LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

PETER C. RENN (CA 247633)
(Admitted Pro Hac Vice)
3325 Wilshire Blvd., Suite 1300
Los Angeles, California 90010
Telephone: (213) 382-7600
Facsimile: (213) 351-6050
Email: prenn@lambdalegal.org

CARLSMITH BALL LLP

JAY S. HANDLIN # 8661
LINDSAY N. MCANEELEY # 8810
ASB Tower, Suite 2200
1001 Bishop Street
Honolulu, Hawai'i 96813
Telephone: (808) 523-2500
Facsimile: (808) 523-0842
Email: jhandlin@carlsmith.com
lmcaneeley@carlsmith.com

Attorneys for Plaintiffs
DIANE CERVELLI and TAEKO BUFFORD

DEPARTMENT OF LABOR
& INDUSTRIAL RELATIONS
HAWAI'I CIVIL RIGHTS COMMISSION

SHIRLEY NAOMI GARCIA # 7873
APRIL L. WILSON-SOUTH # 6346
ROBIN WURTZEL # 5385
830 Punchbowl Street, Room 411
Honolulu, Hawai'i 96813
Telephone: (808) 586-8636
Facsimile: (808) 586-8655
Email: Robin.Wurtzel@hawaii.gov

Attorneys for Plaintiff-Intervenor
WILLIAM D. HOSHIJO, Executive Director

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

DIANE CERVELLI and TAEKO BUFFORD,

Plaintiffs, and

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

Plaintiff-Intervenor,

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 MOTION FOR PARTIAL SUMMARY JUDGMENT; MEMORANDUM IN SUPPORT; DECLARATIONS OF DIANE CERVELLI; EXHIBITS A-D; TAEKO BUFFORD; PETER RENN; EXHIBITS A-E; ROBIN WURTZEL; EXHIBITS A-C; NOTICE OF HEARING AND CERTIFICATE OF SERVICE

HEARING MOTION

JUDGE: Edwin C. Nacino
HEARING DATE: Tues March 12, 2013
HEARING TIME: 9.30 am
TRIAL: Nov. 4, 2013

PLAINTIFFS AND PLAINTIFF-INTERVENOR'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs Diane Cervelli and Taeko Bufford and Plaintiff-Intervenor William D. Hoshijo, as Executive Director of the Hawai'i Civil Rights Commission, hereby move for summary judgment with regard to liability and declaratory and injunctive relief, i.e., on any and all portions of the case except for damages. Plaintiffs are entitled to summary judgment regarding these issues because there is no genuine dispute of material fact that Defendant Aloha Bed & Breakfast discriminated against Plaintiffs on the basis of their sexual orientation in violation of state law prohibiting discrimination in public accommodation. HRS § 489-3. Although "a plaintiff-movant is not required to disprove affirmative defenses asserted by a defendant in order to prevail on a motion for summary judgment," *GECC Fin. Corp. v. Jaffarian*, 80 Haw. 118, 119, 905 P.2d 624, 625 (1995), Plaintiffs are also entitled to summary judgment with regard to Defendant's affirmative defenses on statutory interpretation (Nos. 1 & 11), free exercise of religion (Nos. 2 & 3), free speech (Nos. 4 & 5), expressive association (Nos. 6 & 7), intimate association (No. 13), privacy (No. 14), and takings and due process (No. 15). To the extent any of these defenses rely upon the U.S. Constitution, Plaintiffs presume they are invoked pursuant to the Due Process Clause of the Fourteenth Amendment.

This motion is based on Rules 7 and 56 of the Hawai'i Rules of Civil Procedure and Rules 7 and 8 of the Circuit Courts of the State of Hawai'i, and is supported by the attached memorandum, the declarations of Diane Cervelli, Taeko Bufford, Peter Renn, and Robin Wurtzel, and any other pleadings, papers, and argument that this Court may consider.

DATED: Los Angeles, CA, February 8, 2013.

Peter Renn

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

Attorneys for Plaintiffs

DATED: Honolulu, HI, February 12, 2013.

ROBIN WURTZEL
SHIRLEY NAOMI GARCIA
APRIL WILSON-SOUTH

Attorney for Plaintiff-Intervenor

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Constitutional Provisions

Legislative Materials

MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

This case arises from a straightforward act of discrimination by a commercial business that refused to provide accommodations at a bed and breakfast to a lesbian couple because of their sexual orientation. The business freely admits this, but maintains that it had a right to discriminate. First, the business asserts that it is not a place of public accommodation and thus is free to disregard state law forbidding discrimination in public accommodations. That law, however, expressly covers any establishment that provides lodging to transient guests—the very business of the bed and breakfast. Second, the business argues that the application of Hawai'i's antidiscrimination law is unconstitutional. The business asserts that because its anti-gay conduct was motivated by the business owner's religious beliefs, application of the antidiscrimination law in this case would violate her freedom of religion and other rights under the Hawai'i and U.S. Constitutions. That troubling proposition, if accepted, would devastate the State's ability to protect civil rights. It is also contrary to precedent, which has rejected the notion that individuals may claim exceptions to generally applicable laws based on their religious objections. The plaintiff couple and the plaintiff-intervenor Hawai'i Civil Rights Commission have prosecuted this action to make clear that no business has the right to violate the antidiscrimination law.

I. STATEMENT OF FACTS

A. Defendant Aloha Bed & Breakfast

Defendant Aloha Bed & Breakfast ("Aloha B&B" or "Defendant") is the sole proprietorship of Ms. Phyllis Young. Renn Decl., Ex. A, Dep. of Phyllis Young (hereafter "Dep."), Ex. 12, Def. 040. Defendant operates under the trade name of Aloha Bed & Breakfast, which is registered with the State of Hawai'i Department of Commerce and Consumer Affairs.[1] *Id.* In exchange for a fee, Defendant provides overnight accommodation, breakfast, swimming pool access, and wireless Internet access, among other amenities. Dep. 160:11-14 & Ex. 1; Renn Decl., Ex. B (No. 2). Defendant's facilities are perched on a hillside in the Mariners Ridge section of Hawai'i Kai with ocean views. Dep., Ex. 3, Def. 025. There are three rooms available for booking, each furnished with one or two beds, a dresser, a television, and a fan. Renn Decl., Ex. B (No. 2). There is a three-night minimum for booking, and nightly rates currently range from $85 to $100, plus transient accommodation and general excise tax. Dep., Ex. 1, 9; Dep.

[1] A sole proprietorship is legally indistinguishable from its owner, and "'a judgment against the trade name is the same as a judgment against the individual, sole proprietor.'" *Credit Assocs. v. Carlbom*, 98 Hawai'i 462, 465-66, 50 P.3d 431, 434-35 (2002) (citation omitted).

86:4-87:4. Between 100 to 200 guests patronize Aloha B&B annually. Dep. 89:25-90:4. Defendant first opened its doors to guests twenty years ago, in 1992. Renn Decl., Ex. B (No. 5).

Defendant advertises its accommodation on multiple websites, which are accessible by the general public. Dep. 54:1-4, 56:8-11. This includes Aloha B&B's own website, the information on which is accurate. Dep., Ex. 1; Dep. 49:1-3. Guests to Aloha B&B's website are greeted at the top of the page with information proclaiming that Aloha B&B is a "Best Choice Hawaii Hotel" and "Best Choice Oahu Hotels."[2] Dep., Ex. 1. Defendant has also advertised through multiple third-party websites, either currently or in the past, in which Aloha B&B is described as an "inn" and Ms. Young as its "innkeeper," in the informational fields populated by the business. Dep., Ex. 2, Def. 006 (advertisement listing Aloha B&B as the "inn" and Ms. Young as the "innkeeper"), Ex. 3, Def. 025 (advertisement listing Ms. Young as the "innkeeper"), & Ex. 5, PLTF0252 (same); Dep. 52:18-23, 53:10-22, 55:21-56:3. The purpose of all these websites is to bring business to Defendant. Dep. 48:15-17, 52:6-9, 56:4-7.

The majority of Aloha B&B's guests are vacationing in Hawai'i. Dep. 74:1-6; Wurtzel Decl., Ex. A, P-I 0097. This fact is also reflected in Defendant's advertising material, which targets those who are traveling. Dep., Ex. 2, Def. 014 (describing the smallest room as ideal "for those traveling alone"). Guests hale from around the United States and the world. Dep. 74:10-76:12 (noting guests visiting from New York, California, Washington, Louisiana, Italy, Australia, Germany, France, and Japan). Defendant estimates that only one percent of its guests live in Hawai'i. Def. at 76:13-15. Given that most guests are on vacation, their stays at Aloha B&B are, unsurprisingly, often limited in duration to a few days. The median length of stay for a guest is four to five days. Dep. 78:16-23. More than 99 percent of guests 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. Aloha B&B does not provide a place for its customers to permanently reside. Dep. 79:20-23. The proprietor, Ms. Young, believes that Aloha B&B serves mostly "transient guests," which she understands are guests staying for 30 days or less. Dep. 80:4-13.

B. Aloha B&B's Discriminatory Conduct

Plaintiffs Diane Cervelli and Taeko Bufford are lesbian women in a committed

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[2] For ease of reference, the relevant portion is reproduced here: 

relationship with one another. Cervelli Decl. ¶ 2; Bufford Decl. ¶ 2. In 2007, Ms. Cervelli and Ms. Bufford, who reside in California, began planning a trip for later that year to Hawai'i. Cervelli Decl. ¶¶ 2-3. They wanted to visit one of their friends, who resided in the neighborhood of Hawai'i Kai, and to spend time with their friend's newborn baby. *Id.* Staying near their friend was important because Ms. Cervelli and Ms. Bufford would be relying on their friend to pick them up and drop them off, and their friend could not travel long distances given health issues with her newborn baby. Cervelli Decl. ¶¶ 4-5.

The friend suggested that Ms. Cervelli contact two bed and breakfasts in Hawai'i Kai, one of which was fully booked for the dates requested and the other of which was Aloha B&B. Cervelli Decl. ¶ 6, Ex. A, PLTF0183-0184, & Ex. B, PLTF0185-0186. On October 16, 2007, Ms. Cervelli emailed Aloha B&B to inquire whether it had a room available from December 27, 2007 through January 7, 2008. Cervelli Decl. ¶ 7, Ex. C, PLTF0187. Ms. Cervelli received an email from Ms. Young on the same day stating that Aloha B&B could accommodate Ms. Cervelli in a room with a king bed at $90 per night plus taxes from January 1, 2008 through January 7, 2008, a total of six nights. Cervelli Decl., Ex. D, PLTF0061-0062.

After confirming that the friend could accommodate Ms. Cervelli and Ms. Bufford for the first few nights when the bed and breakfast was unavailable, Ms. Cervelli called Aloha B&B on November 5, 2007 and spoke with Ms. Young, who indicated that the room was still available. Cervelli Decl. ¶ 8; Dep. 97:11-15. Ms. Young asked if someone would be staying with Ms. Cervelli, and then asked for the second person's name. Cervelli Decl. ¶ 9; Dep. 96:12-97:2; Wurtzel Decl., Ex. A, P-I 0098. When Ms. Cervelli responded with words to the effect of "her name is Taeko Bufford," Ms. Young asked, "Are you lesbians?" Cervelli Decl. ¶ 9; Dep. 96:12-97:2; Wurtzel Decl., Ex. A, P-I 0098. Ms. Cervelli was shocked by the question, but answered truthfully that they were. Cervelli Decl. ¶ 9; Dep. 96:12-97:2; Wurtzel Decl., Ex. A, P-I 0098. Ms. Young then refused to rent a room to Ms. Cervelli and Ms. Bufford, stating that she would feel very uncomfortable having lesbians in her house. Dep. 96:12-97:2, 99:5-11; Cervelli Decl. ¶ 9; Wurtzel Decl., Ex. A, P-I 0098; Renn Decl., Ex. C, First Am. Answer ("FAA") ¶ 1, & Ex. D (No. 5). Ms. Cervelli and Ms. Bufford's sexual orientation was the only reason that Ms. Young refused to rent them a room. Dep. 99:5-11; Renn Decl., Ex. E at 4, 6.

Distressed and humiliated by what had transpired, Ms. Cervelli called Ms. Bufford in tears and relayed to her what had happened with Aloha B&B. Cervelli Decl. ¶ 10. In disbelief,

Ms. Bufford called Ms. Young back and attempted to reserve a room for the couple. Dep. 99:21-100:5; Bufford Decl. ¶ 4. Ms. Young again refused to let Ms. Bufford and Ms. Cervelli reserve a room. Dep. 99:21-100:5; Bufford Decl. ¶ 4. Ms. Bufford asked, "Is it because we are lesbians that you will not rent to us?" to which Ms. Young replied, "Yes." Dep. 99:21-100:5; Bufford Decl. ¶ 4; Wurtzel Decl., Ex. A, P-I 0098. Ms. Young stated that she felt uncomfortable renting a room to homosexuals, citing her personal religious views. Bufford Decl. ¶ 4. Ms. Young reiterated those views when she spoke with Ms. Bufford again later that day.[3] Dep. 103:22; Wurtzel Decl., Ex. A, P-I 0098-0099.

Ms. Cervelli and Ms. Bufford subsequently complained to the Hawai'i Civil Rights Commission ("HCRC"), which found reasonable cause to believe that discrimination had occurred. Wurtzel Decl., Exs. B & C. During the HCRC's investigation, Ms. Young explained her religious belief that same-sex relationships are "detestable" and "defile our land." Wurtzel Decl., Ex. A, P-I 0100-101; Dep. 134:9-15. Ms. Young also believes that homosexuality "must be seen as an objective disorder." Dep. 206:24-207:1.

II. LEGAL STANDARD

Summary judgment "upon all or any part" of a claim, Haw. R. Civ. P. 56(a), 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).

III. ARGUMENT

A. Aloha B&B Violated the Public Accommodation Law When It Refused to Serve Ms. Cervelli and Ms. Bufford Because of Their Sexual Orientation

Hawai'i law forbids "[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

[3] During this second conversation, Ms. Young also stated that, while she was unwilling to take Plaintiffs, she could provide the name of a friend with whom they could reserve a room. Dep. 102:21-25. Ms. Young was concerned that Plaintiffs would take legal action against her, Dep. 100:24-101:7, and believed that they would be less upset with her if she found alternate accommodation for them, Dep. 108:1-14. But given the preceding interaction with Ms. Young—in which Ms. Young had made clear her strong discomfort of same-sex couples on religious grounds—Ms. Bufford felt distrustful of Ms. Young and did not feel that she could trust Ms. Young's friend. Bufford Decl. ¶ 5. Ms. Young's friend belongs to the same church as Ms. Young and the two previously participated in the same Bible study group. Dep. 107:1-22.

well as race, sex, gender identity or expression, color, religion, ancestry, and disability. HRS § 489-3. Aloha B&B violated this prohibition by refusing to provide accommodation to Plaintiffs because they are lesbians.

First, Defendant readily admits that the sole reason it refused accommodation to Ms. Cervelli and Ms. Bufford was because they were lesbians. Dep. 99:5-11 ("Q. So, you refused to allow her [Ms. Cervelli] to book the room because they were lesbians; is that right? A. Yes. Q. And apart from Ms. Cervelli's and Ms. Bufford's sexual orientation, was there any other reason that you refused to rent a room to them? A. No."); Renn Decl., Ex. E at 6 (Defendant's Responsive Pretrial Statement: "Defendant admitted that it would not rent a room to Plaintiffs because they were lesbians.").

Second, Aloha B&B is a place of public accommodation, which is defined to include an accommodation or business 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." HRS § 489-2. Aloha B&B is an accommodation facility, Dep. 160:11-14, Ex. 1, as well as a business facility, Renn Decl., Ex. E at 4-5, Dep. 14:7, 15:18-24, 27:15-17, 73:17-22, 93:3-7, 145:15-17, Ex. 12, and, as reflected in its web advertisements and its very name, it provides accommodation to the general public as customers, Dep. 54:1-4, 56:8-11, Renn Decl., Ex. E at 4-5.

"By way of example, but not of limitation," a place of public accommodation includes "[a]n inn, hotel, motel, or other establishment that provides lodging to transient guests." HRS § 489-2. Aloha B&B falls squarely in the teeth of the statute as one of the quintessential, *per se* places of public accommodation: an "establishment that provides lodging to transient guests." The overwhelming majority of its customers are transient guests because they only stay at Aloha B&B for short periods of time and do not take up a permanent residence there. Dep. 79:8-19; Renn Decl., Ex. E at 6. That is also why Aloha B&B assesses transient accommodation tax on customer stays. Dep. 86:4-87:4, Ex. 9. Other courts have found that similar places offering short-term stays constitute places of public accommodation. *See Dean v. Ashling*, 409 F.2d 754, 756 (5th Cir. 1969) (finding substantial evidence that a trailer park was an establishment offering lodging to transient guests under the public accommodation provision of the Civil Rights Act of 1964 where customers rented on a nightly or two-night-minimum basis and the business advertised in national directories); *United States v. Beach Assocs.*, 286 F. Supp. 801, 805-06, 808

(D. Md. 1968) (finding that apartment units rented on a weekly basis constituted lodging for transient guests under the Civil Rights Act of 1964); *see also State v. Hoshijo*, 102 Hawai'i 307, 317-18, 76 P.3d 550, 560-61 (2003) (looking to the Civil Rights Act of 1964 in interpreting language in Hawai'i's public accommodation law that is identical to the federal statute).

"[B]ed and breakfasts are akin to hotels in that they are places of 'temporary sojourn or transient visit.'" *Schneider v. County of Will*, 190 F. Supp. 2d 1082, 1087 (N.D. Ill. 2002). Here, Plaintiffs were the prototypical example of would-be "transient guests," because they only sought to stay at Aloha B&B for six nights. *See Amazing Grace Bed & Breakfast v. Blackmun*, No. 09-0298-WS-N, 2009 U.S. Dist. LEXIS 110975, at *10 (S.D. Ala. Nov. 30, 2009) (holding that a B&B that allowed guests to stay three days was "the archetype of a 'transient visit'").

B. No "Mrs. Murphy" Exemption Exists in the State Public Accommodation Law, and One Cannot Be Judicially Created or Imported From Other Laws.

Defendant claims that it need not comply with any portion of Hawai'i's public accommodation law because there is an exemption in a *different* law—Hawai'i's housing antidiscrimination law, under which Plaintiffs have *not* asserted a claim—that should somehow excuse Defendant's violation of the public accommodation law. FAA, 1st & 11th Aff. Def. Defendant seeks shelter under the so-called "Mrs. Murphy" exemption[4] in the housing law, which states that "Section 515-3 [the *housing* antidiscrimination provision] 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. If its argument were accepted, Defendant would have a free pass to discriminate against customers on any basis, including race, religion, and disability.[5]

Clearly, the Hawai'i Legislature knows how to write a "Mrs. Murphy" exemption where it wishes to do so. But, as its plain language indicates, the exemption applies *only* to claims

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[4] The phrase was coined in the 1960s when Congress was considering the scope of federal antidiscrimination law and created an exemption for "Mrs. Murphy," a hypothetical widow who rented out a small number of rooms in her house and wished to discriminate on the basis of race. In Hawai'i, legislators described a similar provision in the housing antidiscrimination law as the "tight living" exemption. Stand. Comm. Rep. No. 874, in 1967 House Journal, at 819.

[5] Aloha B&B raised this argument during administrative proceedings, and the HCRC rejected it, finding that Aloha B&B is a "place of public accommodation within the meaning of H.R.S. § 489-2." Wurtzel Decl., Ex. B, ¶ 5, & C, ¶ 5; *Hyatt Corp. v. Honolulu Liquor Comm'n*, 69 Haw. 238, 245, 738 P.2d 1205, 1209 (1987) (noting the "great weight to be accorded the Commission's construction of the statute").

brought under the *housing* law. Plaintiffs have not asserted a housing discrimination claim (nor would it have made sense to do so, given that they wished to stay at Aloha B&B for six days, not six years); and Aloha B&B is not in the business of providing housing accommodation. Courts cannot create exemptions to liability under a statute where they do not exist. *See, e.g., Dines v. Pacific Ins. Co.*, 78 Hawai'i 325, 334, 893 P.2d 176, 185 (1995) ("If the legislature wishes to limit such coverage, it can enact legislation that says so"). Aloha B&B's theory is predicated on a claim that Plaintiffs did not bring.

Hawai'i chose not to create a "Mrs. Murphy" exemption in the public accommodation law. This is reflected by the fact that the Hawai'i Legislature had the public accommodation provision of the federal Civil Rights Act of 1964 squarely in mind when enacting its state counterpart in 1986, and even adopted much of the same language—but elected to depart from that law in a critical respect by omitting the "Mrs. Murphy" exemption contained in federal law. Where the legislature looks to another law as a model but then omits and adds language, those departures are intentional. *Dependents of Cazimero v. Kohala Sugar Co.*, 54 Haw. 479, 482-83, 510 P.2d 89, 92 (1973) (legislature's departure from language in a model law is purposeful).

Here, the phrase "inn, hotel, motel, or other establishment that provides lodging to transient guests" in Hawai'i's public accommodation law borrows nearly word for word from the public accommodation provision of Title II of the Civil Rights Act of 1964. *Compare* HRS § 489-2 *with* 42 U.S.C. § 2000a(b)(1). *See Hoshijo*, 102 Hawai'i at 317-18, 76 P.2d at 560 (noting 1986 legislative testimony that "'Hawaii should join the other 38 states . . . in enacting laws that would be in keeping with Title II of the Civil Rights Act'"). But the Hawai'i Legislature stopped there. It jettisoned the 1964 language creating the "Mrs. Murphy" exemption (underlined):

Hawai'i Public Accommodation Law	Federal Public Accommodation Law
A place of public accommodation includes "[a]n inn, hotel, motel, or other establishment that provides lodging to transient guests." HRS § 489-2.	A place of public accommodation includes "any inn, hotel, motel, or other establishment which provides lodging to transient guests, <u>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</u>." 42 U.S.C. § 2000a(b)(1).

To accept Aloha B&B's implausible reading of the public accommodation law would therefore

require this Court to write-in an exemption that the legislature effectively struck out. And even if such a reading were reasonable, which it is not, it would violate the statutory mandate that the public accommodation law must be liberally construed to prohibit discrimination. HRS § 489-1.

C. The Free Exercise Clause Does Not Require the State to Permit Aloha B&B to Discriminate on the Basis of Sexual Orientation.

Defendant contends that the Free Exercise Clauses of the Hawai'i and U.S. Constitutions immunize its discriminatory business practices from the reach of the public accommodation law, either because that law should be contorted to exclude Aloha B&B or because its application to Aloha B&B is unconstitutional. FAA, 2nd & 3rd Aff. Def. Aloha B&B cannot satisfy its heavy burden of "showing unconstitutionality beyond a reasonable doubt." *Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan*, 87 Hawai'i 217, 247-48, 953 P.2d 1315, 1343 (1998).

i. The Free Exercise Clause Does Not Excuse the Violation of A Neutral Law of General Applicability.

A neutral law of general applicability that does not target religion, like Hawai'i's public accommodation law, unquestionably is constitutional under the federal Free Exercise Clause. *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 804 (9th Cir. 2011). In *Employment Division v. Smith*, 494 U.S. 872, 885 (1990), the U.S. Supreme Court held that the Free Exercise Clause did not prohibit the application of a state law that barred possession of peyote, even though the individuals in the case ingested it as part of a religious ceremony. *Id.* "[T]he 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).'" *Id.* Such a law "need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993).

Hawai'i's public accommodation law is a valid and neutral law of general applicability: it categorically prohibits discrimination in places of public accommodation without regard to the motivation, religious or otherwise, underlying the discrimination, and it does not impose burdens on select groups. *See Alpha Delta*, 648 F.3d at 804 (a public school's "nondiscrimination policy, as written, is a rule of general application" and "[i]t does not target religious belief or conduct, and does not 'impose special disabilities' on . . . religious groups"); *Smith v. Fair Employment & Housing Comm'n*, 12 Cal. 4th 1143, 1161-62 (1996) (finding an employment and housing antidiscrimination law generally applicable) (plurality). As a result, Hawai'i law does not violate

the federal Free Exercise Clause. The fact that Aloha B&B's discrimination may have been religiously motivated does not alter the analysis: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Employment Div.*, 494 U.S. at 878.

The Hawai'i Supreme Court has not yet resolved whether the rule of *Employment Division v. Smith*—that neutral laws of general applicability do not violate the federal Free Exercise Clause—applies to the state Free Exercise Clause. *Korean Buddhist*, 87 Hawai'i at 247 n.31, 953 P.2d at 1338 n.31 ("in this case, we need not and do not reach the question"). This case also does not require resolution of that issue, because even under the test that preceded *Employment Division*, the state's antidiscrimination law is constitutional because it serves a compelling state interest, as explained further below.

Nevertheless, if this Court were to interpret the scope of the state Free Exercise Clause, there is no reason to depart from the settled *Employment Division* rule. Certainly, there is no relevant textual difference between the state and federal clauses that would compel such a departure, and the Hawai'i Supreme Court has previously looked to federal free exercise precedent for guidance. *Compare* U.S. Const. amend. I *with* Haw. Const. art. I, § 4; *O'Connor v. Diocese of Honolulu*, 77 Hawai'i 383, 386, 885 P.2d 361, 364 (1994). The U.S. Supreme Court has explained that the alternative free exercise test—requiring any and all laws that substantially burdened free exercise to be supported by a compelling state interest—"would be courting anarchy." *Employment Div.*, 494 U.S. at 888. The alternative test "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind." *Id.* (listing as examples compulsory military service, payment of taxes, health and safety regulation like manslaughter and child neglect, compulsory vaccination, drug laws, traffic laws, and social welfare legislation). In many circumstances, each person would "become a law unto himself," contrary to "both constitutional tradition and common sense." *Id.* at 885.

ii. The Public Accommodation Law Is Constitutional Under Any Level of Review And Serves a Compelling State Interest.

In any event, application of the public accommodation law here is constitutional under any level of scrutiny, including under the test preceding *Employment Division*. That now-discarded alternative test held that "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest." *Employment Div.*, 494 U.S. at 883; *see also Dedman v. Bd. of Land & Natural Res.*, 69 Haw. 255, 260-62, 740 P.2d 28, 32-33

(1987) (decided prior to *Employment Division*).

First, Aloha B&B cannot show a "substantial burden," which the Hawai'i Supreme Court previously defined as that which rises to the level of "coercion to forego the practice" of religion. *Koolau Baptist Church v. Dep't of Labor & Indus. Relations*, 68 Haw. 410, 418, 718 P.2d 267, 272 (1986). Critical to this analysis is whether the prohibited conduct at issue is mandated by the individual's religion—or whether the individual can engage in alternate conduct to avoid the religious burden. *See, e.g.*, *State v. Blake*, 5 Haw. App. 411, 415-18, 695 P.2d 336, 338-40 (1985) (requiring "a virtual inhibition of the religion" and finding insufficient burden where religion did not mandate use of marijuana). The financial cost attendant to such alternate conduct is "generally insufficient to constitute a substantial burden on the free exercise of religion." *Korean Buddhist*, 87 Hawai'i at 248, 953 P.2d at 1346. "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *United States v. Lee*, 455 U.S. 252, 261 (1982) (upholding the imposition of social security taxes against a free exercise challenge).

Here, Ms. Young holds no religious belief that compels her to operate a B&B. Dep 195:25-196:3. *Cf. Smith*, 12 Cal. 4th at 1171 (finding no substantial burden where, among other things, "the landlord . . . does not claim that her religious beliefs require her to rent apartments"). Indeed, because of the "Mrs. Murphy" exemption in the housing law, she could simply rent rooms as a place of residence, Dep. 84:10-17, and avoid any alleged conflict between her religious beliefs and civil law. *Cf. Smith*, 12 Cal. 4th at 1159 (noting that a property owner who refused to rent to an unmarried couple could avoid any religious conflict by investing capital differently); *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). Of course, this is but one of many options available to Ms. Young in which she could deploy her resources and energies.[6] None rises to coercion to "forgo" the practice of her

[6] Ms. Young also works as a licensed real estate broker, the income from which has generated the majority of her household income in some prior years, Dep. 27:21-28:3, operates an herbal business, Dep. 30:8-9, and owns rental property, Dep. 29:25-30:7. Whether Ms. Young would choose to sell her $850,000 house (the mortgage for which is mostly paid) and give up its "breathtaking" ocean views if she decided not to run the B&B, Dep. 25:19-25, 32:18-33:2, Ex. 2,

religion.

Second, even if application of the state's nondiscrimination law did impose a substantial burden on the religious practices of Aloha B&B's proprietor, it is constitutional because Hawai'i has a compelling state interest in eradicating the serious harms that discrimination in public accommodation inflicts upon individuals and society. The legislature said as much: "[T]he people of the State of Hawaii will not condone any discriminatory practices in public accommodation." Stand. Comm. Rep. No. 1447, in 1987 Senate Journal, at 1522. Hawai'i's commitment to eliminating discrimination has only strengthened over time, and the legislature has required a compelling reason for changes that could diminish that commitment. *See, e.g.*, Stand. Comm. Rep. No. 660-88, in 1988 House Journal, at 1081 ("find[ing] that there is a need to strengthen the enforcement policies and procedures of the State's discrimination laws"); Stand. Comm. Rep. No. 2535, in 1988 Senate Journal, at 1075 ("[T]here must be compelling reason for the legislature to remove the jurisdiction to enforce the discrimination laws from these departments to the proposed civil rights commission.").

Courts have repeatedly recognized a compelling state interest in barring discrimination, which "degrades individuals, affronts human dignity, and limits one's opportunities." *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 283 (Alaska 1994) (finding a compelling state interest in Alaska law barring housing discrimination). This includes barring discrimination in public accommodations, where hubs of public life are located. *See Roberts v. Jaycees*, 468 U.S. 609, 624 (1984) (holding that Minnesota's law barring sex discrimination in public accommodation "plainly serves compelling state interests of the highest order" in light of the personal and social harms caused by such discrimination).

"Government has a compelling interest in eradicating discrimination in all its forms," *EEOC v. Mississippi College*, 626 F.2d 477, 488 (5th Cir. 1980), including discrimination based on sexual orientation, as many courts have recognized. *See Benitez*, 44 Cal. 4th at 1158; *Christian Legal Soc'y v. Kane*, No. C-04-04484 JSW, 2006 U.S. Dist. LEXIS 27347, at *27-28 (N.D. Cal, Apr. 17, 2006); *Presbytery of New Jersey of the Orthodox Presbyterian Church v. Florio*, 902 F. Supp. 492, 521 (D.N.J. 1995); *Gay Rights Coal. of Georgetown Univ. Law Center v. Georgetown Univ.*, 536 A.2d 1, 38 (D.C. 1987). The Hawai'i Legislature has explained that, just as the state bars employment discrimination on the basis of characteristics such as race, sex,

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is not the metric for "substantial burden." *Korean Buddhist*, 87 Haw. at 248, 953 P.2d at 1346.

and religion, "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." Stand. Comm. Rep. No. 506, in 1991 Senate Journal, at 956 (emphasis added). "[W]hat they all have in common is the fact that it is offensive to human dignity to discriminate in employment because of them." *Id.* The weight of this state interest is underscored by the long and painful history of discrimination that lesbian and gay individuals have faced, on the basis of an irrelevant characteristic. *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 954 (9th Cir. 2009) (one would be "hard pressed to deny that gays and lesbians have experienced discrimination").

In addition, the public accommodation law is narrowly tailored to further this compelling state interest. Prohibiting discrimination "'responds precisely to the substantive problem which legitimately concerns' the State." *Roberts*, 468 U.S. at 629. Conversely, the state's interest "will clearly suffer" if an exception to liability is granted wherever discrimination is motivated by religious belief. *Swanner*, 874 P.2d at 283. Public accommodation laws address "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments. Discrimination is not simply dollars and cents, hamburgers, and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public." *See Heart of Atlanta Motel v. United States*, 379 U.S. 241, 291-92 (1964) (Goldberg, J., concurring, citations omitted).

D. Aloha B&B's Other Constitutional Defenses Are Also Meritless.

i. No Right of Privacy Authorizes Aloha B&B to Discriminate.

The U.S. and Hawai'i Constitutions protect at least two different kinds of privacy interests: one is an individual's interest in avoiding disclosure of personal matters by the government (not at issue here), and the other is an interest in freely making certain kinds of important personal decisions. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Haw. Const., art. 1, § 6; *McCloskey v. Honolulu Police Dep't,* 71 Haw. 568, 574, 799 P.2d 953, 957 (1990).

Contrary to Defendant's assertion, the ability of a business to discriminate against customers along invidious lines is not the type of conduct protected by a constitutional right to privacy. FAA, 14th Aff. Def. It is certainly not a "personal right that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,'" nor an interest even approaching such a right, as required to merit constitutional protection. *See State v. Mueller*, 66 Haw. 616, 628, 671 P.2d 1351, 1359 (1983). To the contrary, even at common law and prior to the

enactment of public accommodation laws, innkeepers had a duty to receive guests and were barred from picking and choosing their customers. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 571 (1995) (quoting 19th-century judge "that 'the innkeeper is not to select his guests[;] he has no right to say to one, you shall come into my inn, and to another you shall not'"). Accepting a customer's reservation request for transient accommodation is also hardly the kind of "'highly personal and intimate matter[]'" within the zone of privacy protected by the constitution. *State v. Kam*, 69 Haw. 483, 493, 748 P.2d 372, 378-79 (1988) (recognizing privacy right to view pornography); *Jech v. Burch,* 466 F. Supp. 714, 719 (D. Haw. 1979) (recognizing privacy right to name one's child).

That Ms. Young has chosen to operate a commercial business at the same address where she lives does not alter the privacy analysis. Ms. Young continues to have the ability—in purely private dealings, *outside* the public stream of commerce—to choose the individuals with whom she permanently resides. If she wishes to discriminate in those private decisions, or even to bar all individuals from her house outside the public stream of commerce, the public accommodation law does not preclude that.[7]

Aloha B&B transacts business in the public, commercial sphere rather than a private one. Courts have recognized that, in that public sphere, there is no right of privacy to defy reasonable regulation. In *Sprague*, a Wisconsin court rejected defendants' claim that they had a constitutional privacy right to exclude a tenant on the basis of sexual orientation, because they "gave up their unqualified right to such constitutional protection when they rented housing for profit." *Sprague v. City of Madison*, 205 Wis. 2d 110, 1996 Wisc. App. LEXIS 1205, at *9 (1996) (Wis. Ct. App. 1996), *cert. denied*, 520 U.S. 1212 (1997). Similarly, in *Voris*, a Washington court rejected a landlord's argument that she had a constitutional privacy right to refuse to rent a room on the basis of the prospective tenant's race. *Voris v. Wash. State Human Rights Comm'n*, 41 Wn. App. 283, 290-91 (Wash. Ct. App. 1985). Furthermore, even if Aloha B&B had a privacy right to discriminate in business transactions, the State would have a compelling interest in prohibiting such discrimination, for the reasons noted above. "Where one opens one's home to the public by engaging in the rental of rooms therein for monetary gain, one must be deemed to have voluntarily subordinated personal privacy rights to those state interests

[7] Notably, however, the Supreme Court has rejected privacy challenges to laws regulating who may permanently reside together. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7 (1974).

which can be shown to be compelling." *Id.*

ii. Application of the Antidiscrimination Law Does Not Restrict Aloha B&B's Speech Rights.

The First Amendment of the U.S. Constitution and article 1, section 4 of the Hawai'i Constitution[8] protect speech and, by extension, conduct that is inherently expressive. The discriminatory business conduct at issue here is neither. FAA, 4th & 5th Aff. Def.

First, the First Amendment distinguishes between speech and conduct. In *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47, 60 (2006), the Supreme Court held that a statute requiring law schools to permit military recruiters on campus (over the schools' objection that the military's "don't ask, don't tell" policy violated school antidiscrimination policies) regulated conduct rather than speech and found that the schools' conduct was not inherently expressive. As such, the First Amendment did not protect the schools' conduct. The same is true here: Aloha B&B's exclusion of Plaintiffs from its business, like a law school's exclusion of military recruiters, is simply conduct. Notably, Ms. Young remains free to publicly express her personal views about same-sex couples, a right that she has exercised. Dep., Ex. 20, PLTF0263-64; *cf. Rumsfeld*, 547 U.S. at 60 (noting that "[l]aw schools remain free under the statute to express [their] views").

Second, Aloha B&B's conduct also is not inherently expressive. Refusing to process a customer reservation for transient accommodation is hardly symbolic speech, and the fact that Plaintiffs ended up staying in a Waikiki condo, Cervelli Decl. ¶ 11, rather than at Aloha B&B, is not likely to be understood by others as conveying a message. The facts here are again analogous to *Rumsfeld*, where the Supreme Court held that the purpose of a law school's requirement for military interviews to be conducted on the undergraduate campus, rather than the law school campus, would not be apparent to an observer. *Rumsfeld*, 547 U.S. at 66. Processing a customer reservation is wholly unlike wearing a black armband to protest the Vietnam War, *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969), burning an American flag, *Texas v. Johnson,* 491 U.S. 397, 404-06 (1989), or marching in a parade, *Hurley*, 515 U.S. at 568-70. Of course, "[i]t is possible to find some kernel of expression in almost every activity a

[8] The state free speech protections are often interpreted similarly to federal protections where "there is nothing intrinsic in the language of *article I, section 4* that requires more extensive protection of free speech than the *first amendment* affords in the context" at issue. *State v. Viglielmo*, 105 Hawai'i 197, 211 (2004) (declining to interpret state free speech protections differently than analogous federal protections under the circumstances of the case).

person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). Aloha B&B's conduct is quintessentially commercial, not inherently expressive.

Many before Aloha B&B have similarly argued that their discriminatory conduct should be shielded by speech protections, but courts have consistently rejected this defense. Segregated private schools invoked free speech in defense of racially restrictive admission policies, but the Supreme Court held that "'[t]he Constitution . . . places no value on discrimination.'" *Runyon v. McCrary*, 427 U.S. 160, 176. Law firms similarly cannot refuse to abide by federal laws prohibiting sex discrimination in employment, even though the activities of lawyers may entail expression. *Hishon v. King & Spalding*, 467 U.S. 69, 76 (1984). If the law had evolved differently, then all antidiscrimination laws would be in jeopardy, because defendants could always claim that their discriminatory conduct is protected speech.

iii. Application of the Antidiscrimination Law Does Not Violate Aloha B&B's Expressive or Intimate Association Rights.

The First Amendment of the U.S. Constitution and article 1, section 4 of the Hawai'i Constitution protect the right to expressive and intimate association, but—as with Defendant's other defenses—application of the antidiscrimination law does not run afoul of these rights. FAA, 6th, 7th, & 13th Aff. Def.

The right to expressive association is essentially the "right to associate for the purpose of speaking," but it requires that one be engaged in First Amendment protected activity such as expression (through association), which Aloha B&B cannot show. *Rumsfeld*, 547 U.S. at 68. Aloha B&B's purpose in associating with the general public is unequivocally clear: in Ms. Young's own words, it is "[t]o bring in income." Dep. 14:7. *Cf. Boy Scouts of Am. v. Dale*, 530 U.S. 640, 649 (2000) (finding that the Boy Scouts were engaged in expressive association because the organization's mission was "to instill values in young people"). Unlike a typical expressive association, customers of a B&B do not "take positions on public questions" or perform similar activities; they are generally strangers to each other and/or to the owner before their initial patronage; and they certainly do not become members of any organized association by virtue of their patronage. *See Stanglin*, 490 U.S. at 25 (finding that a dance hall was not an expressive association based on similar characteristics); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987) (finding no violation of rotary clubs' expressive association rights through application of antidiscrimination law where clubs did not take

positions on public questions). The only common thread that unites customers with each other and Aloha B&B is their payment of fees. That is an insufficient basis for a right of expressive association.

The right to intimate association protects relationships "'that attend the creation and sustenance of a family' and similar 'highly personal relationships'" such as marriage and parent-child relationships. *IDK, Inc. v. County of Clark*, 836 F.2d 1185, 1193 (9th Cir. 1988) (quoting *Roberts*, 468 U.S. at 618-19). The individuals must be "deeply attached and committed to each other as a result of their having shared each other's thoughts, beliefs, and experiences." *Id.* In determining whether a particular relationship is protected by the right to intimate association, courts examine factors such as "the group's size, its congeniality, its duration, the purposes for which it was formed, and the selectivity in choosing participants." *Id.* Consideration of these factors confirms that the relationship between Aloha B&B and the customers to whom it provides transient accommodation is not of constitutional dimension.

• ***Size.*** Aloha B&B deals in volume, and hundreds of customers have walked through its doors. Aloha B&B has accommodated customers in up to three rooms for twenty years; within the last five years alone, it has received at least 500 customers (averaging between 100 to 200 customers per year). Dep. 89:25-90:4; Renn Decl., Ex. B (No. 5). *Cf. Roberts*, 468 U.S. at 621 (noting that local chapters of the Jaycees "are large and basically unselective groups" where one chapter had as many as 430 members).

• ***Purpose.*** The reason why Aloha B&B enters a relationship with customers is to generate profit, and the reason why customers enter a relationship with Aloha B&B is to secure overnight accommodation. The purpose is not, for either party, to become "deeply attached and committed to each other." *IDK,* 836 F.2d at 1193. *Cf. Roberts*, 468 U.S. at 619-20 (noting that family relationships are protected by the right of intimate association because of their deep attachments).

• ***Selectivity & Congeniality.*** With narrow exceptions such as same-sex couples, Aloha B&B accepts virtually all paying customers so long as space is available for the nights requested. Dep. 72:14-73:1. Aloha B&B does not inquire into the background of its customers, such as their political or religious beliefs, before allowing them to book a reservation. Dep. 73:2-8. *Cf. Roberts*, 468 U.S. at 621 ("new members are . . . admitted with no inquiry into their backgrounds"). Customers thus do not necessarily share a special community of "thoughts,

experiences, and beliefs." *IDK*, 836 F.2d at 1193.

• ***Duration.*** Aloha B&B provides only transient accommodation, and guests may stay for as few as three days. A relationship that "lasts for a short period and only as long as the client is willing to pay the fee" is not generally a protected intimate association. *Id.* (holding that the relationship between a client and escort is not a protected intimate association); *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1050 (9th Cir. 2000) (no protected intimate association between a psychoanalyst and client for same reason).

The Ninth Circuit's recent decision in *Fair Housing Council of San Fernando Valley v. Roommate.com*, 666 F.3d 1216 (9th Cir. 2012), does not change the result here. That case analyzed whether the right to intimate association protects the choice of one's roommate (which the court declined to answer, based on its construction of the statute at issue). But the constitutional issues raised in *Roommate.com* were fundamentally different than those here, because the factors relevant to intimate association in that case pointed in a different direction than here: (1) people generally have very few roommates, in contrast to Aloha B&B's hundreds of customers, (2) people are selective in choosing roommates, in contrast to a business that deals in customer volume, and (3) people may live with roommates for years, whereas it would be quite rare to have a roommate for merely three days. Whatever right may adhere to a roommate relationship, there is no right to intimate association between Aloha B&B and its customers.

iv. Application of the Antidiscrimination Law Does Not Violate the Takings Clause.

Neither the state nor federal Takings Clause or Due Process Clause requires the State of Hawai'i to pay money to businesses that wish to discriminate. U.S. Const. amend. V; Haw. Const. art. 1, §§ 5, 20; FAA, 15th Aff. Def.[9] As the Supreme Court recognized decades ago, the Takings Clause does not confer upon a business the "'right' to select its guests as it sees fit, free from governmental regulation." *Heart of Atlanta Motel*, 379 U.S. at 259, 261 (rejecting the argument that a law barring public accommodation discrimination is a taking of property).

The law has appropriately foreclosed Takings Clause challenges like that raised by Defendant here. There are generally two types of regulatory takings, per se takings and all

[9] The federal and state Takings Clause, while not identical, are analyzed similarly. *See Small Landowners of Oahu v. City & County of Honolulu*, 832 F. Supp. 1404, 1409 (D. Haw. 1993). The Takings Clause also subsumes an alleged substantive due process violation to the extent the conduct at issue is covered by the Takings Clause. *See Colony Cove Props. v. City of Carson*, 640 F.3d 948, 960 (9th Cir. 2011).

others. *Lingle v. Chevron*, 544 U.S. 528, 538 (2005). First, application of an antidiscrimination law is not a "per se" taking, because a per se taking requires either a "permanent physical invasion of [] property" (such as the installation of a cable box in an apartment building) or a situation where the government has deprived a property owner "*all* economically beneficial use" of property (such as barring the construction of any habitable structure on beachfront property). *Id.* (emphasis in original; internal quotation marks omitted). Neither is present here, as there has been no permanent physical invasion and no restriction such as barring any habitable structure.

Second, a taking may also exist depending on multiple factors, the two most important of which are (1) the economic impact of the law on the claimant, and (2) the extent to which the law interferes with reasonable investment-backed expectations. *Id.* (identifying these as the two "[p]rimary . . . factors"). Here, far from creating an adverse economic impact, adherence to the antidiscrimination law would have a *positive* economic impact: Aloha B&B would financially profit from accepting a group of customers—same-sex couples—whom it would otherwise exclude. Dep. 185:1-3 (agreeing that the business could "make more money if [it] accepted reservations from same-sex couples"). Accepting those customers would not interfere with any reasonable investment-backed expectations, because the ability to exclude just that one group of people is not "so essential to the use or economic value of the property that the state-authorized limitation of it amount[s] to a taking." *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 84 (1980) (finding no taking where a shopping center was prohibited from excluding undesired petition gatherers). That is especially true for innkeepers, who, as noted earlier, were barred even at common law from selecting their guests. *Hurley*, 515 U.S. at 571. The antidiscrimination law leaves Aloha B&B's entire business model intact: it may continue to charge a fee in exchange for transient accommodation. *Cf. Kaiser Aetna v. United States*, 444 U.S. 164, 178-81 (1979) (finding a taking where the government required the owner of a private marina to allow free access to the public).

In addition, the character of the government action, such as "whether it amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good,'" may be relevant to whether a taking has occurred. *Lingle*, 544 U.S. at 539. The antidiscrimination law does not "amount to a physical invasion" of Aloha B&B. The business is already open to the public; it retains control over when and how guests use the property; and it provides transient,

not permanent, accommodation. *Cf. PruneYard*, 447 U.S. at 83. The law also does not force "'some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Id.* at 83. To the contrary, the antidiscrimination law assigns responsibilities to *everyone* covered the law, because that is central to achieving its goal of eradicating discrimination. In short, there has been no taking.[10]

v. Courts Have Correctly Rejected the "Hybrid Rights" Theory.

Aloha B&B cannot resuscitate its free exercise defense with the so-called "hybrid rights" theory. Relying on dicta in *Employment Division*, the theory posits that a free exercise claim—which is unsuccessful, standing alone—may be joined with another constitutional claim—which may also prove unsuccessful, standing alone—to somehow create an enforceable right.

A viable claim cannot logically be created from two inadequate ones, which may explain why the theory has gained little acceptance among courts. The U.S. Supreme Court has never adopted it, even given recent opportunity to do so. *See Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2995 n.27 (2010) (rejecting a free exercise claim, despite the presence of a companion free speech claim, and reaffirming the rule in *Employment Division v. Smith* that "the Free Exercise Clause does not inhibit enforcement of otherwise valid regulations of general applicability that incidentally burden religious conduct"). The Ninth Circuit has also refused to apply the "widely criticized" hybrid rights theory. *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 440 n.45 (9th Cir. 2008) ("The 'hybrid rights' doctrine has been widely criticized, and, notably, no court has ever allowed a plaintiff to bootstrap a free exercise claim in this manner. We decline to be the first.") (citations omitted). It similarly has no place in Hawai'i jurisprudence, which has never lowered the standards for establishing a free exercise violation merely because other constitutional claims were asserted. *See, e.g., Meideiros v. Kiyosaki*, 52 Haw. 436, 438-44, 478 P.2d 314, 315-19 (1970) (rejecting free exercise challenge to public school sex education curriculum brought by parents who also asserted privacy rights and parental rights). In any event, Defendant's other constitutional claims are devoid of merit.

E. Plaintiffs Are Entitled to Permanent Injunctive Relief Enjoining Aloha B&B From Its Ongoing Practice of Discrimination Against Same-Sex Couples.

Plaintiffs are statutorily entitled to injunctive relief to enjoin Aloha B&B's unlawful

[10] Even if there were a taking, the remedy would not be an injunction against the antidiscrimination law. *See Lingle*, 544 U.S. at 543 (holding that the Takings Clause "does not bar government from interfering with property rights, but rather requires compensation").

discriminatory practices upon showing a violation of the public accommodation law. HRS § 489-7.5(a)(2) (providing for injunctive relief); *cf. Smallwood v. Nat'l Can Co.*, 583 F.2d 419, 420 (9th Cir. 1978) (upholding an injunction under Title VII and rejecting that a finding of irreparable harm is required where a statute specifically provides for injunctive relief).[11] Aloha B&B's current practice of only allowing married heterosexual couples to reserve a room with one bed, Dep. 72:14-22, operates as a ban against same-sex couples and constitutes sexual orientation discrimination.[12] *Cf. Diaz v. Brewer*, 656 F.3d 1008, 1012 (9th Cir. 2011); *Alaska Civil Liberties Union v. State of Alaska*, 122 P.3d 781, 789 (Alaska 2005); *Tanner v. Oregon Health Sciences Univ.*, 971 P.2d 435, 447-48 (Or. Ct. App. 1998). Plaintiffs thus request that Defendant be enjoined from imposing any requirement that is impossible for same-sex couples to satisfy, without providing any means for same-sex couples to access to the accommodation.

IV. CONCLUSION

Defendant is a place of public accommodation, and, as such, must abide by the same rules that govern all other places of public accommodation. Defendant's religious beliefs do not excuse its discriminatory conduct or the injuries that such conduct inflicts. For the reasons set forth above, and the absence of any genuine dispute of material fact, Plaintiffs and Plaintiff-Intervenor request that their motion for partial summary judgment be granted in all respects.

DATED: Los Angeles, CA, February 8, 2013.

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

Attorneys for Plaintiffs

DATED: Honolulu, HI, February 12, 2013.

ROBIN WURTZEL
SHIRLEY NAOMI GARCIA
APRIL WILSON-SOUTH

Attorneys for Plaintiff-Intervenor

[11] Furthermore, injunctive relief is independently warranted as a matter of equity. *See Stop Rail Now v. De Costa*, 120 Hawai'i 238, 243, 203 P.3d 658, 663 (App. 2008) (noting relevant equitable factors). Plaintiffs have shown actual success on the merits; violation of a civil rights statute constitutes irreparable harm, *see Silver Sage Partners, LTD v. City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001), whereas Aloha B&B will not be harmed (indeed, will financially benefit) by complying with the antidiscrimination law; and "[t]he public interest in . . . anti-discrimination laws generally weighs in favor of granting injunctive relief," *ReMed Recovery Care Ctrs. v. Township of Willistown*, 36 F. Supp. 2d 676, 688 (E.D. Pa. 1999).

[12] Aloha B&B confirmed that "there is nothing that a same-sex couple could do in order to book a room with one bed," Dep. 184:18-21, even if they had married elsewhere, Dep. 183:19-184:17, Wurtzel Decl., Ex. A, P-I 0101, or if same-sex couples could marry in Hawai'i, Dep. 182:10-14.