forged the bonds of their marriage here. They raised their children here. They laughed and played here. They entertained here. Their memories are here. And now, this home is where their grown children return to visit with children of their own, making new memories. For 35 years, the Youngs have laughed and loved in this house, their family home. (ROA at 935.)

Now in their retirement years, the Youngs rent up to three rooms in their home from time to time to supplement their income and pay the mortgage. Mrs. Young calls her rental business Aloha Bed & Breakfast ("Aloha"). When she rents rooms, Mrs. Young welcomes the renters into her home as guests. She allows them full access to her home. She could not avoid doing so even if she wanted—her home is not partitioned. She drives her guests places. She invites them to her Bible study. She watches movies with them if they would like. They are guests in her home, and she treats them as family. (ROA at 936-937.)

The Appellees, a lesbian couple, wanted to rent a room with only one bed in Mrs. Young's home. Mrs. Young declined because of her sincerely held religious beliefs regarding sexual relations outside the bonds of marriage. The Plaintiffs found other accommodations and enjoyed their visit to Honolulu. But they filed a complaint against Mrs. Young anyway, alleging that Mrs. Young violated HRS 489, which prohibits discrimination on the basis of sexual orientation in places of public accommodation. (ROA at 938, 943-956.)

It is important to note at this point that Hawai'i has *two* laws that prohibit discrimination in the renting of rooms, each of which applies to different rental situations. HRS 489, upon which the Appellees relied, applies to the rental of rooms in places of public accommodations. *See id.* The law itself gives three specific examples of the types of establishments renting rooms to which HRS 489 applies—"inns, hotels, and motels." HRS 489-2. It then provides a general description of other places of public accommodation subject to its rental provisions—"other establishment that provides lodging to transient guests." *Id.* The statute includes a laundry list of

examples of the types of "establishments" that qualify as places of public accommodations. *Id.* None of them are private homes. *Id.* In fact, none of them are private. None require members of the public to have a personalized invitation from the owner in order to enter. *Id.* Rather, they each are places that allow the public to walk through their doors without the owner necessarily being aware. In addition to inns, hotels, and motels, examples of places of public accommodation include restaurants, shopping centers, motion picture theaters, convention centers, sports arenas and stadiums, bathhouses and gymnasiums, parks, convalescent homes, and hospitals. *Id.* All of these are open to the public, which makes them public accommodations. Mrs. Young's home is not open to the public like these places, but is open to visitors only upon Mrs. Young's personalized invitation to them.

The other law that prohibits discrimination in the renting of rooms is HRS 515, which is titled, "Discrimination in Real Property Transactions." By its express language, and as its title makes plain, the law deals with real property transactions, including short-term rentals of real property. Unlike HRS 489, it explicitly applies to the rental of rooms in private homes. The law reaches any interest in any "real estate transactions," which it defines to include "the sale, exchange, *rental*, or lease of real property" (emphasis added), and applies to all such transactions involving "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." HRS 515-2 (emphasis added). The term, *residence*, is not defined by the statute. According to Black's Law Dictionary, however, *residence* "usu[ally] just means bodily presence as an inhabitant in a given place," which distinguishes it from *domicile*, which requires "bodily presence plus an intention to make the place one's home." *Black's Law Dictionary* 1335 (8th Ed. 2004). A *residence* can thus be nothing more than the place that one rents for a short stay of a few days.[2]

HRS 515, like HRS 489, bans discrimination in renting, including discrimination based on sexual orientation. HRS. 515-3. But HRS 515 explicitly exempts homeowners like Mrs. Young who rent four or fewer rooms in the homes where they live. HRS 515-4. This is perhaps why Plaintiffs sought to pursue their claim pursuant only to HRS 489, the law relating to places of public accommodation, and did not choose to raise a claim pursuant to HRS 515. (*See* ROA at

[2] HRS 515 is to be "liberally construed" according to the "fair import of its terms." HRS 515-1. The statute does not describe a length of time one must rent in order to fall within the statute. But it does say that it applies to those who rent a residence, which, as explained, can mean the short-term rental of a place to stay for a few days, such as the rentals that Mrs. Young makes.

678-79.) The problem, of course, is that HRS 489 does not apply to the rental of rooms in private homes. HRS 515 is the statute applicable to those types of rental arrangements. Plaintiffs thus brought their claims pursuant to the wrong law. *See infra*, Part V.B.

Even if Mrs. Young's rental of rooms in her home is properly within the scope of HRS 489, applying this statute to Mrs. Young's rentals violates numerous state and federal constitutional guarantees, including the right to privacy, intimate association, and free exercise of religion. *See infra*, Parts V.C and V.D. The court below should have either applied the doctrine of constitutional avoidance and found that Aloha is not subject to HRS 489 but rather HRS 515, *see infra*, Part V.C, or found HRS 489 unconstitutional as applied to the renting of rooms in Mrs. Young's home, *see infra*, Part V.D. Instead, the court declined to consider the constitutional implications of applying HRS 489 to the rental of rooms in a private home. At the summary judgment hearing, the court never delved into the constitutional questions raised by Mrs. Young in her opposition to Plaintiffs' motion for partial summary judgment and in her own cross-motion for summary judgment. *See*, JEFS, docket entry number 12, *generally* (no significant discussion of the constitutional issues raised by either party in their briefing). Instead, the court directed counsel for both parties to focus on statutory questions, explaining that it would make its decision based purely on its understanding of whether the rental of rooms in Mrs. Young's home was governed by HRS 489, without considering the constitutional implications. (*See* Ex. C, Transcript, at 18:11-12) ("I'll give heads up to both counsel. I'm taking it purely as a statutory analysis").) And the court further suggested (without deciding) that constitutional protections are forfeited by one who goes into business. (*Id.* at 21:10 – 22:7) (the court suggested that when one goes into business she forfeits First Amendment protections.)

The court did what it said it would do. Although it issued no written opinion to justify its decision, the court stated in its Order that its legal conclusion was that Mrs. Young is governed by HRS 489, and she violated that statute's antidiscrimination provision when she declined to rent rooms to the Plaintiffs-Apellees. ROA at 1503-04. There is absolutely no consideration—none!—of whether her constitutional rights protect her from being subjected to HRS 489. *See id.* at 1502-04. The court does not even make some cursory comment indicating that it considered but rejected the constitutional arguments Mrs. Young asserted. *See id.* So far as anyone can tell from the Order, the court did what it said at the oral argument hearing that it would do: it made its decision based purely on its understanding of whether the rental of rooms in Mrs. Young's

home was governed by HRS 489, without considering the constitutional implications.

Mrs. Young asserts that the court below was wrong to find that the rental of rooms in her home, where she herself lived, was governed by HRS 489. *See infra*, Part V.B. But even if HRS 489 applies, the court below should have considered whether applying it to Mrs. Young offends the Constitution and violates constitutional guarantees. *See infra*, Parts V.C and V.D. This requires applying strict scrutiny review to determine whether the State has a compelling interest in applying the law to the rental of rooms in Mrs. Young's home, and whether the law is the least restrictive means of accomplishing the State's compelling interest. *See infra*, Part D. As explained above, the court below did not perform that analysis. That in itself is reversible error.

Had the court below correctly recognized that the rental of rooms in Mrs. Young's home must be subject to HRS 515, not HRS 489, it would have granted summary judgment for Mrs. Young. Similarly, had the court correctly recognized the constitutional problems arising from applying HRS 489 to the rental of rooms in a private home where the homeowner herself resides, it would have granted summary judgment for Mrs. Young. Because the court recognized neither the proper statute nor the constitutional problems, it erroneously granted partial summary judgment to Plaintiffs and denied Mrs. Young's motion as moot. This Court should reverse the error committed by the court below and remand with direction that the court enter summary judgment for Mrs. Young and take all further action consistent with this Court's opinion.

B. The Trial Court Erred By Not Finding That, as a Matter of Law, Mrs. Young's Rental of Rooms Is Subject to HRS 515, Not HRS 489.

As a matter of law, the renting of rooms in Mrs. Young's private home, where she lives, is subject to HRS 515, not HRS 489. This is true for three reasons. The first involves the plain language of the statutes. The second concerns canons of statutory construction. And the third derives from the Hawai'i Supreme Court's direction regarding resolving apparent conflict between state-wide antidiscrimination laws and local zoning requirements. Additionally, persuasive case law demonstrates that public accommodation, antidiscrimination provisions should not be enforced against properties that are private in nature, even when the public sometimes come onto them.

The trial court should have found that the rental of rooms in Mrs. Young's home, where she herself lives, is subject to HRS 515, not HRS 489. Instead, the court below found that Mrs. Young's renting of rooms in her home was subject to HRS 489. (ROA at 1503.) The court then found that Aloha violated HRS 489 when she declined to rent the Appellees a room in her home

where she and her husband live. (*Id.*) This is reversible error.

1. The Plain Language of the Statutes Requires That HRS 515 Applies to Rooms Rented in Private Homes.

Only one statute applies on its face to the rental of rooms in private homes—HRS 515. It is the only statute that refers to the rental of real property and housing accommodations. *See* HRS 515-2; 515-3. And it contemplates the rental of such property to those desiring to establish a *home*, which implies a long-term rental, and also to those seeking a *residence*, which implies nothing more than one's "bodily presence as an inhabitant in a given place" for whatever length of time. *Black's Law Dictionary* 1335 (8th Ed. 2004); *see* HRS 515-2, 515-3.

Unlike HRS 515, HRS 489 on its face does not apply to the rental of rooms in private homes. On its face, it does not apply to private places, like someone's actual home, at all. Rather, it applies to public places; that is, to places that people are allowed to enter without any personal invitation from the owner—places like restaurants, hospitals and hotels.

HRS 489 does speak of an "establishment that provides lodging to transient guests," along with inns, hotels, and motels. HRS 489-2. And Mrs. Young does rent to transient guests. But as explained in more detail below, the principle of statutory construction known as *ejusdem generis* indicates that this general term, "establishment that provides lodging to transient guests," must be understood in light of the specific terms to which it is linked, i.e., inns, hotels, and motels. *Singleton v. Liquor Comm'n, County of Hawai'i*, 111 Haw. 234, 243, 140 P.3d 1014, 1023 (Haw. 2006). Because those specific terms describe places that are public, in which the general public may enter without special invitation from the owner, the general term must be understood similarly. An "establishment that provides lodging to transient guests" in HRS 489 thus must describe entities that are open to the public like hotels and inns are, such as youth hostels and homeless shelters. It cannot describe someone's private home. *See* Part V.B.2.b.

Thus, HRS 515 is the only Hawai'i statute that contemplates the rental of rooms in a private home where the homeowner herself lives. The plain language of HRS 515 and HRS 489 requires that HRS 515 is the statute that applies to Mrs. Young's renting of rooms in her home.

2. Canons of Statutory Construction Require That HRS 515 Applies to Rooms Rented in Private Homes.

Two canons of statutory construction require that the rental of rooms in Mrs. Young's home is subject to HRS 515, and not HRS 489. The first, *generalia specialibus non derogant*, indicates that, when a statute with general terms conflicts with a statute with specific terms, the

statute that is specific in its terms controls. The second, *ejusdem generis*, requires that, when a statute includes a general term following specific ones, the general term must be understood as a reference to subjects of the same type as the specific ones.

a. *Generalia Specialibus Non Derogant* Leads to the Conclusion That HRS 489 is Inapplicable.

Both HRS 489, applying to the rental of rooms in public accommodations, and HRS 515, applying to the rental of rooms in private homes, ban sexual orientation discrimination. HRS 489-3; HRS. 515-3. But HRS 515 provides a "Mrs. Murphy" exemption that explicitly exempts homeowners like Mrs. Young who rent four or fewer rooms in the homes where they live, HRS 515-4,[3] while the public accommodation law codified in HRS 489 does not.

The legislative history does not appear to indicate why there is no Mrs. Murphy exemption in HRS 489. It does state, however, that the goal behind adding sexual orientation to HRS 489's antidiscrimination provision was to add to public accommodations law what was already included in nondiscrimination laws applying to rental arrangements involving private homes. (ROA at 1112, 2006 Hawai'i Senate Journal, Standing Comm. Rep., *SCRep. 3178, (Majority) Judiciary and Hawaiian Affairs on H.B. No. 1233*, at 1542.) There is no indication that the legislature intended HRS 489 to provide greater protection than HRS 515; rather, it appears the legislature wanted HRS 489 to provide the same level of protection against discrimination as HRS 515. The fact the legislature provided a Mrs. Murphy exemption in HRS 515, but not in HRS 489, suggests that the legislature did not intend for HRS 489 to reach such homeowners. There was no need for HRS 489 to reach them, since they were already subject to the nondiscrimination provisions of HRS 515 whenever they rented rooms in their homes.

Regardless, it makes no sense to think that the legislature intended in HRS 515 to give property owners like Mrs. Young immunity from laws prohibiting discrimination on the basis of sexual orientation, only to make them subject to such laws in HRS 489. It is even more nonsensical to think that the legislature intended to classify as "illegal discrimination" in HRS

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[3] An exemption from antidiscrimination laws available to homeowners who rent rooms in their own homes where they themselves reside is known as a "Mrs. Murphy exemption" because the law would not reach the proverbial "Mrs. Murphy's boardinghouse." *U.S. v. Space Hunters, Inc.*, 429 F.3d 416, 425 (2d Cir. 2005) (quoting 114 Cong. Rec. 2495, 3345 (1968)). Federal law contains its own Mrs. Murphy exemption, which exempts those who rent four or fewer rooms in their own homes from the provisions of Title VIII of the Civil Rights Act of 1968. 42 U.S.C. § 3603(b)(2).

489 *the very same act* it said was not illegal discrimination in HRS 515, namely, the renting of fewer than five rooms in someone's home. As applied to Mrs. Young, the nondiscrimination provisions in HRS 515 and HRS 489 stand in conflict with one another. One cannot be applied to Mrs. Young without abrogating the other.

Where—as here—there is an irreconcilable conflict between a general statute and a specific one, the specific statute controls. *Wong v. Takeuchi*, 88 Haw. 46, 53, 961 P.2d 611, 618 (Haw. 1998) (*quoting State v. Vallesteros*, 84 Hawai'i 295, 303, 933 P.2d 632, 640, *recons. den.*, 84 Hawai'i 496, 936 P.2d 191 (Haw. 1997)). *Wong* is illustrative of how the canon of *generalia specialibus non derogant* ("the specific governs the general") plays out between two competing statutes. In *Wong*, the court decided a fee petition dispute. The prevailing party's attorney had significant travel costs. *Id.* at 52. Two statutes address the taxing of travel costs. *Id.* at 53. One provides that the prevailing party shall be allowed "[a]ll actual disbursements" for "intrastate travel expenses[.]" HRS 607-9. The other provides "[w]henever any cause or proceeding . . . *is discontinued or dismissed* in any court, the defendant therein shall be entitled to have the defendant's traveling expenses, *to be charged at the rate of 10 cents a mile* . . . taxed as costs." HRS 607-13 (emphasis added). The matter below had been decided on the basis of a laches and statute of limitations defense. *Wong*, 88 Haw. at 48. On appeal, the Court ruled that HRS 607-13, which applied to matters that had been "discontinued or dismissed," was the specific—and so, controlling—statute, because it directly applied to the facts of the case. *Id.* at 53. It therefore "control[ed] over any argument that a defendant's traveling expenses are recoverable under the general statute, HRS § 607–9." *Id.* As a result, the prevailing party's attorney's travel expenses "are limited to that mandated in HRS § 607–13." *Id.*

Similarly, this case concerns two Hawai'i statutes, both of which relate to the rental of rooms. But only one, HRS 515, specifically applies on its terms to the rental of rooms in private homes, where the homeowner herself lives. HRS 489 applies to the rental of rooms in inns, hotels, motels, and similar establishments of the same class as hotels. *See infra* Part V.1.b(2)). As applied to the rental of rooms in Mrs. Young's home, HRS 515—which actually discusses the rental of rooms in private homes—is the specific statute, while HRS 489 is the general one. HRS 515 governs Mrs. Young's rentals, and Section 515-4 of that law provides her with an exemption from the nondiscrimination requirement.

b. *Ejusdem Generis* Leads to the Conclusion That HRS 489 is Inapplicable.

"Other establishments" in HRS 489-2 cannot mean "private homes renting rooms," even when they rent to transient guests, because the canon of *ejusdem generis*. This canon, which means "of the same class," requires that, when a statute includes a general term following specific ones, the general term must be understood as a reference to subjects of the same type as the specific ones. *Singleton v. Liquor Comm'n, County of Hawai'i*, 111 Haw. 234, 243, 140 P.3d 1014, 1023 (Haw. 2006). In HRS 489-2, the specific terms ("inn," "hotel," and "motel") all refer to entities that are non-residential in nature and are designed to provide lodging to many transient guests at the same time. The general term ("other establishments") must refer to the same type of entities, not a small home taking in a few guests at a time.

Hawai'i's courts use this rule. For instance, the Hawai'i Supreme Court held that because a "dirk, dagger, blackjack, slug shot, billy, metal knuckles, [and] pistol" are all *offensive* weapons, the general term, "other deadly or dangerous weapon," must include only instruments designed as *offensive* weapons when those more specific terms precede it. *State v. Rackle*, 55 Haw. 531, 534, 523 P.2d 299, 302 (Haw. 1974). The Court subsequently decided that a "diver's knife" is not an "other deadly or dangerous weapon" pursuant to the statute because it was not designed as an offensive weapon. *State v. Giltner*, 56 Haw. 374, 537 P.2d 14 (Haw. 1975). And it likewise decided that "any other substance," in a list of specific terms describing "volatile organic liquid solvents" that are harmful if swallowed, cannot include "alcoholic beverages, tobacco, [or] coffee," which were designed to be ingested. *State v. Kahalewai*, 56 Haw. 481, 489, 541 P.2d 1020, 1026 (Haw. 1975). *See also Jones v. Hawaiian Elec. Co., Inc.*, 64 Haw. 289, 639 P.2d 1103 (Haw. 1982) (applying *ejusdem generis* to construe "evidence of indebtedness" in HRS 269-17 as limited "to things of like character" as the enumerated, specific terms).

The Ninth Circuit also considers this canon when construing general terms following specific ones. One case involved the meaning of "sleeping quarters" in 49 U.S.C. Section 21106. That statute provides that "[a] railroad carrier and its officers and agents—(1) may provide sleeping quarters (including crew quarters, camp or bunk cars, and trailers) for employees . . . only if the sleeping quarters are clean, safe, and sanitary and . . . free from the interruptions caused by noise under the control of the carrier." *California State Legislative Bd., United Transp. Union v. Dep't of Transp.*, 400 F.3d 760, 762 (9th Cir. 2005). The United Transportation Union alleged that the Union Pacific Railroad Company provided its employees with hotel rooms that

had unsafe wiring and allowed too much noise through their windows, so it was not satisfying its statutory obligation. *Id.* at 761. The Ninth Circuit noted that the general term, "sleeping quarters," appeared in a list alongside "crew quarters, camp or bunk cars, and trailers," which are all "lodgings typically owned or operated by railroads." *Id.* at 763. The court applied the canon of *ejusdem generis* and ruled that "sleeping quarters" can only refer to "accommodations that, like them, the railroad owns and operates[,]" and so could not refer to hotel rooms. *Id.*

HRS 489 gives examples of places of public accommodation that are subject to it. The example related to those entities that rent rooms include specific terms ("an inn, hotel, motel") with a general term ("other establishment") following them. HRS 489-2. Applying *ejusdem generis* leads to the conclusion that "other establishment" must refer to entities in the same class as inns, hotels, and motels. This might include entities like hostels and homeless shelters that, like inns and hotels, serve many guests at once and into which the public may enter without a personalized invitation from the owner. The canon of *ejusdem generis* requires that "other establishment" cannot refer to the renting of a few rooms in a private home in residential neighborhood, where the owners reside.

The legislature could have made homeowners like Mrs. Young subject to HRS 489 by inserting the phrase, "including the rental of rooms in private homes" after the general term, "other establishment." That would have defined the general term and would have made the application of *ejusdem generis* unwarranted. *See, e.g., Leslie Salt Co. v. United States*, 896 F.2d 354, 359 (9th Cir. 1990) ("The ejusdem generis rule of statutory construction is used to illuminate the intent of the drafters; when the rule conflicts with other, clearer indications of intent, its results should be ignored."). But the legislature chose not to include language within HRS 489 indicating it reaches the rental of rooms in private homes. Those situations were already covered by the nondiscrimination provisions in HRS 515. In fact, the legislative history of HRS 489 states that the enactment of the sexual orientation nondiscrimination provision was to add to public accommodations law what was already included in nondiscrimination laws applying to rental arrangements involving private homes. (ROA at 1112, 2006 Hawai'i Senate Journal, Standing Comm. Rep., *SCRep. 3178, (Majority) Judiciary and Hawaiian Affairs on H.B. No. 1233*, at 1542.) The complete absence of any language in HRS 489 referring to the renting of rooms in private homes, coupled with this legislative history indicating that the legislature's desire was to add to public accommodations law what was already applicable to private

homeowners, is striking. It leads to the conclusion that the legislature recognized that room rentals in private homes are subject to the nondiscrimination requirements of HRS 515, where such rentals are actually discussed. HRS 489, meanwhile, was intended to apply to the rental of rooms in other, public properties—inns, hotels, motels, and similar entities that rent to many guests and whose doors are open, usually 24-7, to the public.

3. Honolulu's Land Use Ordinance Requires That HRS 515 Applies to Rooms Rented in Private Homes.

Mrs. Young's home is zoned pursuant to Honolulu's zoning code, known as the Land Use Ordinance (the "LUO"), as a "bed and breakfast home."[4] Its zoning designation qualifies it as a private home, not as a place of public accommodation. The LUO zones places of public accommodation offering rooms for rent as either "transient vacation units" or a "hotels."[5] But it zones private homes offering rooms for rent as a "bed and breakfast home."

Were Mrs. Young's renting of rooms in her home found to be a place of public accommodation, she would be in violation of the LUO because her home's zoning would be wrong. This is significant, because the Hawai'i Supreme Court ruled that one cannot be found guilty of rental discrimination when such a finding would place her in violation of her local zoning code. *Tseu ex rel. Hobbs v. Jeyte*, 88 Haw. 85, 962 P.2d 344 (Haw. 1998).

In *Tseu*, the Hawai'i Civil Rights Commission (the "HCRC") investigated a claim of rental discrimination against the owner of a one-bedroom cottage who declined to rent to a family of four. *Tseu ex rel. Hobbs*, 88 Haw. at 86-87. The cottage owner met with the HCRC but

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[4] The LUO defines a *bed and breakfast home* as a residential house "in which overnight accommodations are provided to guests for compensation, for periods of less than 30 days, in the same detached dwelling as that occupied by an owner, lessee, operator or proprietor of the detached dwelling." LUO § 21-10.1. A "detached dwelling" is "a building containing one or two dwelling units, entirely surrounded by yards or other separation from buildings on adjacent lots." LUO § 21-10.1. A "dwelling unit" is "a room or rooms connected together, constituting an independent housekeeping unit for a family and containing a single kitchen." *Id.* This is substantively similar to how the Discrimination in Real Property Transactions Law defines "housing accommodation," which is subject to HRS 515, not HRS 489. *Compare* LUO § 21-10.1, "bed and breakfast home," *with* HRS § 515-2, "Housing accommodation."

[5] The LUO defines a *hotel* as "a building or group of buildings containing lodging and/or dwelling units offering transient accommodations, and a lobby, clerk's desk or counter with 24 hour clerk service, and facilities for registration and keeping of records relating to hotel guests." LUO § 21-10.1. And the LUO defines *a transient vacation unit* as "a dwelling unit or lodging unit which is provided for compensation to transient occupants for less than 30 days, *other than a bed and breakfast home*." *Id.* (emphasis added).

failed to convince it that he had not engaged in discrimination. *Id.* at 87. The HCRC filed a complaint against the owner, alleging he had violated HRS 515's prohibition against rental discrimination. *Id.* at 87 and 87 n.1. The owner of the cottage answered and filed a counterclaim, alleging that the HCRC negligently failed to recognize that the Honolulu zoning code made it illegal for him to rent a one-bedroom cottage to four people. *Id.* at 87. The court below dismissed the counterclaim and appeal was ultimately taken to the Hawai'i Supreme Court. *Id.*

The Supreme Court reversed, holding that the owner stated a claim by alleging that the HCRC had ignored the local zoning ordinance that presented a defense to the state law charge of discrimination. *Id.* at 91. Significantly, the Court explained that "[t]he HCRC is obligated to recognize the governing statutes of other agencies [i.e., local zoning commissions]," and that generally it is not discriminatory to follow the local zoning ordinance's requirements. *Id.* at 91.

The LUO zones Mrs. Young's home as a private, "bed and breakfast home," not as one of its zoning designations that are typical for public accommodations. The court below should have followed the instruction of the Hawai'i Supreme Court and found that Mrs. Young's rental of rooms cannot be subject to HRS 489 because that would cause her to operate inappropriately for her zoning classification.

4. Case Law Persuades That HRS 489 Does Not Apply.

Like HRS 489, the federal Americans with Disabilities Act (the "ADA"), codified at 42 U.S.C. §§ 12181-89, prohibits public accommodations from engaging in certain types of discrimination. 42 U.S.C. § 12182(a). But the Ninth Circuit Court of Appeals ruled that entities are not subject to the ADA, even when they meet the ADA's definition of public accommodation, if the public may not enter them without a personalized invitation from the owner. *Jankey v. Twentieth Century Fox Film Corp.*, 212 F.3d 1159, 1161 (9th Cir. 2000).

Jankey is persuasive. Twentieth Century Fox operated a film and production facility (the "facility'). *Jankey*, 212 F.3d at 1161. Only Fox's employees, and those personally invited by Twentieth Century Fox or its agents, could enter. *Id.* If one trying to enter the facility had not received a personal invitation they were denied entry by security. *Id.*

The plaintiff was confined to a wheelchair. *Id.* He was often personally invited by one of Twentieth Century Fox's agents to visit the facility, and frequently did so. *Id.* Inside the facility was an Automatic Teller Machine (ATM), commissary, and store. *Id.* Those guests who received a personal invitation and entered the facility could avail themselves of these accommodations. *Id.*

The plaintiff, however, could not, because they were not wheelchair accessible. *Id.*

The ADA defines restaurants, sales and rental establishments, and banks or other service establishments as "public accommodations" falling within its parameters. *Id.* The plaintiff alleged that because the ATM, commissary, and store were not wheelchair accessible, Twentieth Century Fox violated the ADA. *Id.* The Ninth Circuit ruled otherwise. *Id.* Although an ATM, commissary, and store would ordinarily be subject to the ADA's definition of public accommodation, the Ninth Circuit ruled that the in this instance they were not. *Id.* The court recognized that the general public could not walk of its own volition into the facility to make use of the ATM, commissary, and store. *Id.* Rather, they must receive a personal invitation from the property owner or its agents. *Id.* The court noted that another federal statute exempted establishments not open to the public from complying with the antidiscrimination laws. *Id.*

The facts of this case are similar to those in *Jankey*. Just like with the facility, no one can enter Mrs. Young's home except her family and those guests they personally invite to enter. Her home is no more open to the general public than was the ATM and store at issue in *Jankey*. And just like in *Jankey*, there is a statute—HRS 515-4—that exempts private homeowners renting small numbers of rooms from complying with antidiscrimination laws. While *Jankey* does not control this Court, it is persuasive authority indicating that Mrs. Young's rental of rooms to guests that she personally invites to enter her home, and who can only enter with her personal invitation, should not be treated as a public accommodation pursuant to HRS 489.

The Plaintiffs-Appellees alleged only that Mrs. Young violated HRS 489. But Mrs. Young is not subject to that law. The plain language of the statutes indicates that HRS 515—not HRS 489—governs the rental of rooms in a private home. Applying accepted canons of statutory construction leads to the same conclusion. So does the direction the Hawai'i Supreme Court has given for resolving apparent conflict between state-wide antidiscrimination laws and local zoning requirements. Add to that the persuasive authority provided by *Jankey*, and it is clear that HRS 489 does not govern the rental of rooms in private homes where the owner herself lives. The Plaintiffs-Appellees brought their complaint against Mrs. Young pursuant to the wrong law. The law that does govern, meanwhile, provides an exemption from its nondiscrimination requirements for Mrs. Young. The court below should have granted Mrs. Young's motion for summary judgment and denied the Plantiffs-Apellees' motion for partial summary judgment. Its failure to do so was error, which this Court should correct.

C. The Trial Court Erred by Not Applying the Doctrine of Constitutional Avoidance.

As just explained, the trial court below erred by failing to find that, as a matter of law, Mrs. Young's rental of rooms in her own home, where she herself lived, is governed by HRS 515, not HRS 489. But even if the court mistakenly thought that both statutes applied, it should have employed the doctrine of constitutional avoidance to find that HRS 515 controlled.

"Under the doctrine of constitutional avoidance, '[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.'" *United States v. Grisel*, 488 F.3d 844, 846 (9th Cir. 2007) (*quoting United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916)). Some courts call this the "doctrine of constitutional doubt." *See, e.g.*, *In re Doe*, 96 Haw. 73, 81, 26 P.3d 562, 570 (2001) (explaining that "the doctrine of constitutional doubt" "counsels that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is adopt the latter.") (internal quotation omitted). The doctrine leads courts to save statutes from constitutional infirmity by choosing among possible statutory interpretations the one that does not offend the constitution.

As explained *infra*, applying the requirements of HRS 489 to a homeowner renting rooms in her own home, where she herself lives, is unconstitutional. *See infra* at Part V.D. Even if that were not so, such an application would raise grave and doubtful constitutional questions, implicating constitutional guarantees regarding intimate association and due process rights. The court below should have applied the doctrine of constitutional avoidance, found that HRS 515 controlled, and granted Mrs. Young's motion for summary judgment. Not doing so was error.

1. Applying HRS 489 Raises Grave and Doubtful Constitutional Questions About Intimate Association Rights.

Both the United States and Hawai'i Constitutions protect the right to intimate association in our own homes. The source of this right is found, among other places, in the First, Third, Fourth, and Fourteenth Amendments to the United States Constitution, as well as Article I, Sections 4, 5, 6, 7, and 18 of the Hawai'i Constitution. "[T]he freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty[.]" *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987). The Court "ha[s] not attempted to mark the precise boundaries of this type of constitutional protection." *Id.* But "cohabitation" is a protected intimate association. *Id.* (noting that "cohabitation with relatives" is

protected and that "we have not held that constitutional protection is restricted to relationships among family members."). The Court looks to "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" to determine whether a relationship is an intimate association. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984). Relationships without those qualities, "such as a large business enterprise[,]" are not intimate associations. Relevant factors for deciding whether an association is an intimate one "include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." *Id.*

It is difficult to imagine an intimate association greater than the one we have with those with whom we choose to share our homes. Indeed, constitutional provisions provide great protection from State intrusion into our homes. The Fourth Amendment to the federal Constitution and Article I, Section 7 of the Hawai'i Constitution prohibit the State from entering our home without our permission unless it obtains a court warrant. The Third Amendment to the federal Constitution and Article I, Section 18 of the Hawai'i Constitution prohibit the State from forcing us to take soldiers into our homes during peacetime. "[I]t is beyond dispute that the home is entitled to special protection as the center of the private lives of our people." *Minnesota v. Carter*, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring).

Not only do constitutional principles prevent the State bursting uninvited into our homes or quartering soldiers in our homes, they also protect us from being forced to take unwanted guests into our homes. As the U.S. Supreme Court recognized, "[w]e are at our most vulnerable when we are asleep because we cannot monitor our own safety or the security of our belongings." *Minnesota v. Olson*, 495 U.S. 91, 99 (1990). We naturally want to maintain "a high degree of selectivity," *Roberts*, 468 U.S. at 620, in determining with whom we share our homes. Constitutional protection for intimate associations guarantees our right to do so.

Subjecting Mrs. Young to the requirements of HRS 489 would violate this constitutional guarantee by forcing her and her husband to share their private home with housemates she does not desire. Constitutional guarantees cannot tolerate this level of State intrusion.

The Ninth Circuit Court of Appeal's recent decision in *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216 (9th Cir. 2012), is instructive. An online service ("Roommate") asked users to identify their sex, sexual orientation, and familial status, as well as their preferences for their roommates' sex, sexual orientation, and familial

status. *Id.* It used those responses to match roommates. *Id.* The plaintiffs sued, alleging that Roommate's practices violated the federal Fair Housing Act (the "FHA"), 42 U.S.C. 3601 *et seq.*, which prohibits discrimination in the "sale or rental of a dwelling." *Id.* That case thus presented the same question as this case: may the State apply nondiscrimination statutes against private homeowners to compel them to take all comers into their homes as housemates?

The Ninth Circuit held that applying nondiscrimination laws to homeowners inviting roommates into their private homes would raise severe intimate associational concerns. *Id.* at 1222. The court recognized that "it's hard to imagine a relationship more intimate than that between roommates, who share living rooms, dining rooms, kitchens, bathrooms, and even bedrooms." *Id.* at 1221. It further explained that "[h]olding that the FHA applies inside a home or apartment would allow the government to restrict our ability to choose roommates compatible with our lifestyles." *Id.* at 1221. Because "[t]aking on a roommate means giving him full access to the space where we are most vulnerable[,]" such a decision "would be a serious invasion of privacy, autonomy and security." *Id.* That is why the Department of Housing and Urban Development dismissed a complaint against a young woman who advertised that she was "looking for a female Christian roommate." *Id.* at 1222 (*citing Fair Hous. Ctr. of W. Mich. v. Tricia*, No. 05-10-1738-8 (Oct. 28, 2010) (Determination of No Reasonable Cause)).

To avoid these constitutional concerns, the Ninth Circuit interpreted the FHA so that it did not apply to private homeowners sharing space with others in their own homes. *Id.* at 1222. This followed the "well-established principle that statutes will be interpreted to avoid constitutional difficulties." *Id.* (*citing Frisby v. Schultz*, 487 U.S. 474, 483 (1988)).

The court below should likewise have interpreted Hawai'i's nondiscrimination laws so as not to violate intimate association guarantees. Mrs. Young accepts serial roommates into her private home. She shares living space with them. They have access to her house and belongings. The same intimate association concerns identified by the Ninth Circuit in *Fair Housing Council* are present here. In fact, the constitutional avoidance doctrine is even more warranted here because (as discussed *infra*) the constitutional right to privacy, one source of the right to intimate associations in a person's own home, is even stronger under Hawai'i's Constitution than under the United States Constitution. *State v. Kam*, 69 Haw. 483, 491, 748 P.2d 372, 377 (Haw. 1988).

Recognizing that Mrs. Young is subject to HRS 515, not HRS 489, avoids those constitutional problems. The legislature provided a Mrs. Murphy exemption from the

antidiscrimination laws in HRS 515 for homeowners renting a small number of rooms in the house in which they themselves live. That exemption avoids the constitutional concerns the Ninth Circuit identified and which will be present if HRS 489 is applied to Mrs. Young.

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.

D. The Trial Court Erred by Not Finding HRS 489 Unconstitutional As Applied to the Rental of Rooms in a Private Home, in Which the Owner Lives.

As explained *supra*, the trial court should have found that, as a matter of law, HRS 515—not HRS 489—was the statute that regulated the rental of rooms in a private home. Failing to do that, the court should have employed the doctrine of constitutional avoidance and applied HRS

515 to Mrs. Young's rentals. But even if the court below mistakenly thought that HRS 489 applied, and declined to employ the doctrine of constitutional avoidance, the court's judgment against Mrs. Young is still in error. HRS 489 is unconstitutional as applied to the rental of rooms in a private home, in which the owner lives.

Specifically, HRS 489 as applied to the rental of rooms in Mrs. Young's home impermissibly burdens the constitutional right to privacy, intimate association, and the free exercise of religion. 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. *See infra*, Part V.D.5. The court below erred by not granting summary judgment to Mrs. Young.

1. Applying HRS 489 Impermissibly Burdens Privacy Rights.

Hawai'i's Constitution provides that "[t]he right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest." Haw. Const. art. 1, § 6. It also explicitly guarantees the people the right to be "secure in their . . . houses" against State intrusion. Haw. Const. art. 1, § 7. The Constitution must be construed with regard to the intent of the framers and the people adopting it. *State v. Miyasaki*, 62 Haw. 269, 281, 614 P.2d 915, 922 (Haw. 1980). The framers declared that the right to privacy is "the most important right of all—the right to be left alone"—and stated that "it is treated as a fundamental right subject to interference only when a compelling state interest is demonstrated." *Kam*, 69 Haw. at 493, 748 P.2d at 378 (*citing* Stand. Comm. Rep. No. 69, in 1 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 674–75 (1980) *and* Committee of the Whole Rep. No. 15, at 1024)). They also explained that "this privacy concept encompasses the notion that in certain highly personal and intimate matters, the individual should be afforded freedom of choice absent

a compelling state interest [i.e., the strict scrutiny standard]." *Id.* (*citing* Committee of the Whole Rep. No. 15, at 1024).

Nowhere is the right to privacy greater than in one's home. *See State v. Matias*, 51 Haw. 62, 66, 451 P.2d 257, 260 (Haw. 1969) (finding that even an overnight guest had a right to privacy in his place of lodging). *See also U. S. v. Orito*, 413 U.S. 139, 142 (1973) (grouping "privacy of the home" with "other special privacy rights such as those of marriage, procreation, motherhood, child rearing, and education," and explaining that the Constitution provides these rights with "special safeguards."); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65 (1973) (explaining that the "privacy right encompasses and protects the personal intimacies of the home"). Neither Hawai'i's constitution, nor the federal one, will tolerate government dictating that we must take into our home those we would prefer not. The fundamental right to privacy, which extends to homes, will not allow that result. Strict scrutiny must apply.

2. Applying HRS 489 Impermissibly Burdens Intimate Association Rights.

The Ninth Circuit explained in *Roommate* that, when it comes to constitutionally-protected intimate associations, "[t]he roommate relationship easily qualifies: People generally have very few roommates; they are selective in choosing roommates; and non-roommates are excluded from the critical aspects of the relationship, such as using the living spaces." 666 F.3d at 1222. Mrs. Young's relationship with her guests in her private home constitutes such an intimate association. She rents only a small number of rooms—three, at the most. She is not like a hotel that might have hundreds of guests each with their own exclusive, locked living space at the exclusion of each other. Rather, she has "very few roommates," *id.*, at any given time, all living with her within the small confines of her 1,900 square foot home. She is "selective in choosing roommates," *id.*, declining to rent to tall people based on bed size, non-drivers, smokers, unmarried cohabitating couples (including same-sex couples). (ROA at 743:14-18.) And "non-roommates are excluded from critical aspects of the relationship, such as using the living spaces," *Roommate*, 666 F.3d at 1222. Indeed, Mrs. Young locks her doors to keep out the public. One must be invited to enter her home. (ROA at 936, ¶ 12.)

Mrs. Young's relationship with her guests, invited to stay with her in her own home, readily qualifies as an intimate association. As already explained, neither the Hawai'i Constitution nor the federal one will tolerate the State infringing intimate association rights by forcing homeowners to accept as housemates those with whom she does not want to share her

residence. *See supra* Part V.C.1. But applying HRS 489 to Mrs. Young will have precisely that result. Strict scrutiny thus applies. *See Baehr*, 74 Haw. 530 at 572 (laws burdening fundamental rights guaranteed by the Hawai'i Constitution must satisfy strict scrutiny review); *Louisiana Debating & Literary Ass'n v. City of New Orleans*, 42 F.3d 1483, 1498 (5th Cir. 1995) (laws burdening intimate association rights guaranteed by the federal Constitution must satisfy strict scrutiny review). Moreover, application of this heightened standard is bolstered by the Hawai'i Constitution's strong protection of privacy rights, as discussed previously.

3. Applying HRS 489 Impermissibly Burdens Free Exercise Rights Under the Hawai'i Constitution.

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.").

Applying HRS 489 to require Mrs. Young to rent rooms in her own home, where she lives, to same-sex couples would substantially burden Mrs. Young's free exercise rights. Plaintiffs-Appellants wrongly argued below 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." (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 Bed & Breakfast 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 has testified that her 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). 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. 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. Another twelve States' supreme courts have interpreted their state constitutions' free exercise protections to require heightened constitutional scrutiny. *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. Miller*, 549 N.W.2d 235, 238-42 (Wis. 1996);.*Attorney General v. Desilets*, 636 N.E.2d 233, 235-41 (Mass. 1994).

Hawai'i has not definitively 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 importantly, 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, 953 P.2d 1315 (Haw. 1998), decided eight years after

Employment Div. v. Smith, the Court said 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*, 87 Haw. at 247. 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. *Id.* 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 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. 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 for federal free exercise jurisprudence. 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.

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) (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. 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).

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). When the court asked counsel for Mrs. Young a passing question about Mrs. Young's free exercise rights, the court seemed to suggest that, because Mrs. Young had started a business, her free exercise rights were diminished. Ex. C, Transcript, at 21. However, one does not forfeit her First Amendment rights by going into business. Neither the federal courts nor this state's courts have ever 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).

In what may be the most recent decision concerning whether one surrenders her free exercise rights because she engages in business activity, 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). The *Hobby Lobby* 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 district court ruled that businesses are not entitled to protection under the federal Religious Freedom Restoration Act, which protects free exercise rights. *Id.* at 1128. On June 27, 2013, the 10th Circuit Court overturned that ruling, finding that Hobby Lobby not only has free exercise rights, but those rights were burdened by the ACA's abortifacient requirement. *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 forgo renting rooms to unmarried cohabiting couples, including Plaintiffs. If HRS 486 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. It is no solution to say, as the Plaintiffs do, (ROA at 684), 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). Because applying HRS 489 to Mrs. Young's rental practice infringes her free exercise rights, strict scrutiny must apply.

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 comers as guests, there cannot be a compelling interest in requiring Mrs. Young to do so in her own home. It is too remote a possibility that the ability of same-sex couples to find lodging will be frustrated because the three rooms in Mrs. Young's home, among the thousands of rooms for rent in Honolulu hotels, are not available to them.

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 Supreme Court has explained that "a law cannot be regarded as

[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 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

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 contrary decision is error, and this Court should reverse.

E. The Plaintiffs Sued the Wrong Party.

This court below could have decided this matter without reaching any of the statutory or constitutional questions presented by finding that the Plaintiffs-Appellees failed to sue the only indispensible defendant to their cause of action. The party they sued does not exist. "Aloha Bed & Breakfast" is but a trade name that Mrs. Young only registered *after* her discussions with the Plaintiffs in 2007. She did call her bed and breakfast activity by that name since she opened it, but there has never been a person subject to the jurisdiction of the state legal system by that name. It is not a legal entity. It does not even have its own bank account, as most sole proprietorships do. Rather, Mrs. Young is the proper and necessary party to this proceeding. She is the one who decided that the Plaintiffs would not be allowed to stay in her house. But the Plaintiffs did not name her in their complaint. Nor did the Plaintiffs ever name Mrs. Young as a Defendant in the proceedings before the HCRC, and only obtained a right to sue letter naming "Aloha Bed & Breakfast". This Court should therefore dismiss the Plaintiffs complaint for failing to name the indispensible defendant.

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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

VI. CONCLUSION

Mrs. Young's home is not a place of public accommodation subject to HRS 489. It is, rather, her *home*, and HRS 489 does not govern the rental of rooms in private homes. Her home should be the place where she is most protected from government intrusion. It is "the center of [our] private lives." *Minn.*, 525 U.S. at 99 (1998) (Kennedy, J., concurring).

Mrs. Young's choice to rent rooms in her home does not change that fact. Her home is still her *home*. As such, the rental of rooms in her home is subject to the HRS 515, the only statute addressing the rental of rooms in a private home. The Plaintiffs-Appellees brought their suit pursuant to a statute that does not apply, and so summary judgment is appropriate for Mrs. Young.

Even if the Plaintiffs-Appellees had brought their suit pursuant to the correct statute, HRS 515, summary judgment would still be appropriate for Mrs. Young. If Mrs. Young ever rents five or more rooms, she will be subject to HRS 515's antidiscrimination requirements. But since she only rents three rooms, she is exempted from those requirements by the statute's Mrs. Murphy exemption. Summary judgment in her favor is appropriate.

Even if this were not correct, and HRS 489 somehow applied to the rental of rooms in a private home, this application of the law cannot survive strict scrutiny review, and therefore cannot undergird the Plaintiffs' claims.

Defendant -Appellant ALOHA BED & BREAKFAST respectfully requests that this Honorable Court reverse the decision below and remand this case for further proceedings, namely: (1) vacating the April 15, 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"; (2) remand with instructions for the trial court to enter an "Order Denying Plaintiffs' And Plaintiff-Intervenor's Motion For Partial Summary Judgment For Declaratory And Injunctive Relief And Granting Defendant's Motion For Summary Judgment"; (3) and remand for further proceedings consistent therein.

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and same-sex couples.

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Dated: Honolulu, Hawai'i, September 20, 2013.

/s/ SHAWN A. LUIZ
SHAWN A. LUIZ
JAMES HOCHBERG

Attorneys for Defendant
ALOHA BED & BREAKFAST

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.

"A"

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 ("Plaintiff's 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

Certified this May 9, 2013 day of _____, _____.

EDWIN C. NACINO

FIRST CIRCUIT COURT SEAL STATE OF HAWAI'I

Honorable Edwin C. Nacino,

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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,

vs.

ALOHA BED & BREAKFAST, a Hawai'i 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

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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 La Rue, 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.

EDWIN C. NACINO
JUDGE OF THE ABOVE ENTITLED COURT

SEAL

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 HAWAII

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

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

APPEARANCES:

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

ROBIN WURTZEL, For Plaintiff-Intervenor
ATTORNEY AT LAW

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

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

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THURSDAY, MARCH 28, 2013; HONOLULU, HAWAII

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

Counsel, may I have your appearances.

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

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

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

THE COURT: All right. Good morning.

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

MR. LA RUE: Good morning, Your Honor.

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

THE COURT: All right. Good morning.

Good morning, Mr. and Mrs. Young.

Okay. I understand your argument.

MR. RENN: Thank you, Your Honor.

THE COURT: Thank you.

For your side?

I'm sorry.

Name again, Counsel? La Rue?

MR. LA RUE: Joe La Rue.

THE COURT: Okay. Go ahead.

MR. LA RUE: Yes, sir.

THE COURT: Thank you.

And just to let you know, Counsel, I did review the Memo in Opposition as well as your -- the Motion for Summary Judgment. Please -- my understanding of your argument -- and you can correct me if I'm wrong -- is that 489 is not the applicable chapter involved and it should be 515.

Correct?

MR. LA RUE: That's exactly right, Your Honor.

THE COURT: But upon review of the Complaint, don't you agree that the only action here is a 489 action?

MR. LA RUE: I agree with you, Your Honor, that the plaintiffs have brought the action under 489 and have not brought an action under 515, yes, sir.

THE COURT: So then explain to the Court why 515

overrides 489, if the only action before the Court -- and I have the Complaint in front of me -- is one for the violation under Chapter 489.

MR. LA RUE: Absolutely, Your Honor.

Thank you.

I would like to say three things in response to Your Honor's question, if I may.

First, it's a matter of law universal that when a charge is brought pursuant to the wrong statute the charge can't stand. It has to be brought pursuant to the right statute. The plaintiffs did bring their charge pursuant to 489.

Second, I'd like to say that there are a couple of things that the plaintiffs and we agree about, and I'd like to highlight those because they go to Your Honor's question. We agree that this is a purely legal question. There are no materially substantive facts in dispute in this matter. We also agree that discrimination is a horrible evil. We agree with that. But where we part company, and going to Your Honor's question, we believe that the homeowners' rights trump the State's rights to root out discrimination when it's talking about the home.

Imagine, for instance, if you will, Your Honor, if the shoe were on the other foot and if a gay homeowner were asked to rent a room in her house to members of the

horrible Westboro Baptist Church, that pickets funerals and says God hates gay people, which I would imagine no one in this courtroom believes. Surely a gay homeowner has a right not to let someone like that into her home. And by the same token, we believe that the Hawaii Legislature made a choice, and it said that the rental of rooms in homes is subject to Chapter 515, whereas the rental of rooms in places that are open to the public, that hold their doors open to anybody is subject to 489.

THE COURT: And therein lies the issue here that we have between Plaintiffs and Defendants. I mean, essentially -- and not to cut you off, Counsel. But, essentially, it comes down to whether or not a bed and breakfast, as articulated in the fact pattern, is something of a transient accommodation, providing lodging to transient guests, or a long-term, permanent rental.

Right?

MR. LA RUE: Your Honor, I would disagree. The case law indicates that the length of stay of a guest does not transform a residential home into a place of public accommodation. And there are two cases that dealt directly with that question. One arose from the Hawaii District Court for the federal district; the other arose for the Florida District Court. And both courts concerned the -- both cases, rather, concerned the rental

of individual units in a condominium complex to transient guests, and both courts said that the duration of the stay was not the determining factor.

THE COURT: And that's under the Fair Housing Act, under Title -- under 482, the U.S. Code, 2000?

MR. LA RUE: Actually, Your Honor, those cases were brought pursuant to the federal public accommodations law.

THE COURT: Right.

And, so, distinguishable in the sense that we're dealing with Chapter 489 of our statutes here; correct?

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

THE COURT: So I understand the argument that's coming from you.

Again, not to belabor a point, but you tell me why 489, when it is brought purely under -- and that's all Plaintiffs are seeking, is under Chapter 489 -- why you're saying 515 -- in essence, what you're telling the Court is that they don't have a right to bring it under Chapter 489; their right should be under 515. You're dictating to Plaintiffs how they want to litigate their action, and I disagree with that. So tell me why I'm wrong in that sense.

MR. LA RUE: Your Honor, it's dangerous to tell a judge that he's wrong.

THE COURT: Well, in the sense of how can you dictate to Plaintiffs how they choose to litigate their relief, in other words?

MR. LA RUE: Absolutely, Your Honor. And I believe you're asking the question that really is at the heart of the case: Which law does this fall under?

If it please the Court -- we have secured opposing counsel's permission -- we have some charts that we would like to bring up to help demonstrate the answer to that question, if the Court would allow it.

THE COURT: No, because the same question I asked Mr. Renn regarding why our state can be more protective with Constitutional protection opposed to you. You tell me why the federal law supersedes our state law.

MR. LA RUE: Very well, Your Honor.

THE COURT: Because, essentially, that's where this thing is headed. I mean, yes, we have a 515 law that tracks the federal public accommodation law to a certain extent.

Although it's four rooms versus five rooms; right?

But we're purely discussing Chapter 489. And what I'm getting from you is that that's the wrong law they should be litigating and the right one should be 515.

MR. LA RUE: Very well, Your Honor.

I would answer your question this way.

THE COURT: Uh-huh.

MR. LA RUE: There are two laws, as the Court knows, that deal with the rental of rooms.

THE COURT: Right.

MR. LA RUE: Chapter 515 specifically talks about the rental of rooms in homes, private homes, where the owner lives, and it uses that language in Chapter 515. Chapter 489 does not use any language that reflects a private residential home. Rather, the places that are given as examples of public accommodations are places that are open to anybody without invitation, the invitation is to the general public, and there's no effort to exclude anyone in these places of public accommodation.

THE COURT: Right, hotels, motels, inns, and other establishments --

MR. LA RUE: Yes, Your Honor.

THE COURT: -- that are open to transient guests.

MR. LA RUE: That's correct, Your Honor. And the three that are named -- hotels, motels, and inns -- are all places that are non-residential, where the owner does not actually live. It's not a private home.

THE COURT: All right. So let's focus on the fourth definition --

MR. LA RUE: Absolutely, Your Honor.

THE COURT: -- which is establishments --

MR. LA RUE: Yes.

THE COURT: -- that provide lodging to transient guests.

MR. LA RUE: Yes, Your Honor.

THE COURT: Because that's where we are. That's what the Court is focusing on.

And I'll give heads up to both counsel. 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.

Yes. A couple of comments in reply to Your Honor's question. First off, there is a canon of statutory construction that has been recognized by the Hawaii supreme court that has a Latin name that I can't pronounce --

THE COURT: Right.

MR. LA RUE: -- but in English it says, The specific governs the general. And the Hawaii supreme court has said -- and I'm quoting here from a case known

as *State v. Kuuku* -- where two statutes cover the same subject matter, the one general and the other special -- I think it meant to use the word "specific" --

THE COURT: Specific, yeah.

MR. LA RUE: -- but it used the word "special" -- the specific statute will be favored. In our case we have two statutes. 515 specifically applies to the rental of rooms in homes, and nowhere in 515 does it talk about the length of stay. 515 simply talks about the rental of rooms in homes. Chapter 489 does not. It does mention other establishments that rent to transient guests. And we have some other reasons why that language ought not to mean private homes, that we've briefed.

THE COURT: All right. So articulate to me why would your client's home, based on the facts that were drawn out in deposition, would not be an establishment that provides lodging to a transient guest.

MR. LA RUE: Your Honor, Mrs. Young does provide lodging to transient guests. We've not denied that. We've actually admitted that.

THE COURT: Right.

MR. LA RUE: But Mrs. Young, we believe, is not a place of public accommodation for these reasons. She's not one of these other establishments.

First off, there's a second statutory

construction that we talked about in our briefing that basically says when you have a list of things and one is undefined, that undefined term needs to be understood in the same way that the previous terms are understood. And, so, we have hotel, motel, and inn, which are public places, non-residential, business enterprises, where the owner does not live; it's not a private home. Other places of public accommodation -- other places that rent to transient guests, rather, needs to be understood in those terms -- non-residential, no one actually lives there, they're open to everybody.

Mrs. Young in her deposition explained -- and we highlighted this in our briefing -- that when she receives an application to stay in her home, she asks a series of questions because she wants to make sure that the rental arrangement will work, because it's her home. So she has a policy not to rent to smokers; she has a policy not to rent to opposite-sex couples who aren't married, and that includes her own daughter, who lives with her boyfriend, and when she comes to visit Mrs. Young won't let them share a room with a bed; and she doesn't rent to same-sex couples. She asks those questions. Places of public accommodation can't do that; because as the plaintiffs' counsel said, and we completely agree, in places of public accommodation

discrimination is a horrible evil. But when it comes to your home, different Constitutional questions are in play. And I understand Your Honor wants to decide this according to statutory law. He can certainly do that. But I would be remiss if I didn't say, that if Your Honor finds that this fits under 489, there are First Amendment rights to privacy and rights to intimate association and free exercise that do come into play that complicate things.

THE COURT: But, Counsel, if the Court was to rule in favor of Plaintiff on the 489 question, is that then precluding your client from exercising her free right of speech, to practice the religion she wants to practice, to state what she believes about homosexuality? How can you argue that to the Court when purely this business that the Youngs are in is purely of their own decision?

I know it's in the deposition someplace, where Mr. Renn did ask, Does your religion mandate you to run a bed and breakfast? This is something that the Youngs have decided, We want to make money and make a profit by opening our home to the public and renting out rooms in our abode. So the simple answer -- and I know nothing is really simple. But if you want to maintain the type of privacy you're articulating to the Court, which I fully

agree and I think Mr. Renn and his clients would agree, that everyone has that right of privacy, to associate with whom they choose to, but when you make a decision to then step into the realm of business, such as what the Youngs have decided to do, you tell me why the State cannot regulate that type of activity with a statute such as 489.

MR. LA RUE: Thank you, Your Honor.

I think there's been a misunderstanding of what Mrs. Young is asserting is her religious belief. It's not to operate a bed and breakfast, by any means.

THE COURT: No.

MR. LA RUE: No, no, no, I know. But I think that was suggested in Plaintiffs' briefing at one point, and I want to make plain that's not a religious belief. But it's also not just to speak out against homosexuality. I'm not even sure if Mrs. Young does that. She may; I don't know. What her religious belief is, and what really is at issue in this case for free exercise purposes, she believes that it would be wrong for her to rent a room that's going to allow sexual activity to possibly occur that she believes is immoral, that violates her religious views. And, so, it's not -- it's not even -- she's not even making a statement, really, about gay people as much as she's making a

statement about her act in renting a room that would facilitate conduct that she believes is morally wrong.

THE COURT: No. And I --

MR. LA RUE: That's the religious objection, Your Honor.

THE COURT: Yeah. And the Court totally respects her personal right to do those type of things or believe in that type of beliefs.

But again, and I said from the start with both Plaintiffs and Defendants here, I specifically pulled the Complaint and reviewed the Complaint, and what we're here on is a 489 issue. You're arguing to me that it should be a 515 issue and that -- and I guess everyone would agree under 515 there may exist that right to do exactly what she's doing.

Correct, Mr. Renn?

MR. RENN: We don't dispute that if this was offered as housing accommodation.

THE COURT: Right, as a 515 housing accommodation.

So I need to know from you -- you're saying the specific and the general. You have two statutes here. Both are, in my estimation, specific. So I'm now looking at the facts that have been drawn out in this case.

And let me tell you, I don't think you're going

to dispute that she provides overnight accommodations in these rooms.

Correct?

MR. LA RUE: That's correct, Your Honor.

THE COURT: She doesn't provide it as a place to have people permanently live or permanently reside as their humble abode.

MR. LA RUE: That is also correct.

THE COURT: She describes the transient guest as being someone who stays 30 days or less, which is even more narrow in scope than what the transient tax regulation requires.

Correct?

MR. LA RUE: She did describe it that way, I believe, Your Honor. And I don't think the Court's making a big deal out of that. But I do just simply want to point out she's not an attorney. She was asked a question that called for a legal conclusion, that she really is not qualified to give.

THE COURT: All right. So we take that out of the picture.

She testified that she doesn't hold herself out to be a landlord to these transient guests.

MR. LA RUE: That's correct.

THE COURT: And she's never considered renting

any of her rooms to people to make it a primary permanent residence, like a rental situation of six months' lease or a one-year lease.

Correct?

MR. LA RUE: Your Honor, I don't recall for sure. But if the Court is reading from the record, I'm not going to dispute what the Court's reading.

THE COURT: Well, I'm reading from the deposition. And you probably have it in yours, as well.

MR. LA RUE: Certainly.

THE COURT: So I need to know from you, Counsel, why, if I look at the totality of circumstances --

MR. LA RUE: Sure.

THE COURT: -- of the facts that were dawn out by Mr. Renn in deposition, which are undisputed, why doesn't she fall under 489-2 as either an establishment, another type of establishment providing lodging to transient guests, or as a business or as a facility relating to travel?

MR. LA RUE: Thank you, Your Honor.

Yes. Your Honor, there are two reasons that I'd like to highlight for you. The first is just simply an appeal to common sense thinking about what the Legislature was doing. I cannot think of any reason why the Legislature would intend to say if you discriminate

and you rent a room for longer than 30 days or longer than 60 days it's okay. When somebody's actually looking for a place to live, you can discriminate against them; but if it's a vacationer coming to the island, when there are thousands and thousands of hotel rooms and places of lodging for transients, you, homeowner, can't do what you could do if they wanted to stay for six months. So my first response to Your Honor is it simply doesn't -- to me, at least, it doesn't make sense. I realize that's not a very strong legal argument. And yet, when we look at statutory construction, we do try to figure out what the Legislature was thinking. When we look to the legislative history of 489, there is no indication that they were talking about private homes. And, so, it seems to me, again -- and this is the first answer; I'll move to the second very quickly -- it seems to me that the Legislature contemplated that the rental of rooms in homes was already covered by the statute that addressed it, 515.

THE COURT: Okay. So how do you reconcile the -- it's 489-1, I think, or 2 that mandates that the chapter has to be liberally construed?

MR. LA RUE: Yes, Your Honor.

THE COURT: I think you're saying they never intended it to be what Plaintiff is saying.

MR. LA RUE: That leads me to the second response to Your Honor's question, which has to do with the County and City of Honolulu's Land Use Ordinances. As the Court is aware from our briefing, and I don't believe the plaintiffs dispute, though I'm not entirely sure -- and you're welcome to say you do if you do -- the Land Use Ordinance zones Mrs. Young's home as a bed and breakfast home, and it distinguishes bed and breakfast homes from transient vacation rentals, which are hotels, motels, and inns. If Mrs. Young were found to be subject to 489 and be in that category, she would actually be operating a business out of her home that would be illegal for her to do under the County and City zoning laws. And the State of Hawaii supreme court -- I'm sorry. Scratch that please, Your Honor. The State of Hawaii Legislature has issued a statute, I believe it's statute 486, that says that the counties are delegated the responsibility for zoning. The State of Hawaii supreme court has said that statute must be interpreted literally. And there was actually a case that came before the Hawaii supreme court that considered the question of whether a homeowner could be -- I'm sorry -- the owner of a building could be prosecuted for discrimination for failing to rent a single-bedroom room to a family of four. That case is *Tseu, ex rel Hobbs v.*

Jeyte, and it's 88 Hawaii 85. In that case, the State supreme court said there is a statute in zoning law that would make that rental illegal, under the zoning law, and so the Hawaii supreme court said the district court was wrong in dismissing this particular defense and remanded back to the district court for adjudication; because the State supreme court said when zoning laws would make a particular act illegal, the public accommodation law or other law cannot be enforced against the entity that is subject to the zoning law. And, so, that's what we have here, Your Honor, is a zoning law that would make it illegal for Mrs. Young to do what the plaintiffs say she -- or to make Mrs. Young fall within the statute that the plaintiffs say she should fall.

Your Honor, I say in final answer to your question -- and then if you have other questions I'm happy to entertain them -- and I don't say this to be flippant and I hope it won't come off that way, but my understanding is Your Honor used to be a criminal judge, and in criminal law, of course, we know that there may be similar criminal statutes, but the elements of each statute must be met in order for a violation of that statute to occur. And it doesn't matter if the statute is close. If the right elements aren't within the statute, it can't be applied against a defendant. And

that's really what we're arguing, Your Honor. We're arguing that the public accommodations law does not apply because it applies to non-residential places that rent rooms. 515 applies to residential places that rent rooms. They're two different statutes looking at the same question, the rental of rooms, but only one applies to houses. And, so, we believe Mrs. Young fits under that.

THE COURT: Okay. Thank you.

MR. LA RUE: Thank you, Your Honor.

THE COURT: All right. Brief rebuttal?

MR. RENN: Certainly, Your Honor.

Thank you.

THE COURT: And basically it's on this central issue, 515 versus 489. Because I think there's really no dispute as to what the Court articulated, and I want to hear the legal argument as to why the 515, which I guess Defense is saying is the more specific, should apply here.

MR. RENN: Certainly, Your Honor.

I think that Your Honor was correct in saying that the plaintiffs are the masters of their own Complaints. They get to choose which cause of action they bring. And there's only one cause of action on the face of the Complaint, it's Chapter 489, and it makes no

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

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

THE COURT: All right.

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

Thank you, Your Honor.

THE COURT: Okay. Let --

I'm sorry.

You needed to say one more thing?

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

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

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

MR. LA RUE: Thank you, Your Honor.

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

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

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

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

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

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

MR. RENN: We have not seen this.

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

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

THE COURT: Hold on, Counsel.

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

THE COURT: You know what?

Can counsel approach.

On the record.

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

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

Correct?

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

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

MR. LA RUE: Okay.

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

MR. LA RUE: Okay.

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

Correct?

MR. LA RUE: That is correct, yes.

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

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

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

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

THE COURT: Okay.

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

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

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

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

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

MR. LA RUE: Thank you, Your Honor.

MR. LUIZ: If I may --

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

Plaintiff, you give your opposition.

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

THE COURT: Okay. That's it.

MR. LA RUE: Thank you, Your Honor.

(Bench conference concluded.)

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

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

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

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

Mr. Renn said that 515 should not apply because

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

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

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

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

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

Correct?

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

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

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

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

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

THE COURT: Within a statute, you mean.

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

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

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

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

MR. LA RUE: Thank you, Your Honor.

THE COURT: All right. Thank you.

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

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

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

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

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

Correct, Mr. La Rue?

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

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

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

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

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

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

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

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

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

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

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

Court must grant injunctive relief.

THE COURT: Okay. And you're relying on 7.5?

MR. RENN: I believe that's the provision, Your Honor.

THE COURT: All right. Mr. La Rue?

MR. LUIZ: If we might have a moment, Your Honor.

THE COURT: All right.

(Defense counsel confer.)

MR. LUIZ: Thank you, Your Honor.

MR. LA RUE: Your Honor, we believe that injunctive relief ought not to be allowed here or granted here for two reasons. First, there is no evidence in the record that the plaintiffs intend to return to Mrs. Young's home. There's no evidence that they will be harmed in the absence of injunctive relief.

And this -- the second reason is, this is not a class action. It's not the case that the plaintiffs have alleged there are many, many gay couples that want to come stay at Mrs. Young's home. This case involved --

THE COURT: Excuse me, Counsel.

Okay. Proceed.

MR. LA RUE: Finally, Your Honor, this case involved two women, that there's no evidence they will return.

And finally, Your Honor, it goes without saying that there will be -- either way Your Honor ruled, there would have been an appeal ultimately taken of this; the Court knows that. Until this is final, it just doesn't, in my mind, make sense to tell a homeowner she can't do what she wants to do in her home until the issue is finally adjudicated. And I'm not disrespecting this Court. I understand --

THE COURT: No, no.

MR. LA RUE: -- it has adjudicated it. But however Your Honor ruled, there would have been an appeal. And, so, I would encourage Your Honor to allow the process to work its way out. There's no class action and no reason to grant an injunction.

MR. RENN: If I may have a moment, Your Honor.

The public accommodation law is not like some other discrimination statutes that require the plaintiffs to intend to return to the defendant's place of business. Some statutes require that. 489-7.5(a)(2) does not have that requirement. That's the reason why, for example, the Commission can send testers into a business and they're allowed to grant injunctively.

And certainly while we agree that this may go up on appeal, we may very -- it may be possible that the injunction would be stayed pending the resolution of the

appeal. We have not discussed that with the other side. But the propriety of injunctive relief is required because that's what the statute commands.

THE COURT: Okay. I'm not going to hear from your, Mr. Luiz; it's Mr. La Rue that argues the motion.

MR. LUIZ: Yes. I'd just like a moment to confer so he can present another issue.

THE COURT: No. Court is ready to rule on the injunctive relief.

Looking at 489-7.5 --

Sub-section 2, correct, Counsel?

MR. RENN: That's correct.

THE COURT: -- I think it does require the Court to impose the injunctive relief such that it enjoins the bed and breakfast from further discriminatory acts as articulated under Chapter 489. So I am going to grant the injunctive relief, as well. I don't believe it requires it to be intended back on the same plaintiffs again, otherwise it would hold no meaning, that particular section.

Okay. So Mr. Renn can prepare the order granting in part.

My understanding is what we have now would be the sole issue of damages to go forward.

All right. Thank you.

And let my just talk to the counsel in the back here.

(Proceedings concluded.)

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CAAP-13-0000806

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

DIANE CERVELLI and TAEKO BUFFORD, Plaintiffs-Appellees, v. 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,	CIVIL NO. 11-1-3103-12 ECN (Other Civil Action) APPEAL FROM THE (1) "ORDER GRANTING THE PARTIES' STIPULATED APPLICATION FOR APPEAL FROM INTERLOCUTORY ORDER", FILED MAY 9, 2013. (2) FROM 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", FILED APRIL 15, 2013 Circuit Court of the First Circuit State of Hawaii Honorable Edwin C. Nacino

STATEMENT OF RELATED CASES

Defendant -Appellant ALOHA BED & BREAKFAST is unaware of any related case(s) pending before the courts of this jurisdiction.

Dated: Honolulu, Hawai'i, September 20, 2013.

/s/ SHAWN A. LUIZ
SHAWN A. LUIZ
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Attorneys for Defendant
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CAAP-13-0000806

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DIANE CERVELLI and TAEKO BUFFORD, Plaintiffs-Appellees, v. 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,	CIVIL NO. 11-1-3103-12 ECN (Other Civil Action) APPEAL FROM THE (1) "ORDER GRANTING THE PARTIES' STIPULATED APPLICATION FOR APPEAL FROM INTERLOCUTORY ORDER", FILED MAY 9, 2013. (2) FROM 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", FILED APRIL 15, 2013 Circuit Court of the First Circuit State of Hawaii Honorable Edwin C. Nacino

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date of filing, a copy of the "OPENING BRIEF OF DEFENDANT-APPELLANT ALOHA BED & BREAKFAST, APPENDICES "A" –"D", and CERTIFICATE OF SERVICE" was served upon the following parties, in the manner indicated below:

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