No. _____

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

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

vs.

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

and

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

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

APPLICATION FOR WRIT OF CERTIORARI TO REVIEW THE FEBRUARY 23, 2018 OPINION OF THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI`I AND ITS MARCH 20, 2018 JUDGMENT ON APPEAL
APPENDICES A-C
CERTIFICATE OF SERVICE

SHAWN A. LUIZ (6855)
1132 Bishop Street, Suite 1520
Honolulu, HI 96813
Tel: (808) 538-0500; Fax: (808) 538-0600
Email: attorneyluiz@gmail.com
JAMES HOCHBERG (3686)
700 Bishop Street, Suite 2100
Honolulu, HI 96813
Tel: (808) 256-7382; Fax: (808) 538-3075
Email: jim@jameshochberglaw.com

DAVID A. CORTMAN (*pro hac vice*)*
RORY T. GRAY (*pro hac vice*)*
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd. Suite D-1100
Lawrenceville, GA 30043
Tel: (770) 339-0774; Fax: (770) 339-6744
Email: dcortman@ADFlegal.org
Email: rgray@ADFlegal.org
* *pro hac vice* admission pending application submitted contemporaneously

Counsel for Petitioner/Defendant-Appellant

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APPLICATION FOR A WRIT OF CERTIORARI

Phyllis Young operates Petitioner Aloha Bed & Breakfast in the home she has shared with her husband for forty years. Renting up to three spare bedrooms (when her children and grandchildren are not visiting) helps Young pay the mortgage. Without that income, Young will lose the home where she raised her family and now lives out her retirement years. More than a decade after Young began renting rooms to make ends meet, a same-sex couple emailed and phoned ahead to see if they could stay with Young during their week-long vacation. Young is a Christian who adheres to the Catholic Church's teaching about sexuality and marriage. She told the couple that allowing them to share a bed in her home would violate her religious beliefs and that Hawai`i's "Mrs. Murphy's exemption" gave her the ability to decide when to rent rooms in her home. As Young explained, even her adult daughter and the daughter's live-in boyfriend were required to stay in separate bedrooms when they came to visit. And Young also informed the couple that she had called a friend in the area who rents rooms in her home and found an alternative place for the couple to stay during their vacation. Nonetheless, the couple filed complaints with the Hawai`i Civil Rights Commission (the "Commission").

The Commission interrogated Young about her religious beliefs, found probable cause that she discriminated based on sexual orientation, and sought an order forcing her—among other things—to (1) pay actual, compensatory, and punitive damages, (2) pay statutory penalties, (3) develop a nondiscrimination policy, and (4) post nondiscrimination notices on the walls of her own home. Later, the couple filed suit and the Commissioner intervened on their behalf. Young is now faced with a circuit court order—affirmed by the Intermediate Court of Appeals ("ICA")—that forces her to choose between (a) renting out rooms in her home to make ends meet in a manner that seriously violates her Christian faith or (b) ceasing to rent three spare bedrooms in her residence altogether and losing her home of forty years.

QUESTIONS PRESENTED

1. Does the Mrs. Murphy exemption found in HRS § 515-4(a)(2) protect Young's ability to choose when to rent three rooms in her family home?

2. If HRS § 515-4(a)(2) does not apply, does forcing Young to rent rooms in her family home in violation of her religious beliefs under HRS 489-3 infringe her right to due process and equal protection of the laws under Haw. Const. art. I, § 5 and U.S. Const. amend. XIV?

3. If HRS § 515-4(a)(2) does not apply, does forcing Young to rent rooms in her family home in violation of her religious beliefs under HRS 489-3 infringe her right to privacy and intimate association under Haw. Const. art. I, §§ 4-7 and 18 and U.S. Const. amend. I, III-IV, X, and XIV?

4. If HRS § 515-4(a)(2) does not apply, does forcing Young to rent rooms in her family home in violation of her religious beliefs under HRS 489-3 infringe her right to the free exercise of religion under Haw. Const. art. I, § 4 and U.S. Const. amend. I and XIV?

5. If HRS § 515-4(a)(2) does not apply, does forcing Young to rent rooms in her family home in violation of her religious beliefs under HRS 489-3 meet strict scrutiny or any other form of constitutional analysis?

PRIOR PROCEEDINGS

After receiving a right-to-sue letter from the Commission, Diane Cervelli and Taeko Bufford filed a complaint for sexual-orientation discrimination in violation of HRS § 489-3 in the circuit court seeking declaratory relief, an injunction, compensatory, statutory, treble, and punitive damages, and attorneys' fees and costs against Aloha Bed & Breakfast, a sole proprietorship operated by Phyllis Young. . The Commission intervened on the couple's behalf. The parties filed competing motions for summary judgment. The circuit court held a hearing on Plaintiffs' and Intervenor's summary judgment motion, granted it, and denied Defendant's motion as moot without addressing any of Young's constitutional defenses. It then considered and granted Plaintiffs' and Intervenor's request for an injunction that forces Young to rent the three spare bedrooms in her family home in ways that violate her faith without ruling on compensatory, statutory, treble, and punitive damages, and attorneys' fees and costs. The parties stipulated to an immediate appeal of this interlocutory order, and the circuit court granted their request.

On appeal, the ICA held that the Mrs. Murphy exemption found in HRS § 515-4(a)(2) applies only to "long-term" rentals and that Young violated HRS § 489-3 because she only rents rooms in her home on a "short-term" basis. The court did not address Young's argument that this ruling would violate her due process and equal protection rights. It rejected Young's privacy and intimate association claims by characterizing the home—in which she has lived for forty years—not as a private residence but as a place of public accommodation. Although the court assumed that applying HRS § 489-3 to Young would substantially burden her religious beliefs, it held that forcing Young to rent three bedrooms in her own home in a way that conflicts with her faith satisfied strict scrutiny even though many other places to stay are available in Honolulu.

The ICA entered its judgment on March 20, 2018. Appendix A at 1. Young sought and was granted a thirty-day extension of time to file this application for writ of certiorari.

SHORT STATEMENT OF THE CASE

Phyllis Young's family home sits on a quiet residential street in the Hawai`i Kai area of Honolulu. Its 1,926 square feet contain four bedrooms, two and a half bathrooms, a family room, dining room, living room, and kitchen. Young forged her married life in that home, raised her children there, and now welcomes her children and grandchildren back on visits. Now in her retirement years, Young rents up to three bedrooms to guests to help pay the mortgage using the name Aloha Bed & Breakfast. Young does so to make ends meet; otherwise, she could not afford the monthly mortgage payments and would be forced to leave her home of forty years.

No barriers separate Young from her overnight guests. Side-by-side they share the home's living spaces with Young and her family and even use the personal computer in her master bedroom and some play with her grandchildren's toys. Young's spare bedrooms contain her personal items and are where her children and grandchildren stay on visits. Guests are treated like family and enjoy meals with Young and her husband, watch movies with her, go to the store with her, and some have even chosen to participate in the Bible study that meets in Young's home.

Just like family, Young requires guests in her home to abide by certain rules. Smoking is forbidden for health reasons. And, based on Young's sincerely held religious beliefs, no romantic partners other than a married man and woman are allowed to stay in the same room. Young believes that doing otherwise would make her complicit in sexual conduct that her faith teaches is wrong. Those willing to abide by these "house rules," such as an ability to handle the stairs, are welcome to stay if they make a reservation in advance. But Young reserves the right to decline to host any guest in a manner that violates her religious beliefs.

Young accommodates, on average, between one hundred and two hundred guests in her three spare bedrooms each year. She requires that guests stay for no less than three days. Though some renters stay with Young for weeks at a time, nearly all of them stay less than a month, although a few have stayed for five weeks or more.

Young was and is a licensed real estate agent. When she referred the couple to a friend who also rents rooms in her home, Young explicitly cited Hawaii's Mrs. Murphy exemption. She had no knowledge that the ICA would rule, tens years later, that the exemption does not apply.

ARGUMENT

I. HRS § 515-4(a)(2) Protects Young's Right to Select When to Rent Bedrooms in Her Home Without State Interference.

HRS § 515-4(a)(2) exempts those who rent up to four rooms in their home from state nondiscrimination laws that apply to the rental of real property, including any interest (corporeal or incorporeal) in real estate. *See* HRS §§ 515-2 & 515-3. This so-called Mrs. Murphy exemption, *see United States v. Space Hunters, Inc.*, 429 F.3d 416, 425 (2d Cir. 2005) (explaining the origins of that term), protects those like Young who rent spare bedrooms in their family homes to make ends meet. In so doing, it respects private value judgments about what takes place in the home.

The ICA's decision, however, failed to apply HRS § 515-4(a)(2) even though it is squarely on point. It reasoned that the Mrs. Murphy exemption applies only to those who rent rooms on a long-term basis. Appendix B ("App. B") at 16. But that is not what the statute says. HRS § 515-4(a)(2) specifies that nondiscrimination rules that govern real property rentals, including any interest in real estate like Young's private home, *see* HRS § 515-2, do not apply "[t]o the rental of a room or up to four rooms in a housing accommodation by an owner [who] resides in the housing accommodation." Nothing in HRS § 515-4(a)(2) dictates how long that in-home rental must be. And rightly so, for if citizens have the freedom to choose when others share their home for a month or two, they also have the right to select when others live with them for several days or weeks.

Nothing in HRS § 515-4(a)(2)'s text justifies distinguishing between short and long-term rentals. Such line drawing is largely in the eye of the beholder, which reveals why the ICA's ruling did not explain the difference. App. B at 16-17. Is a month-to-month renter "short" or "long" term? No one knows. Reasonable homeowners could certainly regard a one-to-five-week renter as "long term." Young rents rooms in her home for such extended periods. Nonetheless, the ICA's logic strips away her right to select the housemates with whom she shares her daily life.

Basic rules of construction prove that the ICA's statutory interpretation is wrong. First, the ICA's opinion establishes an unreasonable reading of HRS § 515-4(a)(2) that conflicts with the plain text of the statute and leads to the arbitrary distinction between short and long-term rentals discussed above. *Kinkaid v. Bd. of Review. of City & Cnty. of Honolulu*, 106 Haw. 318, 323, 104 P.3d 905, 910 (2004) (the plain text is foremost in statutory analysis and courts avoid illogical and impracticable readings). Second, HRS§ 515-4(a)(2) explicitly safeguards from state intrusion those like Young who rent rooms in their family homes. HRS § 489-3's general ban on

discrimination in a laundry list of places of public accommodation cannot overturn HRS § 515-4(a)(2)'s specific declaration that Young's private home is not a public accommodation. *Kinkaid*, 106 Haw. at 323, 104 P.3d at 910 (courts favor specific statutes over general ones). Third, courts should interpret statutes in a way that avoids any "constitutional doubt." *State v. Jess*, 117 Haw. 381, 399-400, 184 P.3d 133, 151-52 (2008). A straightforward application of HRS § 515-4-(a)(2) avoids serious constitutional concerns. *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1222-23 (9th Cir. 2012) (applying the doctrine of constitutional avoidance to the Fair Housing Act). But the ICA's ruling's constricted reading of the law results in flagrant violations of Young's constitutional rights. *See infra* Parts II-IV.

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

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

Modica and the federal due process precedent on which it is based demand that regulated parties have (a) advance notice of what the law requires so they have an opportunity to comply, and (b) that the law provide enough guidance to prevent enforcement officials—including judges and juries—from punishing citizens under it in an arbitrary or discriminatory way. *State v. Arceo*, 84 Haw. 1, 22-23, 928 P.2d 843, 864-65 (1996); *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Neither requirement is satisfied here. A decade ago, nothing in Hawai'i law gave Young the slightest hint that HRS § 489-3 applied to renting three bedrooms in her family home. HRS § 515-4(a)(2)'s text indicated that Young's private home was not a public

accommodation. No court had ever construed Hawai`i law differently. And, as Young explained to the circuit court at the summary judgment hearing, neither had the Commission. Nothing in the Commission's administrative rules gave Young notice that a private home could fall within HRS§ 489-3's reach. In fact, the Commission's own website (before Young's counsel mentioned it at oral argument) explained that public property—not private property like Young's family home—constitutes a place of public accommodation. Appendix C, transcript of hearing March 28, 2013, ICA Docket #12, pages 33-36. Punishing Young regardless is exactly the sort of arbitrary and unjust enforcement of the law that due process forbids. If Young—a licensed real estate agent —cited the Mrs. Murphy exemption and believed, in good faith, that her conduct was lawful (ROA PDF at 987, 988 and 990), no ordinary citizen would know that HRS § 489-3 applied instead. *State v. Beltran*, 116 Haw. 146, 154, 172 P.3d 458, 465 (2007) (legal distinctions cannot be incomprehensible); *Fox Television*, 567 U.S. at 253 (the law must give fair notice to those of ordinary intelligence).

Penalizing Young but exempting other homeowners who do the very same thing for "long-term" renters also violates equal protection principles under *Modica* and underlying federal precedent. The law must treat similarly situated persons alike. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). When it fails to do so and impinges on personal rights protected by the state and federal constitution, strict scrutiny applies. *Id.* at 440. Forcing any private homeowner to rent rooms in violation of their beliefs implicates the same fundamental rights: personal privacy, freedom of association, and the free exercise of religion. It makes no difference if the rental is for three weeks or three months. Yet the ICA's reasoning safeguards homeowners who rent rooms "long-term" but offers those who rent room "short-term" no protection. *Engquist v. Or. Dep't of Agr.*, 553 U.S. 591, 603 (2008) (legal privileges and liabilities must apply equally); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (the law cannot lay an "unequal hand" on the same quality of offense). This distinction makes no sense. Same-sex couples have a much stronger (not weaker) interest in living "long-term" close to work, a sick relative, or college than they do in vacationing "short-term" near an attractive beach. *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 538 (1973) (classifications cannot be wholly without a rational basis). Because the ICA's legal theory is arbitrary and fails to sensibly advance the state's nondiscrimination interests, it violates Young's equal protection rights under either strict scrutiny or rational-basis review. *Hasegawa v. Maui Pineapple Co.*, 52 Haw. 327, 329, 475 P.2d 679, 681 (1970) (classifications cannot be

arbitrary and must relate to legislation's purpose); *Watson v. Maryland*, 218 U.S. 173, 179-80 (1910) (the choice of exempted classes cannot be arbitrary).

III. Compelling Young to Rent Bedrooms in Her Family Home Violates Her Rights to Privacy and Freedom of Intimate Association.

Privacy rights are nowhere stronger than the home. *State v. Mallan*, 86 Haw. 440, 444, 950 P.2d 178, 182 (1998) (the home is "the situs of privacy"). Sections 7 and 18 of Article I of the Hawai`i Constitution explicitly safeguard the privacy of citizens' houses, as do the Third and Fourth Amendments to the U.S. Constitution. These special defenses grew out of the common law doctrine that "a man's house is his castle." *Payton v. New York*, 445 U.S. 573, 598 (1980). Rather than grappling with Young's argument that forcing her to rent rooms contrary to her faith would violate this zone of personal privacy, the ICA's decision evaded it by labeling her home "a place of public accommodation"—just like any public hotel, cafe, or shop. App. B at 20. But Young's home of forty years is not an amusement park or resort. And the state may not foreclose the exercise of Young's privacy rights by mere labels. *NAACP v. Button*, 371 U.S. 415, 429 (1963). What matters here is American law's "overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic." *Payton*, 445 U.S. at 601.

The ICA's decision violates Young's fundamental right to privacy by forcing her to rent bedrooms in her home in a way that violates her faith. Article I, Section 6 of the Hawai`i Constitution and federal law protect such highly personal and intimate affairs as the sanctity of Young's home and the privacies of her daily life. *State v. Mueller*, 66 Haw. 616, 624-25, 671 P.2d 1352, 1357 (1983) (individuals have the right to control highly personal and intimate affairs and tell the state to mind its own business); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (government cannot invade the sanctity of a man's home and the privacies of his life). Far from evaporating at the sheer mention of HRS § 489-3, Young's right to privacy bars the state from classifying her home as a public accommodation in the first place. *Payton*, 445 U.S. at 597 n. 45 (freedom of one's house is an essential part of English liberty); *Wyman v. James*, 400 U.S. 309, 316 (1971) (security in the home and the privacy of one's dwelling are basic to a free society). The ICA's reasoning fails to account for centuries of American law and extinguishes Young's right to ensure that what happens in her home accords with her values and beliefs. *Carey v. Brown*, 447 U.S. 455, 471 (1980) (the home is a refuge and place for tranquility); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (citizens have the right to satisfy their emotional needs at home). What is

more, it turns on the notion that voluntarily inviting others into the home extinguishes one's privacy rights. App. B at 20. But everyone does that. If that were true, no citizen's home would be free from unreasonable government intrusion. *Kyllo v. United States*, 533 U.S. 27, 31 (2001).

What the ICA's logic fails to appreciate is that the freedom of intimate association exists to protect just such things as personal privacy. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984) (intimate association is protected to safeguard other aspects of individual freedom). One vital aspect of that liberty is Young's right—for whatever reason—not to be forced to rent rooms in her home in a manner that violates her beliefs and refer prospective renters elsewhere. *Id.* at 619 (intimate association protects highly personal aspects of one's life like cohabitation). The ICA's opinion cites factors that apply to things like club meetings in public buildings. App. B at 21-22. But neither this Court nor the United States Supreme Court has ever applied that form of analysis to housemates. Decisions about whom a grandmother like Young shares her living room, bathroom rooms, family room, dining room, and bedrooms are profoundly different. They are much more intimate than group meetings about business and civic affairs that affects enterprising individuals' ability to succeed in life. "In the home ... *all* details are intimate details." *Kyllo*, 533 U.S. at 37; *id.* at 38 (citing as one example the "hour each night the lady of the house takes her daily sauna and bath"). That is not true of intimate associations formed elsewhere.

Intimate association rights are not restricted to families. *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987). So the fact that Young rents rooms to non-family members does not eradicate her freedom in this regard. Nor does Young keep the windows and doors of her private home open to the whole world like a large and highly public Rotary Club. *Id.* at 547. Renters do not indiscriminately walk in off the street but must reach an understanding with Young well in advance, which allows her to ensure that the spare rooms in her home are not needed by visiting family members or for some other purpose. It cannot be that Young's need to temporarily take in others to help pay the mortgage in order to keep her home of forty years deprives her of all constitutional protection. *Roommate.com*, 666 F.3d at 1218, 1220-22. For it is hard to imagine an association more intimate than that between housemates who share a living room, family room, dining room, kitchen, and bathrooms. *Id.* at 1221. Young's renters note her comings and goings, hear the music she listens to, and see the television programs she watches, as well as most other details of her private life. *Id.* More than that, they have access to Young's

person and her belongings at all times—even when she is asleep. *Id.* The freedom to exclude is at its apex when private citizens' homes, physical security, and personal property are at risk. *Id.*

At the end of the day, Young has the fundamental right to lay down rules for renting rooms in her own home. The ICA's logic would render it impossible for her to select renters compatible with her lifestyle. *Id.* And it would force Young to accept as housemates those whose activities or way of life conflict with her core religious beliefs. *Id.* That is "a serious invasion of privacy, autonomy, and security" that the state and federal constitutions forbid. *Id.*

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

Faith-based decisions about the morality of sleeping arrangements in one's family home are precisely the kind of personal choices that the state and federal Free Exercise Clauses were designed to protect. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring) (free exercise is essential to individual dignity and the realization of a self-definition shaped by religious precepts). This Court has not yet decided what standard generally applies under Article I, Section 4 of the Hawai`i Constitution. *Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan*, 87 Haw. 217, 247 n.31, 953 P.2d 1315, 1338 n.31 (1998). But particularly in this case, using the test laid down in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879 (1990), would be inappropriate. Not even the United States Supreme Court views the *Smith* standard as universally controlling. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 n.2 (2017) (distinguishing *Smith* and applying a different standard). And as Young explained below, the *Smith* test has been deemed insufficiently protective of religious liberty by judges and legislators across the nation in a variety of contexts. That is particularly true when Young's right to express her beliefs and establish her religious identity in her own home is at stake. *Hobby Lobby*, 1345 S. Ct. at 2785 (Kennedy, J., concurring).

Under Article I, Section 4 of the Hawai`i Constitution, forcing Young to allow renters to engage in activity that violates her faith in her own home will substantially burden her religious beliefs. One archetypical substantial burden is a law that pressures citizens to violate their faith to make ends meet. *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 140-41 (1987) (forcing a citizen to choose between fidelity to religious belief or cessation of work is a substantial burden). In this case, Young may either (1) remain true to her faith, stop renting rooms to anyone, and lose her home of forty years, or (2) rent three bedrooms in her home to make ends meet and

seriously violate the tenets of her faith. This pressure on Young to change her behavior and violate her beliefs is a classic substantial burden. *Id.* at 141; *Hobby Lobby*, 134 S. Ct. at 2778 (explaining that pressuring a believer to enable or facilitate what they view as an immoral act is a substantial burden on religion). It does not matter that Respondents view Young's religious beliefs as incorrect or unreasonable because the question is whether applying HRS § 489-3 would render it impossible for Young to select housemates "in accordance with [her] religious beliefs." *Hobby Lobby*, 134 S. Ct. at 2778; *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (explaining that the standard under the Religious Freedom Restoration Act and the pre-*Smith* are "comparable).

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

Another reason to apply strict scrutiny under *Smith* is the hybrid rights doctrine. Even neutral and generally applicable laws receive strict scrutiny when they implicate the free exercise of religion and other fundamental rights, such as equal protection, privacy, or freedom of association. *State v. Sunderland*, 115 Haw. 396, 168 P.3d 526, 532 (2007) (recognizing the hybrid rights doctrine applies when free exercise is implicated along with other core constitutional concerns); *Smith*, 494 U.S. at 881-82 (establishing the hybrid rights doctrine and citing free exercise and free association rights as an example). All that is necessary is for a claimant to show that free exercise interests are implicated alongside a colorable claim of the infringement of a companion right. *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999). Young's equal protection, privacy, and intimate association claims are more than colorable. *See supra* Parts II-IV. For this

reason and those detailed above, the ICA's opinion rightly assumed that strict scrutiny applies, but then applied the standard in an incorrect manner. App. B at 25.[1]

V. Respondents Cannot Prove that Forcing Young to Allow Others to Share a Bed in Her Home in a Manner That Violates Her Religious Beliefs is Narrowly Tailored to Further a Compelling State Interest.

The ICA's decision incorrectly applying the strict scrutiny test constitutes egregious error. No presumption of constitutionality adheres to laws that intrude upon fundamental freedoms. *Armitage*, 132 Haw. at 59, 319 P.3d at 1067 (citing *Sherbert v. Verner*, 374 U.S. 398, 404-07 (1963)). Young has shown that applying HRS § 489-3 would violate her equal protection, privacy, freedom of association, and free exercise rights. *See supra* Parts II-IV. Under strict scrutiny, this application of the law is "presumed to be *unconstitutional* unless the state shows compelling state interests which justify [the government's actions], and that the laws are narrowly drawn to avoid unnecessary abridgments of constitutional rights." *Armitage*, 132 Haw. at 59, 319 P.3d at 1067. There is no basis for requiring Young to make a plain, clear, manifest, and unmistakable showing that applying HRS § 489-3 here would violate the state or federal constitution. App. B at 19.

Respondents cannot merely show that strict scrutiny is satisfied at a high level of generality. They must demonstrate that applying HRS § 489-3 to Young—a grandmother seeking to rent three bedrooms in her family home and willing to refer those she cannot house to someone who will—serves a compelling interest. *Holt v. Hobbs*, 135 S. Ct. 853, 863 (2015) (explaining that broadly formulated interests are insufficient and that the government must have a compelling interest in applying the law to the person in question). Only concerns of the highest order will do. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). When state law leaves palpable damage to the government's interest unprohibited, that interest is not compelling and strict scrutiny is not satisfied. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993). In this case, the ICA reasoned that applying HRS § 489-3 to Young served the state's compelling interest in prohibiting discrimination in places of public accommodation. App. B at 27. But if that were true, all homeowners in Hawai`i would be prohibited from referring same-sex couples elsewhere, which is obviously not the case. The ICA's reasoning upheld homeowners' right to decline to rent to anyone—including same-sex couples—if they rent rooms "long term." App. B at 16-17. It is impossible to conclude that Hawai`i has a compelling interest in forcing Young to do something

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

that other homeowners may decline to do for any reason, whenever they like. *O Centro Espirita*, 546 U.S. at 433 (an exception leaves appreciable damage to a supposedly vital interest unprohibited is one way of showing that a law does not serve interests of the highest order). This is particularly true when the state's interest in ensuring that same-sex couples have access to public accommodations is more—not less—compelling when they are needed long term.

Just as importantly, Respondents must prove that forcing Young to violate her faith is narrowly tailored to serve the state's public-accommodation interests when hundreds of rooms in hotels, condos, and other homes in Honolulu are available for rent. The ICA's analysis failed to meaningfully address this point. App. B at 27. Yet narrow tailoring is a vital part of strict scrutiny that requires the state to show that it lacks other means of achieving its goals that are less burdensome on Young's fundamental rights. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 815 (2000). If a less heavy-handed course of action is available, the state must take it. *Id.* Respondents have never explained why it was not enough for Young to refer Cervelli and Bufford to another private homeowner in the same area who was happy to host them. That voluntary course of action clearly served both side's interests. But forcing Young to do so herself is a gratuitous requirement that suggests hostility towards her religious beliefs. *Lukumi*, 508 U.S. at 538 (the state cannot proscribe more religious conduct than is necessary to achieve legitimate ends).

CONCLUSION

Because Hawaii is an expensive place to live and a major travel destination, countless residents of Hawaii make ends meet by renting out rooms in their private homes. This Court should grant review to address the egregious flaws in the ICA's reasoning and to establish the legal rights and obligations of these homeowners. Young respectfully requests that the Court grant her application for writ of certiorari and hold that the plain text of HRS § 515-4(a)(2) protects her right to decide under what circumstances it is morally acceptable to rent rooms in her home. Alternatively, Young requests that this Court determine that forcing a grandmother to rent three bedrooms in her family home in a manner that violates her faith infringes her rights under the state and federal constitution to due process, equal protection, privacy, freedom of association, and the free exercise of religion, and fails strict scrutiny or any lesser form of review.

Dated: May 18, 2018

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

NO. CAAP-13-0000806

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

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

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

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

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

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

FOR THE COURT:

Acting Chief Judge

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

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IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

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DIANE CERVELLI and TAEKO BUFFORD,
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NO. CAAP-13-0000806

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

FEBRUARY 23, 2018

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

OPINION OF THE COURT BY NAKAMURA, C.J.

Defendant-Appellant Aloha Bed & Breakfast (Aloha B&B) is owned and operated by Phyllis Young (Young) as a sole proprietorship. Aloha B&B provides lodging to transient guests, averaging between one hundred and two hundred customers per year. Plaintiffs-Appellees Diane Cervelli (Cervelli) and Taeko Bufford (Bufford) (collectively, Plaintiffs), lesbian women in a

committed relationship, planned a trip to Hawai'i and sought lodging with Aloha B&B. Aloha B&B and Young refused to accommodate Plaintiffs' request for lodging based solely on their sexual orientation.

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

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

On appeal, Aloha B&B argues that the Circuit Court erred in ruling that it is liable for discriminatory practices under HRS Chapter 489. Aloha B&B maintains that because Aloha B&B operates its business out of Young's residence, the Circuit Court should have applied an exemption from prohibited

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

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

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

discriminatory practices in real property transactions set forth in HRS Chapter 515 for the rental of rooms by a resident. Alternatively, Aloha B&B argues that the application of HRS Chapter 489 to prohibit discriminatory practices under the circumstances of this case would violate Young's constitutional rights. Based on these arguments, Aloha B&B contends that the Circuit Court erred in granting Plaintiffs and the HCRC's motion for partial summary judgment and in denying Aloha B&B's motion for summary judgment. We affirm.

BACKGROUND

I.

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

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

Aloha B&B advertises its services to the general public through its own website as well as through multiple third-party websites. Aloha B&B's website, freely accessible through the internet, provides a phone number and email address for potential customers to contact Aloha B&B, and it contains graphics stating "Best Choice Hawaii Hotel" and "Best Choice Oahu Hotels." Aloha B&B also advertises through various bed-and-breakfast-related websites to generate more business for itself, including paying an annual fee of between $400 to $500 to BedandBreakfast.com.

II.

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

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

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

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

III.

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

IV.

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

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

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

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

The Circuit Court granted Plaintiffs and the HCRC's motion for partial summary judgment with respect to liability and declaratory and injunctive relief, and it denied Aloha B&B's cross-motion for summary judgment as moot. In its Summary Judgment Order,[5/] the Circuit Court found that:

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

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

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

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

The Circuit Court entered its Summary Judgment Order on April 15, 2013. The parties subsequently submitted a stipulated application to file an interlocutory appeal from the Summary Judgment Order, which the Circuit Court granted.

DISCUSSION

I.

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

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

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

A.

The statutory provisions relevant to this appeal are as follows.

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

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

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

> "Place of public accommodation" means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the general public as customers, clients, or visitors. By way of example, but not of limitation, place of public accommodation includes facilities of the following types:
>
> (1) A facility providing services relating to travel or transportation; [or]
>
> (2) An inn, hotel, motel, or other establishment that provides lodging to transient guests;
>
> . . . .
>
> "Sexual orientation" means having a preference for heterosexuality, homosexuality, or bisexuality, having a history of any one or more of these preferences, or being identified with any one or more of these preferences.

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

> It is a discriminatory practice for an owner or any other person engaging in a real estate transaction, or for a real estate broker or salesperson, because of race, sex, including gender identity or expression, sexual orientation,

> color, religion, marital status, familial status, ancestry, disability, age, or human immunodeficiency virus infection:
>
> (1) To refuse to engage in a real estate transaction with a person;
>
> . . . .[5/]

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

> (a) Section 515-3 does not apply:
>
> . . .
>
> (2) To the rental of a room or up to four rooms in a housing accommodation by an owner or lessor if the owner or lessor resides in the housing accommodation.[7/]

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

> "Housing accommodation" includes any improved or unimproved real property, or part thereof, which is used or occupied, or is intended, arranged, or designed to be used or occupied, as the home or residence of one or more individuals.
>
> . . . .
>
> "Real estate transaction" includes the sale, exchange, rental, or lease of real property.
>
> "Real property" includes buildings, structures, real estate, lands, tenements, leaseholds, interests in real estate cooperatives, condominiums, and hereditaments, corporeal and incorporeal, or any interest therein.

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

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

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

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

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

B.

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

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

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

C.

Having identified the statutory provisions at issue and the established principles for statutory interpretation, we proceed to consider the parties' statutory interpretation claims. We conclude that the Circuit Court properly ruled that there are no material facts in dispute and that Aloha B&B violated HRS

§ 489-3 by discriminating against Plaintiffs on the basis of their sexual orientation.

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

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

More importantly, the statutory definition of "place of public accommodation" specifically includes, "[b]y way of example, but not of limitation," "[a]n inn, hotel, motel, or other establishment that provides lodging to transient guests[.]"

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

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

When the plain language of the statutory definition of "place of public accommodation" is liberally construed to further the anti-discrimination purposes of HRS Chapter 489, it reinforces our firm conclusion that Aloha B&B is a place of public accommodation. We conclude that the Circuit Court correctly ruled that Aloha B&B constitutes a place of public accommodation that is subject to HRS Chapter 489. It is undisputed that Aloha B&B refused to provide Plaintiffs with lodging on the basis of their sexual orientation. Therefore, we affirm the Circuit Court's determination that Aloha B&B violated

HRS § 489-3 by discriminating against Plaintiffs on the basis of their sexual orientation.[8/]

D.

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

1.

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

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

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

construed according to the fair import of its terms and shall be liberally construed." HRS § 515-1 (2006).

By providing remedies for discrimination and the injuries caused by discrimination, HRS Chapter 489 and HRS Chapter 515 are remedial statutes.[10/] "Remedial statutes are liberally construed to suppress the perceived evil and advance the enacted remedy." Flores v. United Air Lines, Inc., 70 Haw. 1, 12, 757 P.2d 641, 647 (1988) (internal quotation marks, citation, and brackets omitted). In addition, "exceptions to a remedial statute should be narrowly construed[.]" EEOC v. Borden's, Inc., 551 F.Supp. 1095, 1110 (D. Ariz. 1982); see State v. Russell, 62 Haw. 474, 479-80, 617 P.2d 84, 88 (1980) ("The importation of exceptions into statutes properly affected with a public interest is not lightly to be made. . . . It is a well settled rule of statutory construction that exceptions to legislative enactments must be strictly construed."); United States v. Columbus Country Club, 915 F.2d 877, 883 (1990) (construing exemptions to federal Fair Housing Act narrowly). Accordingly, we liberally construe the scope of the protection against discrimination provided by HRS Chapter 489, and we narrowly or strictly construe the scope of the exemption from prohibited discrimination provided by HRS § 515-4(a)(2).

The Hawai'i Legislature's actions in omitting a "Mrs. Murphy" exemption when it enacted HRS Chapter 489 indicates its intent that no such exemption would apply to discrimination in public accommodations and the type of conduct engaged in by Aloha B&B in this case. The "Mrs. Murphy" exemption in HRS Chapter 515 was enacted in 1967. See 1967 Haw. Sess. Laws Act 193, § 4 at 196. Almost twenty years later, the Hawai'i Legislature enacted HRS Chapter 489, which was patterned after the public

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

accommodation provisions of the federal 1964 Civil Rights Act. See State v. Hoshijo ex rel. White, 102 Hawai'i 307, 317-18, 76 P.3d 550, 560 (2003). The federal public accommodation provisions contain the "Mrs. Murphy" exemption in the provision defining a "place of public accommodation" to include an "establishment which provides lodging to transient guests[.]" See 42 U.S.C. § 2000a(b)(1). Although the corresponding Hawai'i provision adopts portions of the federal provision word for word, the "Mrs. Murphy" exemption is conspicuously omitted from the Hawai'i provision.

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

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

We conclude that the Hawai'i Legislature's omission of the "Mrs. Murphy" exemption in enacting HRS Chapter 489 provides persuasive evidence that it did not intend such an exemption to apply to establishments, like Aloha B&B, that provide lodging to transient guests. We also conclude that Congress' inclusion of the "Mrs. Murphy" exemption is instructive, for it demonstrates that Congress believed that a person's residence may constitute a "place of public accommodation" as an "establishment which provides lodging to transient guests." If a person's residence could not constitute a place of public accommodation, then the

"Mrs. Murphy" exemption would not be necessary in the federal public accommodation provision. Congress' inclusion of the "Mrs. Murphy" exemption in the federal public accommodation law supports our conclusion that a place of public accommodation includes a bed and breakfast business, like Aloha B&B, that uses the proprietor's residence to provide lodging to transient guests.

2.

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

In enacting the HRS § 515-4(a)(2) exemption in 1967, the Legislature referred to it as the "tight living" exemption. See H. Stand. Comm. Rep. No. 874, in 1967 House Journal, at 819. Furthermore, in amending HRS Chapter 515 in 2005 to add sexual orientation to the types of discrimination precluded by HRS § 515-3, the Legislature described the "Mrs. Murphy" exemption set forth in HRS 515-4(a)(2) as follows: "Housing laws presently permit landlords to follow their individual value systems in selecting tenants to live in the landlords' own homes[.]" 2005 Haw. Sess. Laws Act 214, § 1 at 688 (emphasis added). This characterization of the "Mrs. Murphy" exemption indicates that the Legislature understood the exemption to apply to longer-term

living or housing arrangements -- where a landlord-tenant relationship would be established. See State v. Sullivan, 97 Hawai'i 259, 266, 36 P.3d 803, 810 (2001) ("'[S]ubsequent legislative history or amendments' may be examined in order to confirm our interpretation of statutory provisions." (citation omitted)).

Here, Aloha B&B admitted that it provides lodging to transient guests and that no landlord-tenant relationship is established during the guests' short-term stays. Construing the phrase "rental of a room" for purposes of HRS § 515-4(a)(2) to exclude short-term lodging provided to transient guests and as applying only to longer-term living arrangements would serve the Legislature's purposes for enacting both HRS Chapter 489 and HRS § 515-4(a)(2). It would advance the Legislature's goal of prohibiting discrimination in public accommodations, while permitting landlords "to follow their individual value systems" in selecting a tenant who will reside with them on a longer-term basis in their own homes. This construction would also avoid any irreconcilable conflict between HRS Chapter 489 and HRS § 515-4(a)(2). See State v. Vallesteros, 84 Hawai'i 295, 303, 933 P.2d 632, 640 (1997) ("[W]here the statutes simply overlap in their application, effect will be given to both if possible, as repeal by implication is disfavored." (block quote format and citation omitted)).

3.

But even if there were an irreconcilable conflict between HRS Chapter 489 and HRS § 515-4(a)(2), we conclude that Chapter 489 would control as it is the more specific statute with respect to Aloha B&B and Aloha B&B's actions that are at issue in this case. See id. ("[W]here there is a 'plainly irreconcilable' conflict between a general and a specific statute concerning the same subject matter, the specific will be favored." (block quote format and citation omitted)). The plain language of HRS Chapter 489 specifically applies to and governs an "establishment that

provides lodging to transient guests." See HRS § 489-2. This language perfectly describes Aloha B&B. HRS Chapter 489 also directly addresses the precise conduct at issue in this case -- the discriminatory refusal by a public accommodation establishment to provide lodging to transient guests based on their sexual orientation. See HRS § 489-3. HRS § 515-4(a)(2), on the other hand, applies more generally to the "rental of rooms," without specifying the time period involved or whether the provision of lodging to transient guests is covered. We conclude that HRS Chapter 489 is the more specific statute regarding the subject matter of this case.[11/]

II.

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

We review "questions of constitutional law *de novo*, under the right/wrong standard," and we "answer questions of constitutional law by exercising [our] own independent judgment based on the facts of the case. Malahoff v. Saito, 111 Hawai'i

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

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

A.

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

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

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

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

Aloha B&B also argues that the right to privacy has special force in a person's own home. However, given Young's choice to use her home for business purposes as a place of public accommodation, it is no longer a purely private home. "The more an owner, for [her] advantage, opens [her] property for use by the public in general, the more do [her] rights become circumscribed by the statutory and constitutional rights of those who use it." State v. Viglielmo, 105 Hawai'i 197, 206, 95 P.3d 952, 961 (2004) (internal quotation marks and citation omitted). In addition, the State retains the right to regulate activities occurring in a home where others are harmed or likely to be harmed. See State v. Kam, 69 Haw. 483, 492, 748 P.2d 372, 378 (1988); Mueller, 66 Haw. at 618-19, 628, 671 P.2d at 1353-54, 1359 (finding no privacy right to engage in prostitution in one's home). Aloha B&B's discriminatory conduct caused direct harm to Plaintiffs and threatens to harm other members of the general public.

The privacy right implicated by this case is not the right to exclude others from a purely private home, but rather the right of a business owner using her home as a place of public accommodation to use invidious discrimination to choose which customers the business will serve. "The Constitution does not guarantee a right to choose employees, customers, suppliers, or

those with whom one engages in simple commercial transactions, without restraint from the State." Roberts, 468 U.S. at 634 (O'Connor, J., concurring). We conclude that Young's asserted right to privacy did not entitle her to refuse to provide Plaintiffs with lodging based on their sexual orientation and that the application of HRS Chapter 489 to prohibit such discriminatory conduct does not violate her right to privacy. See Mueller, 66 Haw. at 618-19, 628, 671 P.2d at 1353-54, 1359.

B.

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

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

The Supreme Court specifically referred to family relationships to exemplify and to suggest limitations on the kinds of relationships entitled to constitutional protection. Id. at 619. The factors relevant for a court to consider in determining whether a particular relationship is entitled to protection are "the group's size, its congeniality, its duration, the purposes for which it was formed, and the selectivity in choosing participants." IDK, Inc. v. Clark County, 836 F.2d 1185, 1193 (9th Cir. 1988).

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

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

With respect to the purpose for which the relationship is formed, Aloha B&B forms relationships with its customers for commercial, business purposes, and it is only the commercial aspects of the relationship that HRS Chapter 489 regulates.

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

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

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

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

engaged in by Aloha B&B in this case does not violate Young's right to intimate association.

C.

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

The Free Exercise Clause of the First Amendment, which is applicable to the States through the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const., amend. I. (emphasis added). The protections of the Free Exercise Clause apply to laws that target religious beliefs or religiously motivated conduct. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532-34 (1993). However, the Supreme Court has held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872, 879 (1990) (citation omitted). In Smith, the Supreme Court further held that neutral laws of general applicability need not be justified by a compelling governmental interest even when they have the incidental effect of burdening a particular religious practice. Id. at 882-85.[13/]

[13/] The Supreme Court explained:

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

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

Under Smith, to withstand a challenge based on the Free Exercise Clause of the First Amendment, a neutral state law of general applicability that has the incidental effect of burdening a particular religious practice need not be justified by a compelling state interest, but need only satisfy the rational basis test.[14/] Aloha B&B does not dispute that HRS Chapter 489 is a neutral law of general applicability. However, it argues that we should depart from Smith, impose a compelling state interest requirement, and apply strict scrutiny in deciding its free exercise claim under the Hawai'i Constitution.[15/]

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

[14/] In response to the Supreme Court's decision in Smith, Congress passed the Religious Freedom Restoration Act of 1993 (RFRA), which prohibits government from substantially burdening the exercise of religion, even through a neutral law of general applicability, unless the government can show that the law was in furtherance of a compelling government interest and was the least restrictive means of furthering that interest. See City of Boerne v. Flores, 521 U.S. 507, 515-16 (1997). In City of Boerne, however, the Supreme Court invalidated the RFRA as it applied to the States. Id. at 511, 536. Thus, with respect to state laws, the Smith standard generally applies to claims under the Free Exercise Clause of the First Amendment. See Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan, 87 Hawai'i 217, 246 & n.31, 953 P.2d 1315, 1344 & n.31 (1998).

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

Hogan, 849 F.3d 114, 133 (4th Cir. 2017) (en banc) ("To satisfy strict scrutiny, . . . the challenged law [must be] 'narrowly tailored to achieve a compelling governmental interest.'" (citation omitted)).

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

Aloha B&B asserts that based on Young's religion, she believes that sexual relations between individuals of the same sex are immoral; that providing a room to a same-sex couple would serve to facilitate conduct she believes is immoral; and thus requiring her to provide lodging to Plaintiffs and other same-sex couples would impose substantial burdens on her free exercise of religion. Plaintiffs have not challenged the sincerity of Young's religious beliefs, but argue that Aloha B&B cannot show a substantial burden on Young's religion. Plaintiffs argue that Young's religious beliefs do not compel her to operate a bed and breakfast business. They also assert that Young can still use her home to generate income without any alleged conflict between her religious beliefs and the law by relying on the "Mrs. Murphy" exemption in HRS Chapter 515 and renting out rooms to tenants seeking long-term housing.

Assuming, without deciding, that Aloha B&B established a prima facie case of substantial burden to Young's exercise of religion, we conclude that the application of HRS Chapter 489 to

Aloha B&B's conduct in this case satisfies the strict scrutiny standard. As previously discussed, Hawai'i has a compelling state interest in prohibiting discrimination in public accommodations. The Hawai'i Legislature has specifically found and declared that "the practice of discrimination because of . . . sexual orientation . . . in . . . public accommodations . . . is against public policy." HRS § 368-1 (2015). Discrimination in public accommodations results in a "stigmatizing injury" that "deprives persons of their individual dignity" and injures their "sense of self-worth and personal integrity." Roberts, 468 U.S. at 625; King, 656 P.2d at 352, cited in Hoshijo ex rel. White, 102 Hawai'i at 317 n.22, 76 P.3d at 560 n.22. Aloha B&B itself has acknowledged that "in places of public accommodation discrimination is a horrible evil."

HRS Chapter 489 is narrowly tailored to achieve Hawai'i's compelling interest in prohibiting discrimination in public accommodations. See Roberts, 468 U.S. at 626 (holding that Minnesota, in applying its public accommodations statute to prohibit the Jaycees from discriminating against women, advanced its interest "through the least restrictive means of achieving its ends"). HRS Chapter 489 "responds precisely to the substantive problem [of discrimination in public accommodations] which legitimately concerns the State." Id. at 629 (internal quotation marks and citation omitted). Because the application of HRS Chapter 489 to Aloha B&B's discriminatory conduct in this case satisfies even strict scrutiny, Aloha B&B is not entitled to relief on its free exercise claim.[16/]

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

CONCLUSION

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

Craig H. Nakamura

On the briefs:

Shawn A. Luiz
James Hochberg
for Defendant-Appellant

Joseph P. Infranco
Joseph E. La Rue
(Alliance Defending Freedom)
for Defendant Appellant

Jay S. Handlin
Linsay N. McAneeley
(Carlsmith Ball LLP)
Peter C. Renn
(Lambda Legal Defense and
Education Fund, Inc.)
For Plaintiffs-Appellees

Robin Wurtzel
Shirley Naomi Garcia
April L. Wilson-South
(Hawai'i Civil Rights Commission)
for Plaintiff-Intervenor-Appellee

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

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

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

APPEARANCES:

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

ROBIN WURTZEL, For Plaintiff-Intervenor
ATTORNEY AT LAW

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

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

THURSDAY, MARCH 28, 2013; HONOLULU, HAWAII

--o0o--

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

Counsel, may I have your appearances.

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

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

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

THE COURT: All right. Good morning.

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

MR. LA RUE: Good morning, Your Honor.

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

THE COURT: All right. Good morning.

Good morning, Mr. and Mrs. Young.

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

No. _____

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

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

vs.

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

and

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

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

CERTIFICATE OF SERVICE

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

TO: LINDSAY N. MCANEELEY *Via JEFS and/or U.S. Mail*
CARLSMITH BALL LLP
ASB Tower, Suite 2200
1001 Bishop Street
Honolulu, Hawai'i 96813
Attorney for Respondents/Plaintiffs-Appellees

PETER C. RENN *Courtesy copy to Pro Hac Vice Counsel*
Lambda Legal Defense and Education Fund, Inc.
3325 Wilshire Blvd., Suite 1300
Los Angeles, California 90010
Pro Hac Vice Counsel for Respondents/Plaintiffs-Appellees

ROBIN WURTZEL
SHIRLEY NAOMI GARCIA
APRIL L. WILSON-SOUTH
Hawai'i Civil Rights Commission
830 Punchbowl Street, Room 411
Honolulu, Hawaii 96813

Via JEFS and/or U.S. Mail

Attorneys for Respondent/Intervenor-Appellee

Dated: Honolulu, Hawai'i, May 18, 2018.

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