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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

DIANE CERVELLI and TAEKO BUFFORD,

Plaintiffs, and

WILLIAM D. HOSHIJO, as Executive Director of the Hawai'i Civil Rights Commission,

Plaintiff-Intervenor,

vs.

ALOHA BED & BREAKFAST, a Hawai'i sole proprietorship,

Defendant.

CIVIL NO. 11-1-3103-12 ECN
(Other Civil Action)

PLAINTIFFS AND PLAINTIFF-INTERVENOR'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; DECLARATION OF JAY S. HANDLIN; EXHIBIT A; CERTIFICATE OF SERVICE

HEARING MOTION

JUDGE: Edwin C. Nacino
HEARING DATE: Mar. 28, 2013
HEARING TIME: 9:00 a.m.
TRIAL: Nov. 4, 2013

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PLAINTIFFS AND PLAINTIFF-INTERVENOR'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This lawsuit revolves around the commercial activities of a business. Like any other business, it was created and continues to be operated for the purpose of generating profit. In order to generate profit, it avails itself of the commercial marketplace by inviting the general public to patronize its offerings as customers. It is a successful business, too. Hundreds of customers have walked through its doors and paid for its services, and its proprietor has directly benefited as a result.

The doors of this business were barred to Diane Cervelli and Taeko Bufford for no reason other than their sexual orientation. This was a painful, humiliating experience for them, causing Ms. Cervelli to break down in tears. As anyone who has experienced discrimination understands, discrimination eats away at one's dignity and sense of belonging in society. Because of the serious injury that discrimination inflicts upon individuals and society, we prohibit it across many settings, including employment, housing, and, as relevant here, public accommodations.

The business proprietor, Phyllis Young, wrongly contends that her choice of where to operate her business can be leveraged to circumvent the public accommodation law. To the extent she uses her house only as a home, the public accommodations law does not regulate her conduct; but to the extent she uses her house as a place of public accommodation, her conduct is subject to the same regulation as any other commercial business. Whom she invites over for afternoon tea is ordinarily of no concern of the State. But if she wishes to make a business out of doing so, then she cannot choose to serve only white customers or only Christian customers.

The motion for summary judgment of Defendant Aloha Bed & Breakfast ("Defendant" or "Aloha B&B") fails for three reasons. First, the public accommodation law covers Defendant's business with laser accuracy: it expressly applies to an establishment that provides lodging to transient guests, without exception. Second, the rights of intimate association, privacy, and free exercise of religion do not shield Defendant's discriminatory business conduct. Third, application of the public accommodation law is constitutional under any level of review, because it is narrowly tailored to serve a compelling state interest in eradicating discrimination in the commercial marketplace.

II. STATEMENT OF FACTS[1]

It is undisputed that Aloha B&B is a commercial business. That is, its reason for existence is to generate profit. Decl. of Jay Handlin, Ex. A, Dep. of Phyllis Young (hereafter "Dep.") 27:11-17. Its trade name is registered with the State of Hawai'i Department of Commerce and Consumer Affairs. Dep., Ex. 12.[2] Like any other business, it collects and pays taxes to the State of Hawai'i on the income that it generates. Dep. 86:14-87:4, Ex. 9. Aloha B&B is also responsible for another tax—transient accommodations tax—that only providers of transient accommodations are required to pay. Dep. 85:2-6, 86:8-13.

Aloha B&B is open to the general public as customers. It advertises its accommodations on multiple websites that invite customers to contact the business either by phone or at the electronic mail address "alohaphyllis@hawaii.rr.com." Dep., Exs. 1-3 & 5. For example, Aloha B&B pays the website BedandBreakfast.com between $400 to $500 per year to advertise on that site and attract business. Dep. 51:10-52:9. With the exception of same-sex couples and a small number of other groups of people (such as smokers), "any member of the public who is willing to pay the fee is allowed to be a guest at the B&B." Dep. 72:14-73:1. That fact is reinforced by the standard response that Aloha B&B provides to prospective customers, in which it collects only basic information, such as their requested dates and dietary restrictions, in order to process a reservation request. Dep. 57:16-58:25, Ex. 6. Aloha B&B does not inquire into the background of customers, such as their political or religious beliefs, before allowing them to book a reservation. Dep. 73:2-8.

Hundreds of customers have patronized Aloha B&B for transient accommodation. Dep. 89:25-90:4, 93:8-13, 94:23-95:2. Understandably, given the customer volume and the nature of the business, Ms. Young cannot recall basic information about some of her customers, such as whether she has ever had a customer from Texas, Oregon, or Illinois. Dep. 74:10-75:9. However, Aloha B&B has had customers from across the nation and around the world. Dep. 74:10-76:12. Ms. Young also forgets some customers' names shortly after they leave. Dep.

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[1] Plaintiffs incorporate by reference the facts and argument set forth in their motion for partial summary judgment filed on February 12, 2013. To minimize duplication where possible, Plaintiffs presume familiarity with that motion.

[2] Exhibits introduced during the deposition of Ms. Young are designated by number (corresponding to the exhibit number assigned during the deposition), whereas exhibits to the declaration of counsel accompanying this opposition are designated by letter.

146:14-18 ("Guests leave and I do the monthly excise tax with the names . . . and I turn to my husband and I say . . . do you remember these people? I can't even remember. I can't even put their faces to the name.").

Aloha B&B does not provide a place for its customers to permanently reside. Dep. 47:1-2, 59:8-12, 79:20-23. The median length of stay is four to five nights. Dep. 78:16-23. More than 99 percent of customers stay for less than a month; more than 95 percent stay for less than two weeks; and a majority stay for less than a week. Dep. 79:8-19. Customers are generally prohibited from engaging in any number of other activities that they might do in their own home, including, for example, cooking food. Dep. 25:6-18, 34:22-36:2. Conversely, customers need not engage in many tasks to which they would otherwise attend to in their place of permanent residence, such as preparing their own breakfast, washing linens and towels, cleaning, vacuuming, or taking out the trash to the curb. Dep. 36:3-9, 38:6-10, 38:17-21. After all, most customers are on vacation. Dep. 74:1-6.

Ms. Cervelli and Ms. Bufford were quite similar to most Aloha B&B customers in that they were visiting Hawai'i and only sought a place to stay for a few nights. But Aloha B&B readily admits that it refused to provide accommodation to them solely because they are lesbians. Dep. 96:12-97:2, 99:5-11; *see* Pls.' Mot. at 3 (describing discriminatory conduct and its effect on Plaintiffs). Ms. Young believes homosexuality "must be seen as an objective disorder" and feels allowing a same-sex couple to stay at Aloha B&B would violate her religious beliefs. Dep. 206:24-207:1. Although Ms. Young resides in the same house out of which Aloha B&B operates, she states it would violate her religious beliefs to permit a same-sex couple to stay in any property that she owned, even if she did not live there. Dep. 189:13-19 (explaining that she also would not rent out the apartment that she owns to same-sex tenants because "it would be giving them the opportunity to have immoral sexual behavior in a place that we owned").

III. LEGAL STANDARD

Summary judgment is warranted where the record shows "'that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Thomas v. Kidani*, 126 Hawai'i 125, 128, 267 P.3d 1230, 1233 (2011). As Plaintiffs have shown in their own motion for partial summary judgment, there is no genuine dispute of any material facts here; there is instead a dispute about the proper law to apply to those facts, which is within the province of the Court to resolve.

IV. ARGUMENT

A. Aloha B&B Violated the Public Accommodation Law by Discriminating Against Plaintiffs Because of Their Sexual Orientation.

Plaintiffs have alleged a single cause of action based on Defendant's conduct: violation of Hawai'i's public accommodation law. HRS § 489-3. That law 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," as well as race, sex, gender identity or expression, color, religion, ancestry, and disability. *Id.* Defendant admits, as it must, that it intentionally refused to serve Ms. Cervelli and Ms. Bufford because they are lesbians. But it wrongly contends there is no legal recourse for its discriminatory conduct under the public accommodation law based on a tortured interpretation of the *housing* law, under which Plaintiffs have not brought suit.

Most importantly, the plain language of the public accommodation law is crystal clear: it applies to any business or accommodation facility whose accommodations are made available to the general public as customers, including specifically "[a]n inn, hotel, motel, or other establishment that provides lodging to transient guests." HRS § 489-2. Aloha B&B indisputably provides lodging to transient guests. Its customers only stay for short periods of time—most for less than a week—and do not establish a permanent residence at Aloha B&B. Dep. 79:8-19. Most of its customers are also travelers; Aloha B&B designs its advertising to target travelers; and the overwhelming majority of its customers (99 percent) live outside Hawai'i. Dep. 74:1-6, 76:13-15, Ex. 2, Def. 014. Ms. Cervelli and Ms. Bufford were prototypical examples of transient guests, given that their stay would last only six nights. If Aloha B&B did not provide transient accommodations, it would not have registered for a transient accommodations tax license or assess transient accommodations tax on customer stays.

The necessary and sufficient condition that defines a place of public accommodation is that the relevant facility's "goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the general public as customers, clients, or visitors." HRS § 489-2. There is no textual or logical requirement that a place of public accommodation must have a lobby, let alone that it be unlocked, open 24 hours a day, and willing to take walk-in customers, as Defendant attempts to imply. The fact that Aloha B&B keeps its door locked is neither unique—hotel rooms are also locked—nor relevant because

customers are given the key to unlock the door, and members of the general public are invited to become customers. Many places of public accommodation, such as a doctor's office, hair salon, small restaurant, or airline, may also require an advance appointment or reservation. That does not negate that the goods or services are "made available to the general public as customers." *Id.* Neither does the fact that Aloha B&B operates out of Ms. Young's home. Many proprietors may choose to operate their business out of their home, including, for example, therapists, doctors, solo legal practitioners, tax preparers, and accountants.

The facts here are nothing like those in *Jankey v. Twentieth Century Fox Film Corp.*, 212 F.3d 1159, 1161 (9th Cir. 2000), on which Defendant seeks to rely. There, the establishments at issue were "'not in fact open to the public,'" because they were limited to only Fox employees and Fox employees' guests. *Id.* Here, Aloha B&B's accommodations are made available to the general public as customers. Although a business may constitute a place of public accommodation even if it chooses not to advertise at all, Aloha B&B has placed virtual billboards across the internet, through its own website and others, to attract business and has succeeded in developing a national and indeed global clientele. Dep. 48:15-17, 74:10-76:12. Except for a few groups, such as same-sex couples, "any member of the public who is willing to pay the fee is allowed to be a guest at the B&B." Dep. 72:14-73:1. Although Ms. Young states that, "[t]he only people who can come into my home are those who I have invited inside," Young Decl. ¶ 12, it is undisputed that Ms. Young extends this invitation to virtually "any member of the public who is willing to pay the fee." Dep. 72:14-73:1.

Whether Aloha B&B violated the public accommodation law begins and ends with that statute. Because there is no genuine dispute that Aloha B&B (1) constitutes an "establishment that provides lodging to transient guests" and (2) rejected Plaintiffs because they are lesbians, the inquiry as to whether Aloha B&B violated the public accommodation law terminates here.

B. There Is No Exemption in the Public Accommodation Law to Shield Defendant's Discriminatory Conduct.

Defendant urges the Court to look beyond the plain language of the public accommodation law—the only statute under which Plaintiffs have brought suit—and instead look to the housing law—under which Plaintiffs have *not* brought suit. Once there, Defendant asks the Court to take the "Mrs. Murphy" exemption in the housing law and then export it back into the public accommodation law. This is not interpreting the law; it is re-writing the law.

First, the Hawai'i Legislature needs no drafting assistance to understand how to write a

"Mrs. Murphy" exemption. It obviously chose to create one in the context of the housing law, and not to create one in the context of the public accommodation law. *Compare* HRS § 515-4 *with* HRS ch. 489.

Second, the Hawai'i Legislature looked to Title II of the Civil Rights Act of 1964 as a model in enacting the state's public accommodation law, but chose to omit from that law the "Mrs. Murphy" exemption contained in Title II, as it was free to do. *See State v. Hoshijo*, 102 Hawai'i 307, 317-18, 76 P.3d 550, 560 (2003); *compare* HRS § 489-2 *with* 42 U.S.C. § 2000a(b)(1); Pls.' Mot. at 7. A legislature's modifications to a model law are intentional. *See Dependents of Cazimero v. Kohala Sugar Co.*, 54 Haw. 479, 482-83, 510 P.2d 89, 92 (1973).

Third, there is no conflict presented by this case between the public accommodation law and the housing law. One law, as relevant here, deals with transient accommodation, and the other law, not relevant here, deals with housing. As reflected by the six-night length of their requested stay, Ms. Cervelli and Ms. Bufford had no intent to make Aloha B&B their residence. They were not moving to Hawai'i, hunting for a new home here, and seeking to "live" with Ms. Young. Yet that is the only type of situation that the "tight *living*" exemption—the phrase Hawai'i legislators used for the "Ms. Murphy" exemption in the housing law—was designed to address. Stand. Comm. Rep. No. 874, in 1967 House Journal, at 819; *compare* Haw. Sess. Laws Act 214 (2005) ("Housing laws presently permit landlords to follow their individual value systems in selecting *tenants* to *live* in the *landlords*' own homes.") (emphasis added) *with* HRS § 489-2 (addressing accommodations "made available to the general public *as customers, clients, or visitors*," not housing made available to the general public *as tenants*) (emphasis added). If Ms. Young was renting rooms for tenants' use as a home, the housing law would apply and she would be exempt from liability under the housing law because of the "Mrs. Murphy" exemption; but that is not the case here.

Defendant's claim of a conflict between the public accommodation and housing laws hinges upon a misrepresentation: that the "Mrs. Murphy" exemption in the housing law somehow creates an affirmative, all-purpose "immunity" from all other laws. It does not. Instead, it states: "*Section 515-3* does not apply . . . [t]o the rental of a room or up to four rooms in a housing accommodation by an owner or lessor if the owner or lessor resides in the housing accommodation." HRS § 515-4(a)(2) (emphasis added). Section 515-3 is the housing antidiscrimination provision. The exemption does not say "Section 515-3, *and all other laws,*

including Section 489-3, do not apply. . . "[3] Defendant's position would thus require disregarding the plain language of both the public accommodation law, which omits a "Mrs. Murphy" exemption, as well as the housing law, which has a "Mrs. Murphy" exemption expressly limited to housing accommodation, not the offering of a place of transient lodging.

Fourth, Defendant's reliance on the proposition that a more specific statute controls over a general one, in the event of irreconcilable conflict (which is absent here), has it backwards: the more specific statute that governs Aloha B&B is the statute that talks about an "establishment that provides lodging to transient guests." HRS § 489-2. That is particularly true given the Legislature's decision not to include the "Mrs. Murphy" exemption that is present in Title II of the Civil Rights Act of 1964 when enacting Hawai'i's public accommodation law. In contrast, the "Mrs. Murphy" exemption in the housing law deals with housing accommodation, not transient lodging.[4]

As all these considerations explained above independently and collectively demonstrate, the interpretation Defendant seeks to impose upon the public accommodation law is not one the statutory text can conceivably bear.[5] The prudential practice of interpreting statutes to avoid constitutional questions is thus of no assistance to Defendant, because it only applies where an otherwise acceptable construction of a statute is available that would obviate those questions. *Cf. Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988) (courts lack the power to "rewrite a state law"). In *Roommate.com*, for example, the Ninth Circuit's interpretation of the word "dwelling" under federal law was sufficient to avoid a constitutional question. *Fair Hous. Council of San Fernando Valley v. Roommate.com*, 666 F.3d 1216 (9th Cir. 2012). Here, there is no remotely comparable analogue: Defendant asks the Court to copy-and-paste the "Mrs.

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[3] Indeed, the "Mrs. Murphy" exemption in the housing law does not even exempt "Mrs. Murphy" from all the activities prohibited by Chapter 515. *See* HRS § 515-16.

[4] Whether Defendant is entitled to a "Mrs. Murphy" exemption under the public accommodation law is a question of law for the Court to resolve. An email from one of the Plaintiffs to Defendant on the day of the discrimination—in which Ms. Bufford stated she would be contacting a lawyer about the matter but expressed her lay view that Ms. Young was *not* entitled to an exemption under the housing law—is both irrelevant and inadmissible for the purpose offered by Defendant. *State v. Yip*, 92 Hawai'i 98, 109, 987 P.2d 996, 1007 (App. 1999) (noting that witness testimony on legal conclusions usurps court's role). Likewise, a city's ordinances related to zoning, Def.'s Mot. at 8-9, are utterly irrelevant to the State's statute barring discrimination in public accommodation.

[5] Even if Defendant's interpretation were reasonable, the Legislature has instructed that the public accommodation law must be liberally construed to prohibit discrimination. HRS § 489-1.

Murphy" exemption in the housing law, insert it into another chapter of the law (from which it was omitted), and then re-write the exemption to include public accommodations (contrary to its plain language). Such changes are the province of the legislature, not the judiciary. Furthermore, to say that an "exemption is permitted . . . is not to say that it is constitutionally required." *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990).

C. Defendant's Constitutional Defenses Are Meritless.

i. The Relationship Between a Transient Accommodation Provider and Its Business Customers Is Not Protected by Intimate Association.

"[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." *Roberts v. Jaycees*, 468 U.S. 609, 618 (1984). The relationship between a transient accommodation provider and its customers is not one of them. Protected intimate associations "involve deep attachments and commitments to the necessarily few other individuals with whom one shares . . . a special community of thoughts, experiences, and beliefs." *Id.* at 619-20; *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987) (referring to "marriage, the begetting and bearing of children, child rearing and education, and cohabitation with relatives" as the kinds of associations protected by this right) (internal quotation marks and citations omitted). Plainly, Aloha B&B's relationship with its customers is hardly on equal constitutional footing with these protected relationships.

The facts here are even weaker than those in *IDK*, where the Ninth Circuit held that there was no right of intimate association between an escort and a client. *IDK, Inc. v. County of Clark*, 836 F.2d 1185, 1193 (9th Cir. 1988). Although an escort and client constitute "the smallest possible association," an escort may be involved with a large number of clients. *Id.* "While we may assume the relationship between them is cordial and that they share conversation, companionship, and the other activities of leisure, we do not believe that a day, an evening, or even a weekend is sufficient time to develop deep attachments or commitments." *Id.* Escorts and clients also do not come together for the purpose of engaging in activities of family life, such as rearing and educating children. *Id.* Their relationship "lasts for only a short period and only so long as the client is willing to pay the fee." *Id.*

Here, too, "the group's size, its congeniality, its duration, the purposes for which it was formed, and the selectivity in choosing participants" confirm that Aloha B&B has no intimate association right with its customers. *IDK*, 836 F.2d at 1193; *see* Pls.' Mot. at 16-17. First, far

from the "necessarily few" relationships protected by a right of intimate association, *Roberts*, 468 U.S. at 620, hundreds of customers have patronized Aloha B&B in recent years. Dep. 89:25-90:4, 93:8-13, 94:24-95:2. *Cf. Roberts*, 468 U.S. at 621 (finding no intimate association among members of local chapters of the Jaycees that had around 400 members); *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (holding that dance-hall patrons were not protected by intimate association). Second, the purpose of the relationship between Aloha B&B and its customers is to exchange money for overnight accommodation and breakfast—not to create or sustain a family. Unsurprisingly, if Ms. Young "couldn't make money running the B&B, [she] wouldn't operate it." Dep. 27:11-17. The only attachment and commitment that customers have with Aloha B&B at issue here is the one secured by their deposit check to hold a reservation. Third, although Ms. Young may be "selective" in terms of the sexual orientation of her customers—in the same way the Jaycees were "selective" in terms of the sex of prospective members—she otherwise accepts virtually all paying customers. Dep. 72:14-73:1. *Cf. Rotary Club of Duarte*, 481 U.S. at 547 (finding no intimate association even though rotary club membership was *not* open to the general public but where membership growth was encouraged). Fourth, customers of Aloha B&B stay for periods as short as 72 hours, in sharp contrast to the longstanding relationships that individuals have or hope to build with those in truly intimate associations. *See Bell v. Maryland*, 378 U.S. 226, 314-15 (1964) (Goldberg, J., concurring) (noting that the relationship between an innkeeper and its customer is "evanescent").

The U.S. Supreme Court specifically identified relationships among family members as guideposts because they "suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection." *Roberts*, 468 U.S. at 619; *see also IDK*, 836 F.2d at 1193 (holding that only relationships sufficiently "similar" to family relationships are protected). The relationship between a transient accommodation provider like Aloha B&B and its customers is not akin to that between spouses, between parents and children, or between siblings. *See, e.g.*, Dep. 146:14-18 ("I can't even put their faces to the name."). By comparison, a client may confess secrets and emotional thoughts to a psychoanalyst, but even that relationship is not protected by the right of intimate association. *See Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1050 (9th Cir. 2000).

The relationship between a transient accommodation provider like Aloha B&B and its customers is also materially different than that between roommates, and Aloha B&B's assertion

that it merely accepts "serial roommates" belies reality. *See* Pls.' Mot. at 17; *Roommate.com*, 666 F.3d at 1221. Individuals do not generally cycle through 500 to 1,000 roommates over five years. *Cf.* Dep. 89:25-90:4, 93:8-13, 94:24-95:2. Individuals do not consistently have roommates for only 72 hours. *Cf.* Dep. 78:13. Individuals do not usually take in roommates without ever having spoken a word with them in-person or by phone. *Cf.* Dep. 57:19-58:9. Aloha B&B does all these things. Furthermore, what Aloha B&B does not do—and yet what is common in selecting a roommate—is to undertake an inquiry that extends beyond essentially confirming a person's financial ability to write a check. *Cf.* Dep. 72:14-73:8. The question of whether roommates are protected by a right of intimate association (which *Roommate.com* did not directly answer) thus has no bearing on the case here—except perhaps to highlight the distance between Aloha B&B and even the potential outer perimeters of a right of intimate association.

Defendant's contention that the State is "forcing" Ms. Young to accept uninvited customers ignores that it was Ms. Young who decided to operate a B&B out of her house, not the State of Hawai'i. If Ms. Young did not choose to operate a commercial business out of her house, she would be free to discriminate against anyone she invites into her house. But having made the contrary choice, she cannot now claim an inviolate right to discriminate against her customers. "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Bell*, 378 U.S. at 314-15 (Goldberg, J., concurring).

Ms. Young also contends that, with respect to some (but not all) of her customers, she chooses to share dinner with them, to pray with them, or to visit them after their stay. Def.'s Mot. at 3. But, given that these activities are not part of what Aloha Bed & Breakfast offers to customers in exchange for their payment, that portion of her relationship is not what the public accommodations law regulates. *See, e.g.*, Dep. 33:9-34:3, 34:19-21. If she chooses to visit only fellow Christians following their stay, and not others, that is her prerogative. The law only obligates Aloha B&B to provide to customers, on a non-discriminatory basis, that which every other customer receives in exchange for their payment. So long as this obligation is satisfied, whatever else Ms. Young may choose to do with some individuals but not others remains within her discretion. A business owner may befriend customers and spend time with them in addition to doing business with them, but that does not make their commercial activities non-commercial.

ii. There Is No Privacy Right for a Business to Discriminate.

"[T]he 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). The Hawai'i Constitution's privacy provision, Haw. Const., art. 1, § 6, also does not confer a right upon Aloha B&B to discriminate against its customers. The relevant issue here is not whether there is a privacy right for individuals to exclude others from their purely *private* homes, because the public accommodation law only affects *public* accommodations, which are those "made available to the general public as customers." HRS § 489-2. Instead, the relevant issue is whether Aloha B&B, a commercial provider of lodging to transient guests, has a right to discriminate against customers merely because Ms. Young has chosen to operate her business out of her home. It does not.

As Plaintiffs explained in their motion, Pls.' Mot. at 12-13, Aloha B&B's right to discriminate against customers is nowhere near "'fundamental' or 'implicit in the concept of ordered liberty,'" as required for privacy protection. *State v. Mueller*, 66 Haw. 616, 621, 628, 671 P.2d 1351, 1355 1359 (1983). To the contrary, the obligation to guarantee access to places of public accommodation "was firmly rooted in ancient Anglo-American tradition" and innkeepers were "'bound . . . to take all travelers and wayfaring persons.'" *See Bell*, 378 U.S. at 296-97 (quoting 1878 treatise). That includes, of course, innkeepers who lived in their inns.

Defendant's invocation of a supposed "right to be left alone" rings hollow. Far from exercising a "right to be left alone," Aloha B&B has flung its doors open by inviting virtually any member of the public—from all over the world—to patronize its accommodations as customers. Having invited the general public as customers, it cannot simultaneously claim a right to privacy in this context. *See* Pls.' Mot. at 12-13. Indeed, if Aloha B&B were "left alone," its business would collapse; it owes its existence to the public stream of commerce, which the State has a right to regulate.

Furthermore, the "right to be left alone," including in one's home, is derived from—and limited by—the harm-to-others principle: each person has "the right to control certain highly personal and highly intimate affairs of his own life . . . *as long as his act does not endanger others*." *State v. Kam*, 69 Haw. 483, 492, 748 P.2d 372, 378 (1988) (internal quotation marks omitted; emphasis added). There is no privacy right when a person's "actions affect the general

welfare—that is, where others are harmed or likely to be harmed." 69 Haw. at 494, 748 P.2d at 379. Thus, in *Kam*, the Court held that there was a right to view pornography in one's home because that conduct "in no way affects the general public's rights . . . so long as others confine their taste for it to their homes." 69 Haw. at 494, 748 P.2d at 379. Here, however, Defendant's discriminatory conduct directly injures the general public's rights, because Ms. Young has chosen to make her house the site of a commercial business establishment. The fact that conduct occurs at home does not automatically cloak it in privacy protection, let alone where the home at issue is the locus of a commercial business establishment. *See, e.g.*, *Mueller*, 66 Haw. at 628, 671 P.2d at 1359 (finding no privacy right to engage in prostitution in one's home).

Defendant's reliance upon a criminal case involving the unauthorized search of an overnight guest's bedroom has no relevance to this case. Def.'s Mot. at 14 (citing *State v. Matias*, 51 Haw. 62, 66, 451 P.2d 257, 260 (1969)). Defendant conflates two privacy provisions of the Hawai'i Constitution that deal with different issues: one section (article I, section 6) deals with informational privacy and personal autonomy, whereas another section (article I, section 7) prohibits unreasonable search and seizure. The 1978 Constitutional Convention decided that "it would be appropriate to retain the privacy provision in [what is now article I, section 7], but *limit its application to criminal cases* and create a new section as it relates to privacy in the informational and personal autonomy sense." *Mueller*, 66 Haw. at 624, 671 P.2d at 1357 (internal quotation marks and alterations omitted; emphasis added).

That distinction makes sense. One may have a right against the police conducting an unlawful home search that yields evidence that one has engaged the services of a prostitute—or any number of other unlawful activities that may occur in the home, such as pirating software, abusing one's children, or manufacturing methamphetamine. But that does not mean that, as a result, the conduct is afforded affirmative constitutional protection that prevents the State from prohibiting it. *See, e.g.*, *Mueller*, 66 Haw. at 628, 671 P.2d at 1359 (no privacy right to engage in prostitution in one's home). If there is a privacy right to engage in the conduct itself, the right can only be found (if at all) in the constitutional provision that pertains to personal autonomy (section 6), not the provision that pertains to criminal search and seizure (section 7). As explained above, however, a right to privacy has never been found in conduct causing harm to others, regardless of where that conduct occurs.

iii. The Free Exercise Clause Does Not Create a Right to Violate a Neutral Law of General Applicability.

For nearly a quarter century now, the law of the federal Free Exercise Clause has been well-settled: "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.*, 494 U.S. at 886. The public accommodation law here easily passes muster under that standard, because it categorically bars discrimination in all places of public accommodation. *See* Pls.' Mot. at 8-9.

The Hawai'i Supreme Court has not yet had occasion to decide whether this test under the federal Free Exercise Clause also applies to the state Free Exercise Clause. *Korean Buddhist Dae Won Sa Temple of Haw. v. Sullivan*, 87 Hawai'i 217, 247 n.31, 953 P.2d 1315, 1338 n.31 (1998). In *Korean Buddhist*, a Buddhist temple alleged that its federal and state Free Exercise Clause rights were violated by the government's refusal to grant it a variance from the zoning code to enable its hall to exceed the allowable height limit. *Id.* at 221. The Hawai'i Supreme Court recognized the case was controlled by a special exception described in *Employment Division v. Smith* that applies when the government has a system of individualized exemptions in place (which thus renders the law not generally applicable). *Id.* at 247. In those situations (including, for example, when the state provides unemployment benefits to individuals who have either been terminated or who quit work for "good cause"), a substantial burden on religious exercise must be justified by a compelling interest. *Id.* Because the variances from the zoning code constituted a system of individualized exemptions, heightened scrutiny was *already* applicable under the federal Free Exercise Clause.

Korean Buddhist thus had no occasion to decide whether the state Free Exercise Clause followed the general rule in *Employment Division v. Smith* upholding neutral laws of general applicability (where a system of individualized exemptions is not present). That is why the Hawai'i Supreme Court unequivocally stated: "in this case, we need not and do not reach the question." 87 Hawai'i at 247 n.31, 953 P.2d at 1338 n.31. Defendant's assertion that *Korean Buddhist* somehow "signaled" that broader protection exists under the state Free Exercise Clause is unsupportable and inexplicable. As explained further below, this Court also need not reach that question, because Defendant cannot show a substantial burden on religious exercise and, in any event, the public accommodation law serves a compelling state interest.

If this Court were to construe the scope of the state Free Exercise Clause, Defendant has

not offered any persuasive reason to depart from *Employment Division v. Smith*. Defendant's invocation of other states that have taken legislative action to require heightened scrutiny in analyzing free exercise challenges only highlights that there is no such applicable law here. Likewise, whereas the language of some state constitutions' Free Exercise Clauses differs substantially from that of the federal Free Exercise Clause—and thus may warrant a different interpretation—there is no relevant textual difference between the state and federal clauses here.

While the Hawai'i Supreme Court has interpreted the state constitution differently than the federal constitution in appropriate situations, this case does not present such a situation. "Precisely because we are a cosmopolitan nation made up of people of almost every conceivable religious preference, and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order." *Employment Div.*, 494 U.S. at 888 (citations and internal quotation marks omitted); Pls.' Mot. at 9. Indeed, the State's ability to prohibit discrimination on the basis of religion would also be impacted by the interpretation of the state Free Exercise Clause urged by Defendant.[6]

In any event, even if heightened scrutiny were appropriate under the state Free Exercise Clause, Aloha B&B cannot satisfy its threshold burden of demonstrating a "substantial burden" on religion. *See* Pls.' Mot. at 10. A vital component of this analysis—as Hawai'i courts have interpreted it—is whether the religious objector can reasonably engage in alternate conduct to avoid the asserted burden. *Korean Buddhist* illustrates this principle. The Hawai'i Supreme Court held that there was no substantial burden on religion in that case because the temple could have chosen to build its hall in a non-residential area and thus avoid the height limits to which it objected. 87 Hawai'i at 248, 953 P.2d at 1346. Even though lowering the hall roof to conform to the height limit was "tantamount to an act of religious desecration" to temple members, it was nonetheless a "self-inflicted" injury. *Id.*

Defendant contends a "substantial burden" exists whenever the government conditions any benefit or right on conduct inconsistent with one's religious beliefs. That gossamer-thin measure is hardly a "substantial burden," was not applied by the Hawai'i Supreme Court, and is

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[6] For example, a B&B proprietor could also hold a sincere religious belief that bars non-Christians from entering the premises. *See, e.g.*, Dep., Ex. 19 (2 John 11-12) ("If anyone comes to you and does not bring this teaching [of Christ], do not receive him into your house . . . for the one who gives him a greeting participates in his evil deeds.").

difficult to reconcile with *Korean Buddhist*. Other Hawai'i cases have also rejected claims of substantial burden where the religious objector could have engaged in alternate conduct to avoid the asserted burden. *See, e.g.*, *Koolau Baptist Church v. Dep't of Labor & Indus. Relations*, 68 Haw. 410, 418, 718 P.2d 267, 272 (1986) (finding no substantial burden where a church objected to paying unemployment insurance tax associated with operating a school because it could have chosen to employ only ordained ministers, for whom no such tax was assessed); *State v. Blake*, 5 Haw. App. 411, 415-18, 695 P.2d 336, 338-40 (1985) (finding insufficient burden where religion did not mandate use of marijuana). In those circumstances, there has not been "coercion to forego [sic] the practice" of religion or a "virtual inhibition" thereof. *Koolau Baptist*, 68 Haw. at 418, 718 P.2d at 272; *Blake*, 5 Haw. App. at 415-18.

Ms. Young cannot claim a "virtual inhibition" of her ability to practice her religion merely because she cannot operate a commercial B&B out of her house without abiding by the same commercial regulations that apply to all other similar businesses. It is undisputed that Ms. Young's religion does not require her to operate a B&B. Dep. 195:25-196:3. *Cf. Smith v. Fair Employment & Hous. Comm'n*, 12 Cal. 4th 1143, 1171 (1996) (finding no substantial burden where, among other things, "the landlord . . . does not claim that her religious beliefs require her to rent apartments") (plurality op.); *N. Coast Women's Care Med. Group, Inc. v. Benitez*, 44 Cal. 4th 1145, 1159 (2008) (noting that a doctor with a religious objection to performing a medical procedure for infertility on a lesbian patient could avoid the burden by refraining from performing the procedure on any patient). Defendant's claim of substantial burden is thus even weaker than that rejected in *Korean Buddhist*, where the height of the hall had religious significance. 87 Hawai'i at 224, 953 P.2d at 1322. Ms. Young's apparent preference to operate a B&B—as opposed to limitless other income-generating activities (including taking in actual roommates to live with her) that would obviate any purported conflict between the public accommodation law and her religious beliefs—does not rise to a substantial burden on her free exercise of religion.

iv. Application of the Public Accommodation Law Does Not Violate the Takings Clause.

Aloha B&B is not the first business to attempt to invoke the Takings Clause as a shield against antidiscrimination laws. But the U.S. Supreme Court closed off this line of attack long ago in *Heart of Atlanta Motel*, when it upheld the constitutionality of the public accommodations provision of the Civil Rights Act of 1964 against, among other things, a Takings Clause

challenge. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 259, 261 (1964).

Ms. Young asserts that she will *choose* to cease operation of the B&B—rather than to continue operating it on a nondiscriminatory basis—and that this choice will deprive her of a "small amount of income." Def.'s Mot. at 1. Of course, the exact same could have been said of the owner of Heart of Atlanta Motel, who restricted the motel's clientele to whites only. The Takings Clause takes into account the economic impact of the law, not an individual's voluntary choices in response to the law. When the U.S. Supreme Court held that prohibiting a private shopping center from excluding undesired petition gatherers did not constitute a taking, it found that the prohibition did not "unreasonably impair the value or use of their property as a shopping center." *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980). The question was not the economic impact from closing down the shopping center altogether, because that is not what the law required. Here, compliance with the public accommodation law could only have a positive impact on the B&B, because it would remove the categorical exclusion of same-sex couples as customers. The other considerations relevant to a Takings Clause analysis (which Defendant does not address) also confirm that there has been no taking here.[7] Pls.' Mot. at 17-19.

v. Courts Have Not Adopted the "Hybrid Rights" Theory.

Defendant's assertion that the U.S. Supreme Court "applies strict scrutiny to laws burdening First Amendment free exercise rights when some other constitutional right is also burdened," Def.'s Mot. at 18, grossly misrepresents the state of the law. The hybrid rights theory relies on *dicta* in *Employment Division v. Smith* positing that an unmeritorious free exercise claim may be married with another unmeritorious constitutional claim to somehow produce a meritorious claim as its offspring. The U.S. Supreme Court has never actually adopted it as a holding. This Court should also decline Defendant's invitation to embrace this "widely criticized" theory. *Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419, 440 n.45 (9th Cir. 2008). In any event, this case presents no opportunity for its adoption because all of Defendant's constitutional defenses are wholly lacking in merit.

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[7] There are two types of regulatory takings: per se takings and all others. Pls.' Mot. at 17-19. There is no per se taking because there has been no permanent physical invasion of property or a deprivation of all economically beneficial use of property, such as a prohibition on any habitable structure on the land. There is also no regulatory taking of any other variety because the economic impact of the law is to increase profit, and Defendant may still charge a fee for providing transient accommodation on a nondiscriminatory basis.

D. The Public Accommodation Law Serves a Compelling State Interest.

Even if Defendant could show that any of its constitutional rights were burdened, application of the public accommodation law to Aloha B&B would still be warranted because the law serves a compelling state interest of the highest order: the eradication of discrimination. Defendant asserts that the state's interest must have a particularized focus, relying upon a case interpreting the wording of the Religious Freedom Restoration Act (which applies only to the federal government), and then makes the leap that antidiscrimination is too amorphous an interest, relying upon a Massachusetts case that dealt with marital status discrimination. Def.'s Mot. at 18-19. Defendant's attempt to minimize the weight of the state's interest here, either in terms of eradicating discrimination as a general matter or on the basis of sexual orientation in the context of public accommodations as a specific matter, fails for three reasons.

First, Defendant's constitutional defenses are not limited to sexual orientation, and they threaten to compromise the State's ability to bar discrimination across-the-board. Defendant argues that the State's regulation of discrimination by Aloha B&B "is not even a legitimate interest" because it violates Ms. Young's purported rights of privacy and intimate association in the home. Def.'s Mot. at 19. If this argument were accepted, Aloha B&B and other similarly situated places of public accommodation would be free to discriminate not only on the basis of sexual orientation, but the full range of characteristics protected by the public accommodation law, including race, sex, gender identity or expression, color, religion, ancestry, and disability. That is why Defendant urges the Court to create a "Mrs. Murphy" exemption in the public accommodation law, which would exempt Aloha B&B and several other businesses from the law in *any* of its applications. The state interest at issue and in jeopardy here is therefore not limited to the prohibition of discrimination based on sexual orientation, but encompasses the full range of discrimination prohibited by Chapter 489, HRS.

Second, because the State has a compelling interest in eradicating "all forms of discrimination," *EEOC v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1280 (9th Cir. 1982), that includes the specific context of public accommodations. The Hawai'i Supreme Court explained in *Hoshijo* that a "'chief harm resulting from the practice of discrimination by establishments serving the general public is not the monetary loss of a commercial transaction or the inconvenience of limited access but, rather, the greater evil of unequal treatment, which is the injury to an individual's sense of self-worth and personal integrity.'" *Hoshijo*, 102 Hawai'i at

317 n.22, 76 P.3d at 560 n.22 (quoting *King v. Greyhound Lines*, 61 Or. App. 197 (Or. App. Ct. 1982)). The U.S. Supreme Court similarly held that "acts 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." *Roberts*, 468 U.S. at 628; *accord N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 14 n.5 (1988) ("the Court has recognized the State's 'compelling interest' in combating invidious discrimination"); *Rotary Club of Duarte*, 481 U.S. at 549 ("public accommodations laws plainly serv[e] compelling state interests of the highest order") (internal quotation marks omitted).

As *Hoshijo* and other cases demonstrate, the State has at least two distinct interests in the public accommodation law here: one is an interest in ensuring access to public accommodations, and the other is an interest in preventing acts of discrimination. *See Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 282-83 (Alaska 1994) (describing two distinct interests served by antidiscrimination laws). A victim of discrimination may, in some cases, be able to locate an alternate place of public accommodation; but that fails to erase the injury that has already been inflicted. *Id.* at 283 (noting that "[t]he government views acts of discrimination as independent social evils even if the [victims of discrimination] ultimately find [a non-discriminatory alternative]"). Similarly, by analogy, an employee who has been fired for a discriminatory reason may be able to find a new job with a new employer, which may mitigate lost wages, but that does not relieve the prior employer of liability for emotional distress caused by the discrimination nor deprive the court of its ability to enjoin that employer's discriminatory practices from harming others.

The State's interest here is thus not merely to ensure that same-sex couples or others "ha[ve] a place to stay"—as Defendant characterizes it—although that is certainly a relevant consideration. *See* Dep. 24:9-11 (noting that, apart from Aloha B&B, there are no hotels, motels, or inns in Hawai'i Kai). Just as Title II of the Civil Rights Act of 1964 was not merely about "hamburgers, and movies," the state interest here is about more than blankets and pancakes. *See Heart of Atlanta Motel*, 379 U.S. at 291-92 (citations omitted). Instead, it is about ensuring that all people may participate in public life without the harm of being shunned by a business simply because of who they are—what the Hawai'i Supreme Court described as the "evil of unequal treatment." *Hoshijo*, 102 Hawai'i at 317 n.22, 76 P.3d at 560 n.22; *see* Cervelli Decl. ¶ 10 (explaining that Defendant's discrimination caused Ms. Cervelli to call Ms. Bufford in tears,

feeling deeply upset, distressed, and humiliated) (attached to Pls.' Mot.). Defendant's narrow, literal focus on the bed and breakfast accommodation that it denied Plaintiffs fails to take into account "the deprivation of personal dignity" and the deep "humiliation, frustration, and embarrassment" that a person experiences upon denial of access to a public accommodation. *Heart of Atlanta Motel*, 379 U.S. at 250, 292. The public accommodation law is necessary and narrowly tailored to preventing those harms. *Cf. Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983).

Third, the State's interest in eradicating discrimination on the basis of sexual orientation is no less compelling than its interest in eradicating other types of prohibited discrimination. The State has placed sexual orientation discrimination in the same category as discrimination on the basis of race, religion, sex, and other characteristics. HRS § 489-3; *cf.* Stand. Comm. Rep. No. 506, in 1991 Senate Journal, at 956 (as with other forms of discrimination, "it is *equally offensive, and contrary to national and state public policies*, to allow discrimination in employment merely because of a person's sexual orientation") (emphasis added). The Hawai'i Legislature has confirmed that prohibiting discrimination on the basis of sexual orientation in places of public accommodation serves a vital state interest. HRS § 368-1 (stating that the legislature "finds and declares" that the practice of discrimination because of sexual orientation in public accommodations is against public policy). Legislative determinations may not be lightly set aside. *See, e.g.*, *Convention Ctr. Auth. v. Anzai*, 78 Hawai'i 157, 164, 890 P.2d 1197, 1204 (1995) (recognizing that courts, not legislatures, interpret the Constitution, but noting that legislative findings are entitled to substantial deference).

Laws barring discrimination on the basis of sexual orientation are crucial to preventing significant injury to lesbians and gay men, who have long been targets of discrimination, including discrimination that may be religiously motivated. The compelling state interests in eradicating sexual orientation discrimination "include the fostering of individual dignity, the creation of a climate and environment in which each individual can utilize his or her potential to contribute to and benefit from society, and equal protection of the life, liberty and property that the Founding Fathers guaranteed to us all." *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 37 (D.C. 1987) (rejecting a free exercise challenge to a public accommodation law and holding that the law served a compelling interest in eliminating sexual orientation discrimination); *see also* Pls.' Mot. at 11-12.

Defendant attempts to trivialize the State's commitment to preventing the harm that public accommodation discrimination inflicts upon lesbians and gay men by pointing to a *non sequitur*: the fact that they cannot marry in Hawai'i. It is difficult to comprehend why a place of public accommodation that provides lodging to transient guests should be excused from its nondiscrimination obligations simply because same-sex couples cannot obtain the status of marriage in Hawai'i. *Cf. Swanner*, 874 P.2d at 283 (holding that whether the state itself discriminates on the basis of marital status outside of housing is "irrelevant" to whether the state views marital status discrimination in housing as a pressing problem). To the extent Defendant contends that the status of marriage itself somehow constitutes a place of public accommodation, whether an individual should be able to obtain that status implicates different constitutional questions than whether that individual should be permitted to eat at a restaurant, shop at a drug store, or stay at a B&B without discrimination.

The circumstances here are nothing like those present in the case relied upon by Defendant, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993). There, a city claimed that its prohibition on animal sacrifice was narrowly tailored to serve the interests of public health and preventing animal cruelty; but it failed to prohibit numerous types of nonreligious conduct also endangering those interests, such as fishing, extermination of rodents, euthanasia of unwanted animals, destruction of animals removed from their owners, and infliction of pain for medical science. *Id.* at 543-44. "The underinclusion [was] substantial, not inconsequential." *Id.* at 543. Here, the public accommodation law bars discrimination across-the-board. HRS ch. 489. That law reflects this State's deep commitment to eradicating discrimination in all places of public accommodation.

V. CONCLUSION

Plaintiffs and Plaintiff-Intervenor respectfully request that this Court deny Defendant's Motion for Summary Judgment in all respects.

DATED: Honolulu, HI, March 19, 2013.

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