NO. 18-451

IN THE

Supreme Court of the United States

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

v.

DIANE CERVELLI AND TAEKO BUFFORD,
Respondents,

v.

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

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

REPLY BRIEF FOR PETITIONER

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CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement in the Petition for a Writ of Certiorari remains unchanged.

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INTRODUCTION

The Commission and Individual Respondents' joint campaign to punish Mrs. Young for her Catholic beliefs about sex and marriage continues. And their palpable hostility toward her faith shows. The Commission cannot even bring itself to admit that this case is about Mrs. Young' s ability to live out her faith in her home, a home filled with memories of the husband she recently lost. Now more than ever, she can ill afford to pay hundreds of thousands of dollars in damages, fines, and attorney fees simply for remaining true to her Christian faith.

Respondents largely avoid contesting the merits of the petition. Instead, they incorrectly characterize the decision below as non-appealable, and they rely on inapplicable waiver theories. This Court should reject those gambits, grant review, and vindicate Mrs. Young's First and Fourteenth Amendment rights, rights which should not be diminished simply because the Commission despises Mrs. Young's Catholic beliefs.

ARGUMENT

I. No procedural obstacle bars this Court from reviewing the Hawai`i Court of Appeals' decision in Mrs. Young's case.

Neither a lack of finality nor waiver justify denying the petition and leaving the State's constitutional violations unremedied.

A. The Hawai`i Court of Appeals' decision is "final" under *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975).

Individual Respondents contend that the Hawai`i Court of Appeals' ruling is not a "final judgment." Cervelli & Bufford Br. in Opp. ("C.B. Br.") 13–15. But *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), recognized four instances in which no strictly final-state-court judgment is required. *See also Duquesne Light Co.* v. *Barasch*, 488 U.S. 299, 306–07 (1989). Mrs. Young's case falls neatly into the first two. *Cf. ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 611–12 (1989).

The Hawai`i Court of Appeals resolved all legal issues in this case in Respondents' favor. Unless this Court finds a due-process or free-exercise violation, all that remains is for the trial court to decide how much Mrs. Young must pay in compensatory, treble, and punitive damages, statutory fines, and (likely ruinous) attorney fees and costs. Mrs. Young's federal claims are "conclusive," and absent this Court's intervention "the outcome of further proceedings [is] preordained." *Cox*, 420 U.S. at 479. Similarly, nothing related to awarding Respondents damages, fines, and attorney fees and costs is capable of "foreclos[ing]" or making "unnecessary" this Court's resolution of Mrs. Young's federal claims. *Id.* at 480.

Individual Respondents' speculate that Mrs. Young could appeal a limitations argument that the trial court rejected, a defense Respondents contest and say is waived. C.B. Br.13–14. But doing so would be plainly futile given the Hawai`i courts' resolve to punish Mrs. Young, seeing how they have already penalized her under a never-before-announced rule.

B. Waiver doctrine does not apply to Mrs. Young's fair-notice and *Masterpiece* arguments and would not bar this Court from considering them even if it did.

Respondents' core defense is that Mrs. Young did not preserve her fair-notice and *Masterpiece* arguments. Hawai`i Civil Rights Comm'n Br. in Opp. ("Comm'n Br.") 11–13, 23–24; C.B. Br.15–17, 26–27. These contentions ignore the nature of Mrs. Young's claims and the realities of her case.

Fair Notice. The petition explains that nothing in Hawai`i law in 2007 gave Mrs. Young fair warning that the Mrs. Murphy exemption did *not* protect her until the Hawai`i Court of Appeals narrowed that provision for the first time in this case, applying a newly-constricted reading to punish her 11 years after the fact. Pet.13–18. While the Hawai`i courts are free to misinterpret the Mrs. Murphy exemption's plain text, they cannot retroactively punish Mrs. Young based on such a new and unforeseeable reading. "[R]etroactive imposition of liability" is not subject to "waiver" doctrine. *Pennsylvania* v. *Union Gas. Co.*, 491 U.S. 1, 44 n.2 (1989) (Scalia, J., concurring in part and dissenting in part). The fair-warning issue did not even arise until the Hawai`i Court of Appeals ruled. Failure to raise a "then non-existent issue" at summary judgment does not waive a claim "once it [does] come into existence." *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416, 427–28 (1947).

Raising the fair-notice argument sooner was not an option because the trial court did not rule on any of Mrs. Young's statutory and constitutional claims; it denied her summary-judgment motion as "moot." App.44a. It did not address the Mrs. Murphy exemption at all, let alone exclude Mrs. Young from its scope; the Hawai`i Court of Appeals did. Mrs. Young's application to the Hawai`i Supreme Court was her first opportunity to make a fair-warning argument, and she promptly raised that claim, App.139a–41a, 146a–47a, preserving it for this Court's review, *Curtis Publ'g Co.* v. *Butts*, 388 U.S. 130, 142–45 (1967) (plurality); *Herndon* v. *Georgia*, 295 U.S. 441, 443–44 (1935). That Respondents would push such a fatuous waiver argument speaks volumes about their view of Mrs. Young's Catholic beliefs.

Respondents also misunderstand the "pressed or passed upon below" standard. When parties enlarge issues previously raised or present questions closely connected in substance to preserved issues, their arguments count as "pressed." *Illinois* v. *Gates*, 462 U.S. 213, 219–20 (1983). Mrs. Young asserted an irreconcilable conflict between Hawai`i's Mrs. Murphy exemption and its public-accommodations law at every stage. *E.g.*, App. 21a–23a; Opening Br. of Def.-Appellant ("Opening Br.") at 11–12; Mem. in Supp. of Def.'s Mot. for Summ. J. 7–8. A lack of fair warning that the public-accommodations law applied to Mrs. Young is a direct result of, and inextricably tied to, that conflict. *United States* v. *Tonawanda Coke Corp*, 636 Fed. App'x 24, 27 (2d Cir. 2016) (asserting "insoluble statutory ambiguity" preserves a "fair-notice argument").

Nor is Mrs. Young's due-process argument new. She long cautioned that ignoring the direct conflict between Hawai`i's Mrs. Murphy exemption and public-accommodations law would violate due process. App.69a, 125a, Opening Br.18, 21; Def.'s Reply Mem. to Def.'s Mot. for Summ. J. 5. But the Hawai`i Court of Appeals punished her anyway, retroactively and without notice. Pet.12–30. Once that violation materialised, Mrs. Young promptly raised a fair-warning argument. Nothing required her to assume that Hawai`i courts would violate the Fourteenth Amendment from the start. *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U.S. 673, 677–78 (1930). And although Mrs. Young's claim is not waived, this Court corrects even unpreserved errors in the due-process context. *Wood* v. *Georgia*, 450 U.S. 261, 264–65 (1981); *Vachon* v. *New Hampshire*, 414 U.S. 478, 479–80 (1974).

Masterpiece. Respondents' waiver argument regarding Mrs. Young's free-exercise claim is equally flawed. They fault Mrs. Young for not raising a claim based on *Masterpiece Cakeshop, Ltd* v. *Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), years before this Court issued that decision. Such clairvoyance is not required, as this Court recently confirmed. *Arlene's Flowers, Inc.* v. *Washington*, 138 S. Ct. 2671, 2671–72 (2018) (granting the petition, vacating the judgment, and remanding in light of *Masterpiece*).

Masterpiece did not merely repeat *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993). *Masterpiece* expanded *Lukumi* by holding that state civil rights commissions and courts cannot pass "judgment upon or presuppose[] the illegitimacy

of religious beliefs and practices." 138 S. Ct. at 1731. And it broadly condemned any "signal of official disapproval of [Mrs. Young's] religious beliefs" or any government "practice [that] disfavor[s] the religious basis of [her] objection." *Ibid.* *Lukumi* had nothing to do with a religious objection. Mrs. Young raised *Masterpiece* at her earliest opportunity: her reply brief in the Hawai`i Supreme Court. App.148a–50a.

Moreover, parties may make any contention that supports a preserved federal claim: they "are not limited to the precise arguments they made below." *Lebron* v. *Nat'l R.R. Passenger Corp*, 513 U.S. 374, 379 (1995) (cleaned up). Mrs. Young's reliance on *Masterpiece* is "a new argument to support what has been [her] consistent claim"—punishing her under Hawai`i's public-accommodations law violates the Free Exercise Clause. *Ibid.* Because Mrs. Young raised a federal free-exercise claim at every stage, App.67a, 72a, 79a, 91a–92a, 125a–26a, 142a–45a, 148a–50a, her *Masterpiece* argument is preserved.

C. No adequate and independent state ground bars this Court's review of Mrs. Young's federal constitutional claims.

Respondents half-heartedly argue that adequate and independent state grounds resulted in Mrs. Young waiving her federal constitutional claims. Comm'n Br.12–13; C.B. Br.15–17. Not so. Mrs. Young raised her fair-warning and *Masterpiece* arguments with fair precision in due time. *Supra* Part I.B. Any state-law rule that would forfeit them is plainly "inadequate." *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 85 n.9 (1980).

Respondents contend that Mrs. Young's briefing before the Hawai`i Supreme Court gave state courts a sufficient opportunity to address this Court's decision in *Masterpiece*. Comm'n Br.28; C.B. Br.33. But if that is true of Mrs. Young's *Masterpiece* claim, it is true of her fair-warning argument as well.

Nor are Hawai`i courts' preservation rules as strict as Respondents suggest. Like this Court, Hawai`i appellate courts address issues that are implicitly raised. *Ueoka* v. *Szymanski*, 114 P.3d 892, 900 n.9 (Haw. 2005); *Kie* v. *McMahel*, 984 P.2d 1264, 1268 (Haw. Ct. App. 1999). They even decide unpreserved issues, particularly when reviewing summary-judgment rulings that implicate a novel or constitutional claim, *e.g.*, *Earl M. Jorgensen Co.* v. *Mark Constr., Inc.*, 540 P.2d 978, 985 (1975); *Fujioka* v. *Kam*, 514 P.2d 568, 569–70(1973). It is wrong for Respondents to suggest that Mrs. Young's claims were beyond the Hawai`i courts' reach. Raising such an unfounded argument merely confirms the Commission's hostility towards her beliefs.

II. Respondents' merits arguments confirm that (1) Mrs. Young lacked fair warning that the public-accommodations law applied to her, and (2) courts are in conflict regarding federal due-process precedent.

Mrs. Young had no way of anticipating the Hawai`i Court of Appeals ruling 11 years beforehand. So Respondents contend that their reading of Hawai`i law was inevitable. But not even the Hawai`i courts believed that. And far from throwing doubt on the conflict between Hawai`i and federal fair-warning precedent, Respondents' arguments confirm it.

A. Even the Hawai`i Court of Appeals rejected Respondents' contention that their biased reading of Hawai`i law is the only possible option.

Respondents' only answer to the merits of Mrs. Young's due-process claim is that the public-accommodations law's text gave her all the notice required. Comm'n Br.15–17; C.B. Br.17–19. But choosing to ignore the direct conflict between Hawai`i's public-accommodation law and its Mrs. Murphy exemption is biased and unjustifiable.

The Hawai`i Court of Appeals was far more candid. It admitted that state law was ambiguous, App.14a, because the public-accommodations law and real-property-transaction law "overlap in their application," App.23a (cleaned up). The court spilled much ink explaining how it could "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," App.21a. Narrowing the Mrs. Murphy exemption was unnecessary if no statutory conflict existed and the public-accommodation law obviously controlled.

That the Hawai`i Court of Appeals' rejected Respondents' unjust reading is not surprising, given what the law actually says. Ordinary people do not think of family homes as "public accommodations" or "establishments" regardless of whether their owners rent rooms. App.117a ("I don't consider my home an establishment."). Before oral argument in the trial

court, the Commission's *own website* explained that Hawai`i's public-accommodation law applied to "public property," not private homes. Opening Br.2. Nothing in state law in 2007 gave Mrs. Young fair warning that the Commission would change position and start a campaign to label the home in which she lived most of her married life and raised her children a "place of public accommodation."

Respondents' attempts to explain away the Mrs. Murphy exemption are no more credible. Comm'n Br.17–19; C.B. Br.20–21. They make the outlandish claim that Mrs. Young could not possibly qualify for the Mrs. Murphy exemption because Ms. Cervelli and Ms. Bufford did not wish to use her home as their long-term residence. That gets things entirely backwards. Mrs. Young believed the Mrs. Murphy's exemption applied to her because the home where she has lived for 40 years is *her* residence. That Mrs. Young's perspective is the relevant one is confirmed by HRS § 515-4(a)(2), which exempts renting rooms "in a housing accommodation by an individual if the individual resides therein." App.65a. Respondents also harp on a (non-statutory) description of the Mrs. Murphy exemption as meant for those engaged in "tight living," which does not help their argument. Mrs. Young lives in close proximity to renters in her home whether they stay three months or a week.

In short, Respondents' attempts to deny any statutory ambiguity ring hollow and confirm that vagueness pervaded Hawai`i law when Mrs. Young respectfully referred Ms. Cervelli and Ms. Bufford to a nearby friend for lodging.

B. Hawai`i courts' refusal to ensure that Mrs. Young had fair warning of the public-accommodation law's scope directly conflicts with federal precedent.

Respondents allege that Hawai`i courts apply the proper vagueness standard to civil laws and that no conflict exists between their rulings and those of federal courts. Comm'n Br.14–22; C.B. Br.22–26. But their briefing proves the opposite.

This Court's decision in *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), mandates a strict vagueness test for civil laws that (1) are quasi-criminal, and have a prohibitory and stigmatizing effect, or (2) impede the exercise of constitutional rights. *Id.* at 499. But Respondents do not cite a single Hawai`i case that relies on *Hoffman Estates* or applies a strict vagueness standard to civil laws. They allude only to a few Hawai`i cases that treat *A.B. Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233 (1925), as this Court's last word on the subject. Comm'n Br.14; C.B. Br.26.

A.B. Small did *not* apply a strict vagueness standard; rather, it applied the lowest bar possible, a test of incomprehensibility. 267 U.S. at 239. Because Hawai`i courts viewed that 93-year-old decision as controlling, they refused to address Mrs. Young's fair-warning argument. Virtually no law fails the *A.B. Small* test, and Hawai`i courts refused to accept that the Due Process Clause may demand more. Federal courts do, as the petition describes. Pet.26–30.

Respondents' efforts to distinguish those federal cases fall flat because they rely on factual minutiae that have no bearing on the level of fair-warning the Constitution requires. The clear import of Respondents' arguments is that a strict vagueness test should *never* apply to civil laws, which is simply a quarrel with this Court's precedent.

To the extent Respondents do engage *Hoffman Estates*, their arguments are meritless. Hawai`i's public-accommodation law subjects Mrs. Young to compensatory, treble, and punitive damages awards, statutory fines up to $10,000, and attorney fees and costs for seven years of litigation. App.58a–59a, 62a, 66a. Those are "significant penalties" under any definition. And *Masterpiece* proves that Mrs. Young did not waive her constitutional rights by engaging in business. 138 S. Ct. 1731–32.

III. Respondents' *ipse dixit* cannot mask the State's hostility towards Mrs. Young's Catholic beliefs or weaken the strength of her *Masterpiece* claim.

The Commission proclaims that nothing it "did or said evidenced even a shred of religious hostility" towards Mrs. Young. Comm'n Br.22. But the record speaks for itself. Mrs. Young raised both a Mrs. Murphy and free-exercise defense in the administrative proceedings but the Commission turned a deaf ear. App.81a-84a. At every level of the state court system, the Commission filed joint briefs with the Individual Respondents citing Mrs. Young's Catholic beliefs as a reason to punish her. Time and again, it condemned Mrs. Young for paraphrasing the Old Testament and agreeing with the Letter to the

Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons. Respondents/Pls.-Appellees' Resp. to Application for a Writ of Certiorari 2; Answering Br. of Pl.'s-Appellees & Pl.-Intervenor-Appellee 5; Mem. in Supp. of Pls. & Pl.-Intervenor's Mot. for Partial Summ. J. ("Pl.'s Summ. J. Memo.") 4. The Commission's attacks on Mrs. Young's Catholic beliefs ceased only when the case reached this Court.

Previously, the Commission and Individual Respondents boasted that they jointly "prosecuted" Mrs. Young "to make clear" that the State would not tolerate any "anti-gay conduct . . . motivated by [her] religious beliefs." Pl.'s Summ. J. Memo. 4. This synchronised campaign included forcing Mrs. Young to undergo an inquisition about whether she agreed with passages from the New Testament and Catholic Catechism. App.97a–103a. State judicial proceedings compelled Mrs. Young to affirm that she believes "everything in the Bible" and "everything that the Catholic church teaches." App.97a, 103a.

The Commission then used Mrs. Young's fidelity to Catholic teachings as incriminating evidence. App.84a, 86a; Comm'n Interview of Phyllis Young 6. It even likened Mrs. Young to the racist owner of "a lunch counter" who refuses to serve "African-American customer[s]" food and drink. Pls. & Pl.-Intervenor's Reply in Supp. of Mot. for Partial Summ. J. 1.

Masterpiece held that it violates the Free Exercise Clause for any government official to "act in a manner that passes judgment upon or presupposes the illegitimacy of [Mrs. Young's] religious beliefs and

practices." 138 S. Ct. at 1731. The Commission's conduct fails squarely within that prohibition.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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