CAAP-13-0000806

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI'I

DIANE CERVELLI and TAEKO BUFFORD,

Plaintiffs-Appellees, and

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

Plaintiff-Intervenor-Appellee,

vs.

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

Defendant-Appellant.

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

APPEAL FROM

(1) ORDER GRANTING THE PARTIES' STIPULATED APPLICATION FOR APPEAL FROM INTERLOCUTORY ORDER, FILED MAY 9, 2013; AND

(2) ORDER GRANTING PLAINTIFFS' AND PLAINTIFF-INTERVENOR'S MOTION FOR PARTIAL SUMMARY JUDGMENT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, FILED APRIL 15, 2013

Circuit Court of the First Circuit
State of Hawaii

Honorable Edwin C. Nacino

ANSWERING BRIEF OF PLAINTIFFS-APPELLEES DIANE CERVELLI AND TAEKO BUFFORD AND PLAINTIFF-INTERVENOR-APPELLEE WILLIAM D. HOSHIJO

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I. STATEMENT OF THE CASE

A. Introduction

This appeal involves the commercial activities of a business. The business was created and continues to be operated by its proprietor 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 patronized the bed and breakfast over its many years of operation, and the business has profited as a result.

The business admits that it barred its doors 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, it is prohibited across many settings, including employment, housing, and, as relevant here, public accommodations.

The business proprietor wrongly contends that her choice of where to operate her business makes it exempt from the public accommodations law, which provides for no such exemption. 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 accommodations, her conduct is subject to the same regulation as any other commercial business, just as would be businesses of doctors, therapists, or accountants operated out of their homes. 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, only Christian, or only heterosexual customers.

The trial court correctly held that there was no genuine dispute of material fact that the business violated the public accommodations law. First, the public accommodations law covers this business with laser precision, both as a business that provides lodging to transient guests, as well as a facility that provides services relating to travel. Second, the constitutional rights to privacy, intimate association, and free exercise of religion do not shield discriminatory business conduct from state regulation. Third, even if a business could show that application of the public accommodations law burdened any of these rights, the law would still be constitutional, under

any level of scrutiny, because it is narrowly tailored to serve a compelling state interest in eliminating the harms of discrimination in the commercial marketplace.

B. Statement of Facts

1. Defendant Aloha Bed & Breakfast's Business

Despite more than 100 references in the opening brief to the proprietor's "home" (sometimes coupled with the redundant references to her "family" home, her "own" home, and the home in which she herself "lives"), Defendant Aloha Bed & Breakfast ("Defendant" or "Aloha B&B") is a commercial business. Its sole reason for existence is to turn a profit by selling its offerings in the market. Record on Appeal ("ROA"), JEFS Doc. No. 32, 728:15-17. The business is the sole proprietorship of Ms. Phyllis Young ("Ms. Young"), and it operates under the trade name of Aloha Bed & Breakfast, which is registered with the State of Hawai'i Department of Commerce and Consumer Affairs. ROA 828. Like other businesses, Defendant collects and pays taxes to the State of Hawai'i on the income that it generates. ROA 752:14-753:4, 827. Aloha B&B is also responsible for another tax—transient accommodations tax—that only providers of transient accommodations are required to pay. ROA 1394:2-6, 752:8-13.

In exchange for a fee, Defendant provides overnight accommodation, breakfast, swimming pool access, and wireless Internet access, among other amenities. ROA 774:11-14, 788-90, 837. Its facilities are perched on a hillside in the Mariners Ridge section of Hawai'i Kai with "breathtaking" ocean views. ROA 792, 811. Defendant estimates the property is worth approximately $850,000, approximately $650,000 of which is equity. ROA 727:19-25, 732:22-733:2. There is a three-night minimum for booking, with nightly rates up to $100, plus transient accommodation and general excise tax. ROA 789, 827, 1395:4-1396:4. Between 100 to 200 guests patronize Aloha B&B annually. ROA 754:25-755:4. Defendant first opened its doors to guests twenty years ago, in 1992. ROA 839.

Aloha B&B is open to the general public as customers. Defendant advertises its accommodation on multiple websites, which are accessible to the general public. ROA 740:1-4, 742:8-11. This includes Aloha B&B's own website, which invites customers to contact the business either by phone or electronic mail. ROA 788. The website boasts graphics stating "Best Choice Hawaii Hotel" and "Best Choice Oahu Hotels." ROA 676, 788. Defendant has also advertised through multiple third-party websites, either currently or in the past. ROA 792, 811, 825. For example, Aloha B&B pays the website BedandBreakfast.com between $400 to

$500 per year to advertise on that site. ROA 737:10-738:9. The purpose of all these websites is to bring business to Defendant. ROA 734:15-17, 738:7-9, 742:4-7.

With the exception of same-sex couples and a few 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." ROA 743:14-744:1. 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. ROA 1379:16-1380:25, 1463. Aloha B&B does not inquire into the background of customers, such as their political or religious beliefs, before accepting a reservation. ROA 744:2-8.

The vast majority of Aloha B&B's guests travel to Hawai'i. ROA 745:1-6, 883. Defendant estimates that only one percent of its guests live in Hawai'i. ROA 747:13-15. Defendant's advertising material holds out Aloha B&B as well-suited for travelers. ROA 800 (describing the smallest room as ideal "for those traveling alone"). Guests travel from around the United States and the world. ROA 745:10-747:12 (noting guests visiting from New York, California, Washington, Louisiana, Italy, Australia, Germany, France, and Japan).

Aloha B&B does not provide a place for its customers to permanently reside. ROA 1370:1-2, 1381:8-12, 1388:20-23. The median length of stay is four to five nights. ROA 748:16-23. 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. ROA 749:8-19. Ms. Young has never held herself out as a "landlord" to any of these customers. ROA 751:3-9. Customers are generally prohibited from engaging in a number of activities that would take place in their own home, including, for example, cooking food. ROA 727:6-18, 1364:22-1366:2. Conversely, customers need not engage in many tasks that they would otherwise perform at home, such as preparing their own breakfast, washing linens and towels, cleaning, vacuuming, or taking out the trash to the curb. ROA 1366:3-9, 1367:6-21. Instead, those services are provided by Defendant, just like other establishments providing lodging to transient guests, such as hotels, motels, and inns.

Hundreds of customers have patronized Aloha B&B for transient accommodation. ROA 754:25-755:4, 1399:8-13, 1400:23-1401:2. 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. ROA 745:10-746:9. Ms.

Young explained that she forgets some customers' names shortly after they leave: "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." ROA 1407:14-18.

2. Defendant's Discriminatory Business Conduct

Diane Cervelli and Taeko Bufford ("Ms. Cervelli" and "Ms. Bufford," respectively, and "Plaintiffs," collectively) are lesbian women in a committed relationship with one another. ROA 697, 715. In 2007, Ms. Cervelli and Ms. Bufford, who reside in California, began planning a trip for later that year to Hawai'i. ROA 697. They wanted to visit one of their friends, who resided in the neighborhood of Hawai'i Kai. *Id.* Staying near their friend was important because Ms. Cervelli and Ms. Bufford needed to rely on her for transportation, and their friend could not travel long distances because of health issues with her baby. *Id.*

On October 16, 2007, Ms. Cervelli emailed Aloha B&B to inquire about room availability. ROA 697, 709. 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 1-7, 2008, a total of six nights. ROA 711-12.

Ms. Cervelli called Aloha B&B on November 5, 2007 to book the reservation and spoke with Ms. Young, who indicated that the room was still available. ROA 697-98, 758:11-15. Ms. Young asked if someone would be staying with Ms. Cervelli, and then asked for the second person's name. ROA 698, 757:12-758:2, 884. When Ms. Cervelli responded with words to the effect of "her name is Taeko Bufford," Ms. Young asked, "Are you lesbians?" ROA 698, 757:12-758:2, 884. Ms. Cervelli was shocked by the question, but answered truthfully that they were. ROA 698, 757:12-758:2, 884. Ms. Young then refused to proceed with the reservation for Ms. Cervelli and Ms. Bufford, stating that she would feel very uncomfortable having lesbians in her house. ROA 698, 757:12-758:2, 759:5-11, 846, 862, 884. Ms. Cervelli and Ms. Bufford's sexual orientation was the only reason that Ms. Young refused the reservation. ROA 759:5-11, 868, 870.

Distressed and humiliated by what had transpired, Ms. Cervelli called Ms. Bufford in tears and relayed to her what had happened. ROA 698. In disbelief, Ms. Bufford called Ms. Young back and attempted to reserve a room. ROA 715, 759:21-760:5. Ms. Young again refused a reservation. ROA 715, 759:21-760:5. Ms. Bufford asked, "Is it because we are

lesbians that you will not rent to us?" to which Ms. Young replied, "Yes." ROA 715, 759:21-760:5, 884. Ms. Young stated that she felt uncomfortable providing a room to homosexuals, citing her personal religious views. ROA 715. Ms. Young reiterated those views when she spoke with Ms. Bufford again later that day.[1] ROA 763:22, 884-85.

Ms. Cervelli and Ms. Bufford subsequently complained to the Hawai'i Civil Rights Commission ("HCRC"), which conducted an investigation and found reasonable cause to believe that discrimination had occurred. ROA 892-96, 899-903. During its investigation, Ms. Young explained her religious belief that same-sex relationships are "detestable" and "defile our land." ROA 886-87, 766:9-15. Ms. Young also believes that homosexuality "must be seen as an objective disorder." ROA 781:24-782:1.

Although Ms. Young resides in the same house out of which Aloha B&B operates, she has made clear that 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 at the property. For example, she also owns an apartment, but she would not rent it to a same-sex couple because she believes that "it would be giving them the opportunity to have immoral sexual behavior in a place that we owned." ROA 1415:13-19.

C. Relevant Procedural History

Plaintiffs' complaint alleged a single cause of action for sexual orientation discrimination in public accommodations in violation of Hawai'i Revised Statutes (HRS) Chapter 489. ROA 29. The Executive Director of the HCRC, William Hoshijo ("Plaintiff-Intervenor"), moved to intervene in the case pursuant to the HCRC's statutory right to intervene in a civil rights case of general importance, HRS § 368-12, which the trial court granted. ROA 5, 36-43.

Plaintiffs and Plaintiff-Intervenor filed a motion for partial summary judgment with respect to liability and declaratory and injunctive relief, *i.e.*, all aspects of the case except

[1] During this second conversation, Ms. Young also stated that, while she was unwilling to serve Plaintiffs, she could provide the name of a friend with whom they could try to reserve a room. ROA 762:21-25. Ms. Young was concerned that Plaintiffs would take legal action against her, ROA 760:24-761:7, and believed that they would be less upset with her if she found alternate accommodation for them, ROA 765:1-14. 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. ROA 715. Ms. Young's friend belongs to the same church as Ms. Young and the two previously participated in the same Bible study group. ROA 764.

damages. ROA 668-906. Defendant filed a cross-motion for summary judgment. ROA 907-1239. The trial court held a hearing on both summary judgment motions on March 28, 2013 and entertained substantial oral argument. Mar. 28, 2013 Tr. (hereafter, "Tr."), JEFS Doc. No. 12. This included oral argument on the statutory question of whether Aloha B&B provided lodging to transient guests or services relating to travel, Tr. 25-29, as well as oral argument from both counsel for Plaintiffs, Tr. 6-9, and Defendant, Tr. 21-23, on the asserted constitutional defenses. Defendant also attempted to introduce a website printout, not submitted with any of its briefs, that purportedly showed that HRS Chapter 489 covers "public property not public accommodations," Tr. 35:18-19, which the court rejected as untimely and lacking foundation, Tr. 33-36. Defendant agreed that the motions presented "a purely legal question" and that "[t]here are no materially substantive facts in dispute in this matter." Tr. 13:16-18.

II. STANDARD OF REVIEW

A grant of summary judgment is reviewed *de novo* using the same standard applied by the trial court. *Thomas v. Kidani*, 126 Hawai'i 125, 127-28, 267 P.3d 1230, 1232-33 (2011). "'Where it is alleged that the legislature has acted unconstitutionally, this court has consistently held that every enactment of the legislature is presumptively constitutional, and a party challenging the statute has the burden of showing unconstitutionality beyond a reasonable doubt.'" *Korean Buddhist Dae Won Sa Temple of Haw. v. Sullivan*, 87 Hawai'i 217, 247-48, 953 P.2d 1315, 1343 (1998). The constitutional violation "'should be plain, clear, manifest, and unmistakable.'" *Id.*

III. ARGUMENT

A. The Trial Court Correctly Held that Aloha B&B Violated the Public Accommodations Law by Discriminating Against Plaintiffs Because of Their Sexual Orientation.

Plaintiffs alleged a single cause of action based on Defendant's conduct: violation of HRS § 489-3 ("public accommodations law"). 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.* As discussed below, the trial court correctly held that there was no genuine dispute of material fact that Defendant violated the public accommodations law and that this was the only cause of action at issue. Plaintiffs never

invoked the *housing* law, HRS Chapter 515 ("housing law"), and Plaintiff-Intervenor never charged a violation of that law, because Plaintiffs had not been seeking to take up residence at Aloha B&B. Tr. 42.

First, Defendant readily admits that the sole reason it refused accommodation to Ms. Cervelli and Ms. Bufford was because they were lesbians. ROA 759:5-11 ("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."); ROA 870 (Defendant's Responsive Pretrial Statement: "Defendant admitted that it would not rent a room to Plaintiffs because they were lesbians.").[2]

Second, the plain language of the law defining what constitutes a "place of public accommodation" is crystal clear: it encompasses any business or accommodation facility whose accommodations are extended, offered, sold, or otherwise made available to the general public as customers. HRS § 489-2. That specifically includes—but is not limited to—"[a]n inn, hotel, motel, or other establishment that provides lodging to transient guests" as well as "[a] facility providing services relating to travel or transportation." *Id.* The statute expressly cautions that the examples are illustrative only and may not be construed as limitations. *Id.* 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." *Id.* The Hawai'i Legislature has also directed that HRS Chapter 489 must be liberally construed to further its antidiscrimination objectives. HRS § 489-1.

Aloha B&B admits that it provides lodging to transient guests. "Mrs. Young does provide lodging to transient guests. We've not denied that. We've actually admitted that." Tr. 19:18-20. In addition, "Defendant admitted that it does not offer permanent housing." ROA 870. Aloha B&B's customers only stay for short periods of time—most for less than a week; more than 95 percent for less than two weeks; and more than 99 percent for less than a month—and they do not establish a permanent residence there. ROA 1370:1-2, 1381:8-12, 1388:8-23.

[2] The fact that Defendant also excludes some others does not diminish that Defendant engaged in sexual orientation discrimination. If a business denied service not only to African-Americans, but also to seniors, and left-handed people, it still would be engaging in race discrimination.

Ms. Cervelli and Ms. Bufford were prototypical examples of transient guests, given that their stay was intended to 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. ROA 1394:2-6, 752:8-13.

The trial court further correctly held that there was no genuine dispute that Aloha B&B also provides services relating to travel, a point that Defendant has not challenged as a factual matter on appeal and accordingly has waived. *See* ROA 1502-04; *Haw. Ventures, LLC v. Otaka, Inc.*, 114 Haw. 438, 472 n.17, 164 P.3d 696, 730 n.17 (2007). Aloha B&B has succeeded in developing a national and global clientele. ROA 745:10-747:12. Approximately 99 percent of its customers travel from outside Hawai‘i, and Aloha B&B designs its advertising to target travelers. ROA 745:1-6, 747:13-15, 800. In addition to providing a bed and breakfast to travelers, Defendant also chooses to provide traveling guests with computer access for the purpose of printing airline boarding passes. ROA 837.

In its responsive pretrial statement, Aloha B&B also "admitted that it offers bed and breakfast services to the general public." ROA 868. It cannot backtrack from this admission; and its attempts to do so are unavailing in any event. There is no textual or logical requirement that a place of public accommodation be unlocked, open 24 hours a day, or willing to take walk-in customers, as Defendant attempts to imply. The fact that Aloha B&B keeps its front door locked is neither unique—the front door of an inn may also be 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 are "by appointment only" or may require an advance reservation and do not provide services around the clock, such as a doctor's office, hair salon, small restaurant, or airline. That does not negate that the goods or services are "made available to the general public as customers." HRS § 489-2. 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 accessible only to Fox employees and Fox employees' guests. *Id.* Here, Aloha B&B's accommodations are made

available to the general public as customers. ROA 734:15-17, 745:10-747:12. Except for a few groups, such as same-sex couples, any member of the general public willing to pay the fee is permitted to be an Aloha B&B customer. ROA 743:14-744:1. Although Ms. Young asserts that the only people who can enter the house are those whom she has invited inside, it is undisputed that Ms. Young extends this invitation to virtually any member of the general public willing to pay the fee. *Id.* The fact that Aloha B&B may also exclude smokers, for example, does not change that it is still open to the general public. To illustrate, a daycare may also be open to the general public even if it accepts only toddler-aged children, who comprise a small percentage of the public, and not children of other ages or adults.

Whether Aloha B&B violated the public accommodations law does not require the court to look beyond that law. Because there is no genuine dispute that Aloha B&B (1) constitutes an establishment that provides lodging to transient guests as well as a facility that provides services relating to travel, and (2) rejected Plaintiffs because they are lesbians, the inquiry as to whether Aloha B&B violated the public accommodations law terminates here.

B. The Trial Court Correctly Held that There is No Exemption in the Public Accommodations Law to Shield Defendant's Discriminatory Business Conduct.

1. Defendant Cannot Borrow an Exemption from the Housing Law that the Legislature Intentionally Omitted from the Public Accommodations Law.

Defendant claims that it need not comply with any portion of the public accommodations law because there is an exemption applicable to a *different* law—a law prohibiting housing discrimination, HRS § 515-3—that should somehow excuse Defendant's violation of the public accommodations law which contains no such exemption. Plaintiffs, however, have *not* asserted a claim under the *housing* law given that they were only seeking transient lodging and other services as part of their travel to Hawai'i, and were not seeking housing in which to take up residence as roommates with the B&B's proprietor. Defendant's argument would first require the court to look beyond the plain language of the public accommodations law, the only statute under which Plaintiffs have brought suit. It would then require the court to take the so-called "Mrs. Murphy" exemption[3] from the housing law and export it into the public accommodations

[3] "Mrs. Murphy" was a hypothetical widow, imagined by Congress in the 1960s, who rented out a small number of rooms in her house and wished to discriminate on the basis of race.

law. This would not be interpreting the public accommodations law; it would be re-writing it. If Defendant's argument were accepted, it would also allow businesses like Aloha B&B to discriminate against customers on *any* basis, including race, religion, and disability. The HCRC rejected this same argument in administrative proceedings when it issued reasonable cause determinations finding that Defendant constituted a place of public accommodation. ROA 893, 900. An agency's construction of a statute it is charged to enforce is entitled to "great weight." *See Hyatt Corp. v. Honolulu Liquor Comm'n*, 69 Haw. 238, 245, 738 P.2d 1205, 1209 (1987).

The language and context of the public accommodations law show that the Legislature did not intend to create a "Mrs. Murphy" exemption. The Hawai'i Legislature clearly knows how to write a "Mrs. Murphy" exemption where it wishes to do so. But, as the plain language of the exemption in the housing law indicates, that exemption, HRS § 515-4, applies only to violations of HRS section 515-3. That exemption is narrow: it does not even exempt compliance from the other requirements imposed by HRS Chapter 515—let alone laws outside that chapter—but only HRS section 515-3. *See, e.g.*, HRS § 515-16 (other prohibited practices); *cf. United States v. Hunter*, 459 F.2d 205, 213-14 (4th Cir. 1972) (noting the similarly limited scope of the "Mrs. Murphy" exemption in federal 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").

Moreover, Hawai'i deliberately *chose* not to create a "Mrs. Murphy" exemption in the public accommodations law. The Hawai'i Legislature had the public accommodations provision of the federal Civil Rights Act of 1964 ("Title II") 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. *See State v. Hoshijo*, 102 Hawai'i 307, 317-18, 76 P.3d 550, 560 (2003) (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'"). Where the Legislature looks to another law as a model but then omits and adds language, those departures are intentional. *See, e.g.*, *Dependents*

of Cazimero v. Kohala Sugar Co., 54 Haw. 479, 482-83, 510 P.2d 89, 92 (1973). For example, Title II sets forth an exhaustive list of places of public accommodation; in clear contrast, state law does not. *See* HRS § 489-2 (non-exhaustive list including barber shops, hospitals, and mortuaries, which are not covered by Title II).

Here, the phrase "inn, hotel, motel, or other establishment that provides lodging to transient guests" in the state public accommodations law borrows nearly word for word from Title II. *Compare* HRS § 489-2 *with* 42 U.S.C. § 2000a(b)(1). But the Hawai'i Legislature stopped there. It jettisoned the 1964 language creating the "Mrs. Murphy" exemption:

Hawai'i Public Accommodations Law	Federal Public Accommodations 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, 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." 42 U.S.C. § 2000a(b)(1) (underlining added).

To accept Defendant's implausible reading of the public accommodations law would therefore require this court to write-in an exemption that the Legislature effectively struck out.[4] It would also violate the statutory mandate that the public accommodations law must be liberally construed to prohibit discrimination. HRS § 489-1.

Hawai'i is by no means unique in choosing to omit the "Mrs. Murphy" exemption from its public accommodations law, thus prohibiting a broader scope of discrimination than what Title II covered. Many states have done precisely the same. *See* David Forman, *A Room for 'Adam and Steve' at Mrs. Murphy's Bed and Breakfast: Avoiding the Sin of Inhospitality in Places of Public Accommodation*, 23 Colum. J. Gender & L. 326, 365-66 nn.174 & 177 (2012) (surveying 21 states that bar sexual orientation discrimination in public accommodations and

[4] In addition, when the Legislature passed the Marriage Equality Act of 2013 permitting same-sex couples to marry, it rejected attempts to exempt an individual, sole proprietor, or small business from needing to provide lodging or similar accommodation to any couple if doing so would violate the religious beliefs of the individual, sole proprietor, or business owner. S.B.1, H.D.1, Floor Amend. Nos. 8, 12, 16, 19, 20, 22 (2013). The rejected amendments are online at http://www.capitol.hawaii.gov/measure_indivSS.aspx?billtype=SB&billnumber=1&year=2013b.

finding that the vast majority have *not* adopted a "Mrs. Murphy" exemption in their public accommodations laws). States are entitled to afford greater protection from discrimination than federal law: to say an "exemption is permitted . . . is not to say that it is constitutionally required." *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990). Conversely, where states have chosen to exempt "Mrs. Murphy" from an antidiscrimination law, they have done so expressly. Forman, 23 Colum. J. Gender & L. at 365-66 nn.174 & 177.

2. Defendant's Statutory Construction Arguments Are Meritless.

There is no conflict presented by this case between the public accommodations law and the housing law. One law deals with transient accommodations and the other law deals with housing accommodations. 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. *See* Stand. Comm. Rep. No. 874, in 1967 House Journal, at 819; c*ompare* 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).

Defendant's resort to a dictionary definition of "residence"[5] ignores that the housing law uses the word "home" as well as "residence" to explain the phrase "housing accommodation." Aloha B&B, however, offers transient accommodations to travelers. If Ms. Young had been renting rooms for tenants' use as housing accommodation, the housing law would apply; but that is not at all the situation here.

Defendant's claim of a conflict between the public accommodation and housing laws

[5] The word "residence" does not appear in the public accommodations law, the only law relevant to this case. Even if the definition of "residence" were relevant, however, Webster's Third New International Dictionary (2002) defines "residence" as specifically *excluding* "a place of temporary sojourn or transient visit." *Accord* Merriam-Webster's Dictionary of Law (1996) (same). Black's Law Dictionary likewise makes clear that Plaintiffs were not seeking a residence, as it defines "residence" as "[t]he place where one *actually lives*," instead of is visiting (9th ed. 2009) (emphasis added).

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. As explained in *Watson v. Fraternal Order of Eagles*, 915 F.2d 235, 240 (6th Cir. 1990), an exemption in one antidiscrimination law does not give defendants "*carte blanche* to violate all other antidiscrimination laws" and "only exempts them from the particular provisions" at issue. The exemption here does not say "Section 515-3*, and all other laws, including Section 489-3,* do not apply . . ." Defendant's argument thus disregards the plain language of both the public accommodations law, which omits a "Mrs. Murphy" exemption, and the housing law, for which there is only a limited "Mrs. Murphy" exemption.

Defendant misapplies the canons of statutory construction that it invokes. Defendant's reliance on the proposition that a more specific statute controls over a general one, in the event of irreconcilable conflict (which as discussed above is absent here), has it backwards: the specific statute that governs Aloha B&B is the one that addresses an "establishment that provides lodging to transient guests." HRS § 489-2. The public accommodations law, and not the housing law, is also the specific statute that necessarily considered—but rejected—the notion that "Mrs. Murphy" should be exempt from the public accommodations law when providing lodging to transient guests. Defendant admits that "the Legislature provided a Mrs. Murphy exemption in HRS 515, but not in HRS 489." Def.'s Op. Br. 11. Defendant's conjecture about the reasons why the Legislature chose to omit a "Mrs. Murphy" exemption in the public accommodations law is both irrelevant and unsupportable.[6]

Defendant also attempts to apply the *ejusdem generis* ("of the same class") canon to the phrase "inn, hotel, motel, or other establishment that provides lodging to transient guests." HRS § 489-2. But the statute already expressly identifies what unifies the items in its list: they all "provide[] lodging to transient guests." *Id.* The statute does not stop at "other establishment" and leave the rest to speculation about which characteristic of the enumerated establishments is relevant; it goes on to explain "or other establishment *that provides lodging to transient guests*."

[6] For example, Defendant posits that perhaps there was no need for a "Mrs. Murphy" exemption in the public accommodations law, because the exemption for the housing law was sufficiently broad. As discussed, that is incorrect. In addition, Title II and the federal Fair Housing Act (from which Hawai'i created its own public accommodations and housing laws) each have their own separate "Mrs. Murphy" exemptions, 42 U.S.C. §§ 2000a(b)(1) & 3603(b)(2), because they stand and are applied independent of the other.

Id. (emphasis added).

Whether a business "provides lodging to transient guests" bears a logical relation to whether its accommodation is "made available to the general public as customers," which remains the touchstone of what constitutes a place of public accommodation. HRS § 489-2. As Aloha B&B itself demonstrates, a business that provides lodging to transient guests depends upon the general public's patronage as customers. In contrast, (a) whether a facility is used as the residence of the proprietor, or (b) how many customers can be served simultaneously—two arbitrary limitations concocted by Defendant, that have no basis in and are in conflict with the statute's plain language—do not inform whether the accommodation is made available to the general public as customers. It may also be true that all hotels, motels, and inns provide mattresses; but that is not the salient characteristic they share for purposes of the public accommodations law, and a transient accommodation provider that offered straw tatami mats could still be subject to the law.

The arbitrary limitations advanced by Defendant also disregard whether members of the general public are injured by discrimination. Preventing those injuries is the whole point of the public accommodations law. In *Dean v. Ashling*, 409 F.2d 754, 755-56 (5th Cir. 1969), the Fifth Circuit confronted whether a trailer park providing short-term accommodation to travelers constituted an "establishment which provides lodging to transient guests" under Title II of the Civil Rights Act of 1964, given that it was not an inn, hotel, or motel. The court held that it was covered under Title II, recognizing that the African-American plaintiffs' "problem upon rejection at a trailer park is the same as upon rejection at a motel or hotel." *Id.* The same is true of the injuries inflicted by Aloha B&B's discriminatory business practices, as Plaintiffs' experiences demonstrate. Whether Ms. Young chooses to live on the premises of the B&B or somewhere elsewhere does not change the injuries that her business inflicts. The public accommodations law protects individuals from discrimination regardless of whether a business is operated from inside one's house or from a high-rise office building, because the injury to victims of discrimination and to society at large is precisely the same in either case.

The situation here—of whether a bed-and-breakfast like Aloha B&B constitutes an "establishment that provides lodging to transient guests"—is also nothing like the cases relied upon by Defendant, where the scope of a law was pushed beyond its plain language and any reasonable limit. Those cases include whether deep-sea diving equipment constitutes a deadly

weapon, *State v. Giltner*, 56 Haw. 374, 375, 537 P.2d 14, 16 (1974); whether beer or coffee constitutes a volatile organic liquid solvent under a criminal law, *State v. Kahalewai*, 56 Haw. 481, 489, 541 P.2d 1020, 1026 (1975); and whether a railroad law regulating the sleeping quarters of a railroad company extends beyond the railroad, *Cal. State Legislative Bd. v. Dep't of Transp.*, 400 F.3d 760, 762 (9th Cir. 2005). But, here, it takes no leap to conclude that Aloha B&B constitutes "an establishment that provides lodging to transient guests" when it admits that it "provide[s] lodging to transient guests." Tr. 19:18-19. The same is true with respect to the fact that Aloha B&B provides "services relating to travel," when, by its own admission, approximately 99 percent of its customers are travelers from outside Hawai'i. ROA 747:13-15.

Also unavailing is Defendant's attempt to use a local zoning ordinance to undermine the plain language of a state statute. As the trial court noted, it is black letter law that a statute controls over an ordinance. Tr. 38. The zoning ordinance Defendant cites does not attempt to regulate discrimination, let alone define what constitutes a place of public accommodation, but instead seeks "to regulate land use." LUO § 21-1.20. How Honolulu (or any other local government) wishes to zone land use has no bearing on the state public accommodations law. Defendant cites *Tseu ex rel. Hobbs v. Jeyte*, 88 Hawai'i 85, 962 P.2d 344 (1998), but that involved a state regulation that expressly looked to a municipal ordinance. The regulation provided an exemption to housing discrimination on the basis of familial status if a municipal ordinance imposed an occupancy limit. There is no comparable state law here that looks to a municipal ordinance, and there is also no municipal ordinance that requires Defendant to discriminate on the basis of sexual orientation. Nothing prevents a business treated as a "bed and breakfast home" under Honolulu's zoning ordinance from also complying with the antidiscrimination requirement of the public accommodations law.

The prudential practice of interpreting statutes to avoid "grave and doubtful" constitutional questions is of no assistance to Defendant either, because it only applies where an otherwise acceptable construction of a statute is available that would obviate those questions—which is not the case here.[7] *Cf. Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988)

[7] For example, Defendant argues that its statutory interpretation is necessary to avoid equal protection and due process questions. Even if Defendant had not waived a defense based on equal protection by failing to raise it below, *see* ROA 361-63, 841-42, the defense founders on the notion that the public accommodations law and housing law regulate "the same act"

(courts lack the power to "rewrite a state law"). In *Fair Housing Council of San Fernando Valley v. Roommate.com*, for example, the Ninth Circuit's interpretation of the word "dwelling" under federal law was sufficient to avoid a constitutional question. 666 F.3d 1216 (9th Cir. 2012). Here, there is no remotely comparable analogue: Defendant asks the court to copy-and-paste the "Mrs. Murphy" exemption from 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.

C. The Trial Court Correctly Rejected Defendant's Constitutional Defenses as Meritless.

1. Defendant's Attacks on the Trial Court Are Baseless and Irrelevant.

Defendant complains that the trial court supposedly gave "absolutely no consideration—none!—of whether her constitutional rights" provide a defense. Def.'s Op. Br. 8. But the trial court entertained oral argument on those constitutional issues. Tr. 6-9, 21-23. At the same time, it expressed its desire for counsel to focus oral argument on the statutory issues, as the court was entitled to do. Tr. 18. It then orally explained the reasons for its decision. Tr. 21-22, 39, 45. Defendant's objections that the trial court should have taken a different approach are not only baseless, but irrelevant. An appellate court may affirm on any basis supported by the record, even if the trial court did not rely on it, and even if the trial court relied on the "wrong reason" for its ruling. *Whitey's Boat Cruises, Inc. v. Napali-Kauai Boat Charters, Inc.*, 110 Hawai'i 302, 309 n.15, 132 P.2d 302, 1220 n.15 (2006).

2. No Constitutional Right Protects Defendant's Discriminatory Business Conduct.

a. *There Is No Privacy Right for a Business 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, which is not at issue here, and the other is an interest in freely making certain kinds

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differently. Def.'s Op. Br. 21-22. As discussed above, the public accommodations law regulates discrimination in transient accommodation, whereas the housing law regulates discrimination in housing accommodation. The public accommodations law also requires proof of an element—that there is a place of public accommodation that makes its goods, services, or offerings available to the general public as customers, clients, or visitors—that is not required for the housing law.

of important personal decisions, which Defendant invokes. *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). A right to privacy does not include a right to harm third parties, but that is precisely what Defendant asks this court to vindicate: the ability of a business to discriminate against customers along invidious lines. No such right exists or should be recognized, because "the Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State." *Roberts v. Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring).

Aloha B&B's asserted right to discriminate against its customers is 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 privacy protection. *See State v. Mueller*, 66 Haw. 616, 628, 671 P.2d 1351, 1359 (1983). To the contrary, the ability of a business to pick and choose its customers has long been subject state regulation, even prior to the enactment of modern public accommodation statutes. The duty to guarantee access to places of public accommodation "was firmly rooted in ancient Anglo-American tradition," and all innkeepers were "'bound . . . to take all travelers and wayfaring persons.'" *See Bell v. Maryland*, 378 U.S. 226, 296-97 (1964) (Goldberg, J., concurring) (quoting 1878 treatise); *accord Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 571 (1995). There is no indication that a business proprietor who chose to live on the premises was relieved of this obligation. Accepting a customer's reservation request for transient accommodation is also not the kind of highly personal and intimate matter that has been recognized as protected by privacy. *Cf. 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).

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. 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. Notably, 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 accommodations law only affects *public* accommodations, which are those "made available to the general public as customers." HRS § 489-2; *cf. 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) (rejecting purported constitutional privacy right to exclude a tenant based on sexual orientation because defendants "gave up their unqualified right to such constitutional protection when they rented housing for profit"). By offering transient accommodations in her house to the traveling public, Ms. Young chose to make it no longer purely a "private home," but instead a business subject to laws governing places of public accommodation.

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*." *Kam*, 69 Haw. at 492, 748 P.2d at 378 (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." *Id.* 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." *Id.* at 494, 748 P.2d at 379; *accord State v. Kameenui*, 69 Haw. 620, 623, 753 P.2d 1250, 1252 (1988) (holding that the government may temporarily remove a spouse from the home where abuse is reasonably suspected, because "[t]here is no constitutionally protected right to remain free in your home" where potential harm to a third party is at issue).

Here, Defendant's discriminatory conduct directly harms members of the general public. The fact that conduct occurs in a home does not prevent its regulation, especially where commercial transactions are taking place there. *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); *see also Voris v. Wash. State Human Rights Comm'n*, 41 Wn. App. 283, 290-91 (Wash. Ct. App. 1985) (rejecting landlord's purported privacy right to engage in race discrimination against prospective tenant).[8]

[8] Furthermore, the harm that a business inflicts is not erased merely because it "refers" the customer elsewhere, a practice with an ignominious history in this nation that public

Defendant asserts that neither the federal nor state constitution "will tolerate government dictating that we must take into our home those we would prefer not." Def.'s Op. Br. 23. If accepted as true, that principle would apply whenever an owner living on the premises rents any number of rooms—even if more than four—because the government would still be "dictating" who must be taken into the owner's home. This would implicate the constitutionality of major portions of multiple federal and state civil rights laws.

Defendant's cited authorities do not, in any event, support the privacy right it claims. For example, *State v. Matias*, 51 Haw. 62, 66, 451 P.2d 257, 260 (1969), discusses one's reasonable expectation of privacy against unreasonable search and seizure. But a limitation on how the government collects evidence of unlawful conduct, whether in the home or otherwise, does not prevent the government from prohibiting that conduct. Importantly, none of Defendant's cases stands for the proposition that a right of privacy extends so far as to prevent the government from prohibiting conduct that harms third parties, even if the conduct takes place at home.

b. *The Relationship Between a Business and Its 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*, 468 U.S. at 618. The right of intimate association protects family relationships and relationships similar to those between family members, because they "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). 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, Inc. v. County of Clark*, 836 F.2d 1185, 1193 (9th Cir. 1988).

Plainly, the relationship between a provider of transient accommodation or travel-related services and its customers is not on equal constitutional footing with these protected relationships. A relationship that can be commoditized and auctioned off to the highest bidder is

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accommodations laws were enacted to stop. *See, e.g., United States v. Landsdowne Swim Club*, 713 F. Supp. 785, 818 (E.D. Pa. 1989) (describing practice in which black prospective members of swim club were referred to a different swim club).

perhaps the antithesis of what the right of intimate association protects. As confirmed by Ms. Young's telling admission that she often "can't even put [customers'] faces to the name," the relationship between Aloha B&B and its business customers is not a deep attachment and commitment of constitutional dimension. ROA 1407:14-18.

Two initial examples of other relationships unprotected by a right of intimate association are instructive. First, 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*, 836 F.2d at 1193. "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.*

Second, even the relationship between a therapist and a client is not protected by the right of intimate association. *See Pickup v. Brown*, 728 F.3d 1042, 1058 (9th Cir. 2013); *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1050 (9th Cir. 2000). If the relationship between a therapist and client—which may involve the confession of secrets and one's most intimate thoughts—is not protected by the right of intimate association, it is difficult to see how the relationship between a B&B and its customers—which need not involve any meaningful communication at all in order to exist—can possibly be protected.

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." *IDK*, 836 F.2d at 1193. Consideration of these factors confirms that the relationship between Aloha B&B and the customers to whom it provides transient accommodation or travel-related services is not of constitutional dimension.

● ***Size.*** Far from the "necessarily few" relationships protected by a right of intimate association, *Roberts*, 468 U.S. at 620, 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 at a time for twenty years; within the last five years alone, it has received at least 500 customers (averaging between 100 to 200 customers per year). ROA 754:25-755:4, 839. *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); *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (holding that dance-hall patrons were not protected by intimate association). While an escort and client constitute "the smallest possible association," an escort may be involved with a large number of clients, and the same is true with respect to Aloha B&B. *IDK*, 836 F.2d at 1193.

● ***Purpose.*** Aloha B&B's relationship with its customers owes its existence to a commercial purpose, and the commercial aspect of the relationship is the only one the public accommodations law regulates. 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). Unsurprisingly, if Ms. Young "couldn't make money running the B&B, [she] wouldn't operate it." ROA 728:11-17. The only attachment customers have with Aloha B&B is the one secured by their deposit check to hold a reservation.

● ***Selectivity & Congeniality.*** With narrow exceptions such as same-sex couples and smokers, Aloha B&B accepts virtually all paying customers so long as space is available for the nights requested. ROA 743:14-755:1. 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. ROA 744:2-8. *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. Although Ms. Young may be "selective" in terms of the sexual orientation of her customers, she is no more "selective" than the Jaycees in *Roberts*, which excluded all women and anyone outside the ages of 18-35 from full membership. 468 U.S. at 613. She likewise is no more "selective" than the Rotary Clubs in *Rotary Club of Duarte*, which not only excluded women in various respects but did not even make club membership open to the general public. 481 U.S. at 547. The U.S. Supreme Court nevertheless rejected a right to intimate association asserted by these clubs.

● ***Duration.*** Aloha B&B provides only transient accommodation, and customers may 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*, 378 U.S. at 314-15 (Goldberg, J., concurring) (noting that the relationship between an innkeeper and its customer is "evanescent"). 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. *IDK*, 836 F.2d at 1193; *Nat'l Ass'n for the Advancement of Psychoanalysis*, 228 F.3d at 1050 (9th Cir. 2000).

Defendant's contrary arguments are unavailing. The relationship between a transient accommodation provider like Aloha B&B and its customers is materially different than that between roommates, and Aloha B&B's assertion that it merely accepts "serial roommates" belies reality. *See* Def.'s Op. Br. 20; *Roommate.com*, 666 F.3d at 1221. Unlike Aloha B&B, individuals do not generally cycle through 500 to 1,000 roommates over five years. *Cf.* ROA 754:25-755:4, 1399:8-13, 1400:24-1401:2. Individuals do not consistently have roommates for only 72 hours. *Cf.* ROA 748:13. Individuals do not usually take in roommates without ever having spoken a word with them in-person or by phone. *Cf.* ROA 1379:19-1380:9. 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.* ROA 743:14-744:8. 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 also argues that non-"roommates" are excluded from critical aspects of the relationship. The same is true, however, of the relationship between a therapist and client, and an escort and a client. Furthermore, this consideration only makes sense in conjunction with selectivity, because if virtually any member of the general public can become part of the relationship, excluding others from that relationship is not particularly meaningful. Like a rotary club that holds itself out as having "windows and doors open to the whole world," *Rotary Club of Duarte*, 481 U.S. at 547, Aloha B&B admits that it "offers bed and breakfast services to the general public." ROA 868.

The notion that the State is somehow "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. Def.'s Op. Br. 19. 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 Op. Br. 4. 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.*, ROA 1363:9-1364:3, 1364:19-21. 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.

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

A neutral law of general applicability that does not target religion 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 unequivocally held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" Such a law need not be justified by a compelling governmental interest even where the law incidentally burdens a religious practice. *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993).

The public accommodations law here 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; *Smith v. Fair Employment & Housing Comm'n*, 12 Cal. 4th 1143, 1161-62 (1996) (plurality). As a result, the public accommodations law does not violate the federal free exercise clause. Defendant concedes that Hawai'i courts are "bound by [*Employment Division v.*] *Smith*'s lower level of scrutiny," and it explained below that it has raised a federal free exercise defense to preserve the issue in the event the U.S. Supreme Court were to abandon that holding. ROA 1482.

The Hawai‘i Supreme Court has not yet had occasion to decide whether the test under the federal free exercise clause also applies to the state free exercise clause. *Korean Buddhist*, 87 Hawai‘i at 247 n.31, 953 P.2d at 1338 n.31. In *Korean Buddhist*, a Buddhist temple alleged that its federal and state free exercise 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 what it described as a "loophole" in *Employment Division*: "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.* at 247 (quoting *Employment Div.*, 494 U.S. at 884). Because the local government in *Korean Buddhist* granted variances from the zoning code—thus permitting individualized exemptions from the general law—the Hawai‘i Supreme Court held that heightened scrutiny applied under the federal free exercise clause. *Id.* However, application of the zoning code was constitutional, because the temple could not satisfy its threshold requirement of showing a substantial burden on its free exercise of religion. *Id.* at 247-49.

Korean Buddhist thus had no occasion to decide whether the state free exercise clause required heightened scrutiny in the event that this "loophole" did not apply, which is the situation here, because the public accommodations law contains no individualized exemption. 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 thus, to put it mildly, is incorrect.

This court also need not decide the scope of the state free exercise clause, because even assuming that heightened scrutiny were appropriate under the state free exercise clause, Aloha B&B cannot satisfy its threshold burden of demonstrating a "substantial burden" on the free exercise of religion. The Hawai‘i Supreme Court has held that this requires a burden that rises to the level of coercion to *forgo* the practice of religion. *Koolau Baptist Church v. Dep't of Labor & Indus. Relations*, 68 Haw. 410, 418, 718 P.2d 267, 272 (1986). A vital component of this substantial burden requirement, as Hawai‘i courts have interpreted it, is whether the religious objector can reasonably engage in alternate conduct to avoid the asserted burden. *See id.* (finding no substantial burden where a church objected to paying unemployment insurance tax associated with operating a school because it could have employed 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) (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.

Korean Buddhist is illustrative. 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. *Id.*, 87 Hawai'i at 248, 953 P.2d at 1346. Even though removing the upper part of the hall directly implicated religious exercise—to temple members, it was "tantamount to an act of religious desecration" and akin to "removing the hand of God from Michelangelo's painting on the ceiling of the Sistine chapel"—the court held that this was nevertheless a self-inflicted injury that could have been avoided. *Id.*, 87 Hawai'i at 224 & 248, 953 P.2d at 1323 & 1346.

Ms. Young cannot claim a substantial burden on 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. Notably, she holds no religious belief that compels her to operate a B&B. ROA 779:25-780:3. *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 for use as housing accommodation, ROA 751:10-17, and avoid the alleged conflict between her religious beliefs and civil law.[9] *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 refrain from performing the procedure on any patient).

Defendant contends a "substantial burden" exists whenever the government conditions

[9] Whether Ms. Young would choose to sell her $850,000 house, thereby liquidating $650,000 in equity, if she decided not to run the B&B, ROA 727:19-25, 732:18-733:2, 792—rather than take in actual roommates as many people do, or engage in other income-generating activity—is not the metric for "substantial burden." *Korean Buddhist*, 87 Haw. at 248, 953 P.2d at 1346.

any benefit or right on conduct inconsistent with one's religious beliefs. That gossamer-thin measure is hardly a "substantial burden," and is not the test applied by the Hawai'i Supreme Court in *Korean Buddhist*. *See also Koolau Baptist Church*, 68 Haw. at 418, 718 P.2d 272; *Blake*, 5 Haw. App. at 415-18, 695 P.2d at 338-40. Ms. Young claims she has been forced to choose between following or abandoning her religious beliefs, but that is a false choice: she was not compelled to operate a B&B, just as the temple in *Korean Buddhist* was not compelled to construct its hall in a residential neighborhood with height limitations to which it objected.

Defendant's reliance on *Hobby Lobby*, a case decided under the Religious Freedom Restoration Act applicable to the federal government, underscores why there is no substantial burden on religion here. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), *pet. for cert. filed*, (Sept. 19, 2013) (No. 13-354) . The court found a substantial burden on religion where an employer would pay at least $23 million—and up to half a billion dollars—for its noncompliance with the federal contraceptive-coverage requirement. *Id.* at 1141. Here, in contrast, Aloha B&B characterized its profit as a "small amount of income," ROA 915, and it could continue to reap income from offering rooms as housing accommodation rather than transient accommodation.[10]

Defendant also concedes that the fact that it is a business engaged in for-profit commercial activity is relevant, even if not fatal, to their free exercise challenge. Def.'s Op. Br. 27. The U.S. Supreme Court has explained that "[w]hen 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).

If this court were to construe the scope of the state free exercise clause, Defendant has not offered any persuasive reason to depart from the federal free exercise clause analysis. The U.S. Supreme Court expressed concern that imposing a mandatory strict scrutiny test in free

[10] In addition, whether *Hobby Lobby* correctly applied the Religious Freedom Restoration Act is subject to considerable doubt, as reflected in the federal government's petition for *certiorari* in that case, and the circuit split on the issue presented by *Hobby Lobby*. *See, e.g.*, *Conestoga Wood Specialties Corp. v. Sec'y of U.S. HHS*, 724 F.3d 377, 384 (3d Cir. 2013), *pet. for cert. filed*, (Sept. 19, 2013) (No. 13-356).

exercise challenges "would be courting anarchy." *Employment Div.*, 494 U.S. at 888. It "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.

Furthermore, 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. For example, a B&B proprietor could also hold a sincere religious belief that bars non-Christians from entering the premises. *See, e.g.*, ROA 1047 (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."). Far from protecting religious freedom, Defendant's position would compromise the State's ability to bar religious discrimination.

Defendant's invocation of other states that have taken legislative action to require heightened scrutiny in analyzing free exercise challenges only highlights that Hawai‘i has not chosen to enact such a law here, despite various proposals to do so. *See, e.g.*, S.B.1, H.D.1, Floor Amend. Nos. 6-9, 18-22 (2013); H.B. 1196 (2013). 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 warrant doing so here. "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).

d. *Application of the Public Accommodations Law Does Not Violate the Takings Clause.*

Aloha B&B asserts that its property rights, including specifically under the takings clause, provide a defense to violation of the public accommodations law. U.S. Const. amend. V;

Haw. Const. art. 1, §§ 5, 20. The takings clause "does not bar government from interfering with property rights, but rather requires compensation." *Lingle v. Chevron*, 544 U.S. 528, 543 (2005). The State of Hawai'i is not obligated to pay money to a business that wishes to discriminate. But even the existence of a "taking," which is absent here, would not preclude enforcement of the public accommodations law.

Aloha B&B is not the first business to try to invoke property rights as a shield against antidiscrimination laws. 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. Ms. Young asserts that she will choose to cease operation of the B&B—rather than to continue operating it on a nondiscriminatory basis. The same argument, however, could have been made by the owner of Heart of Atlanta Motel, who restricted the motel's clientele to whites only.

There are generally two types of regulatory takings, per se takings and all others. *Lingle*, 544 U.S. at 538. First, application of the public accommodations 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.

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.* 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 it would otherwise exclude. ROA 778:1-3. 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). In short, there has been no "taking."

e. *Courts Have Not Adopted 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 challenge—which is unsuccessful, standing alone—may be joined with another constitutional challenge—which may also prove unsuccessful, standing alone—to somehow create an enforceable right. Defendant admits that the only situation that might require this court to even consider *whether* to adopt the hybrid rights theory is if Defendant can show a "likelihood" of success on the merits of both its free exercise defense as well as another constitutional defense, even if those defenses ultimately fail. Defendant has not done so. Accordingly, this case does not require this court to decide whether a "hybrid rights" theory should be adopted.

The "hybrid rights" theory has gained little acceptance among courts. 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 Op. Br. 28, grossly misrepresents the state of the law. The U.S. Supreme Court has never adopted the "hybrid rights" theory in the holding of a case, despite 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); *see also 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 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 school sex education curriculum brought by parents who also asserted privacy rights and parental rights).

3. Application of the Public Accommodations Law Survives Any Level of Review, Including Heightened Scrutiny.

a. *Countering Discrimination In Public Accommodations Is a Quintessential Compelling State Interest.*

Application of the public accommodations law does not burden any of Defendant's constitutional rights; but even assuming that Defendant could overcome that insurmountable hurdle, all of its defenses fail for the common reason that application of the public

accommodations law is justified under any level of scrutiny.[11] The public accommodations law serves a compelling state interest of the highest order: eliminating discrimination. The State is constitutionally empowered to prevent and redress the serious harms that discrimination inflicts upon victims of discrimination and society itself.

The State has a compelling interest in eliminating "all forms of discrimination," *EEOC v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1280 (9th Cir. 1982), including in 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)). Accordingly, "the 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. The State also bars discrimination on the basis of sexual orientation in employment, housing, and access to services receiving state financial assistance. *See generally* HRS § 368-1.

The U.S. Supreme Court has similarly held that a state law barring discrimination in public accommodations serves compelling state interests of the highest order in light of the personal and social harms caused by such discrimination. *Roberts*, 468 U.S. at 624; *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). A state interest in antidiscrimination is equally if not more compelling than other interests that have justified laws under heightened scrutiny. *EEOC*, 676 F.2d at 1280.

As *Hoshijo* and other cases demonstrate, the State has at least two distinct interests in its public accommodations law: (1) ensuring access to public accommodations, and (2) preventing acts of discrimination. *See Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 282-83

[11] Because the public accommodations law survives strict scrutiny, it also necessarily survives intermediate scrutiny, which generally requires that a law substantially further an important government interest. *See State v. Rivera*, 62 Haw. 120, 123, 612 P.2d 526, 529 (1980).

(Alaska 1994). A victim of discrimination may, in some cases, be able to locate an alternate provider of the good or service at issue; but that does not 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]"). Discrimination degrades individuals and affronts human dignity. *Id.*; *Daniel v. Paul*, 395 U.S. 298, 307-08 (1964) (noting that the overriding purpose of Title II was "to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public") (internal quotation marks omitted). The U.S. Supreme Court recognized the "stigmatizing injury" that individuals experience when they are targeted for discrimination. *Roberts*, 468 U.S. at 625. 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. However, that does not relieve the prior employer of liability for emotional distress caused by the discrimination, and it does not deprive the court of its ability to enjoin that employer's discriminatory practices.

The State's interest here is thus not merely to ensure that same-sex couples or others have "a place to stay"—as Defendant characterizes it—although that is certainly a relevant consideration. 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, the State has a compelling interest in ensuring that all people may participate in public life without the harm of being shunned by a place of public accommodation 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. Defendant agrees with this fundamental point: "We also agree that discrimination is a horrible evil. We agree with that." Tr. 13:18-19.

The harm that discrimination can inflict is borne out by the facts here. Aloha B&B's discrimination caused Ms. Cervelli to deteriorate into tears, feeling humiliated and deeply distressed. ROA 698. 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 State's interest in eliminating discrimination on the basis of sexual orientation is no

less compelling than its interest in eliminating 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; c*f.* 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"). 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 religiously-motivated discrimination. The compelling state interests in eliminating sexual orientation discrimination include the protection 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 free exercise challenge to a public accommodations law and holding that the law served a compelling interest in eliminating sexual orientation discrimination); *see also 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).

It is important to note, however, that Defendant's constitutional defenses are not limited to sexual orientation, and they threaten to compromise the State's ability to bar all forms of discrimination. Defendant laid bare its belief that "the homeowners' rights trump the State's right to root out discrimination." Tr. 13:21-22. If this court were to agree, it would hand Aloha B&B and similar places of public accommodation a free pass to discriminate not only on the basis of sexual orientation, but the full range of characteristics protected by the public

accommodations law, including race, sex, gender identity or expression, color, religion, ancestry, and disability. 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 HRS Chapter 489. Commercial profiteering cannot and should not be elevated above the State's civil rights laws.

b. *The Public Accommodations Law Is Narrowly Tailored to Advance the State's Interest in Antidiscrimination.*

Prohibiting discrimination "responds precisely to the substantive problem which legitimately concerns the State"—even if there is "incidental abridgment" of other asserted constitutional rights. *Roberts*, 468 U.S. at 628-29 (internal quotation marks omitted); *see also In re Herrick*, 82 Haw. 329, 342, 922 P.2d 942, 955 (1996) (noting that a law is narrowly tailored where it is "of a character appropriate to the public purpose justifying the legislation's adoption"); *Coyle v. Compton*, 85 Hawai'i 197, 207, 940 P.2d 404, 414 (App. 1997). Defendant suggests that the State need only regulate the discriminatory practices of "large" places of public accommodation like hotels in order to achieve its antidiscrimination objectives. Def.'s Op. Br. 30. In other words, if other places of public accommodation are willing to abide by the public accommodations law, why should Aloha B&B need to comply with the law?

As explained above, this incorrectly narrows the State's interest to ensuring access to goods, services, and other offerings of places of public accommodation. However, even that aspect of the State's interest would not be served by only prohibiting discrimination by "large" places of public accommodation, particularly in locations like Hawai'i Kai where there is limited lodging for transient guests. *See* ROA 1360 (noting that, apart from Aloha B&B, there are no hotels, motels, or inns in Hawai'i Kai). Staying in Hawai'i Kai was important for Plaintiffs because they were dependent on their friend for transportation, and she could not travel long distances because of health issues with her newborn baby. ROA 697.

Excusing compliance with the public accommodations law, particularly on an *ad hoc* basis, also undermines the public trust and confidence that is critical to achieving the law's antidiscrimination objectives. It introduces the specter that any routine trip to a drug store, restaurant, or other place of public accommodation may end in discrimination. In *Lee*, for example, an individual sought an exemption from the obligation to pay social security taxes based on a religious objection to doing so, but the U.S. Supreme Court rejected that bid, because mandatory compliance with the duty to pay such taxes was indispensable to the vitality of the

overall system. 455 U.S. at 258. The same is true here.

Next, Defendant tries the opposite tack: rather than arguing that the State does "too much" to achieve its antidiscrimination objective, it maintains that the State does "too little," because of its position with respect to whether same-sex couples may marry. But the State has now passed legislation permitting same-sex couples to marry. Act 1, Second Special Session of 2013 (signed Nov. 13, 2013). Accordingly, whatever force Defendant's argument may have had as an initial matter, it has no continuing force now.[12] *Cf. Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (noting the government's compelling interest in eliminating racial discrimination in education, which had historically prevailed with official approval).

The government may advance a compelling state interest in antidiscrimination without prohibiting every act of discrimination in every conceivable situation. The fact that Congress chose not to prohibit discrimination by employers with 15 or fewer employees in Title VII, and exempted other employers from its coverage, 42 U.S.C. § 2000e(b),[13] does not mean that the federal government has forfeited a compelling state interest in antidiscrimination, *EEOC*, 676 F.2d at 1280. Similarly, even setting aside "Mrs. Murphy," the federal public accommodations law does not prohibit discrimination on buses or airplanes, as well as any number of other settings not specifically enumerated. *See Kalantar v. Lufthansa German Airlines*, 402 F. Supp. 2d 130, 139 (D.D.C. 2005); 42 U.S.C. § 2000a(b). But there can be no question that laws barring discrimination in public accommodations advance a compelling state interest. *Cf. Roberts*, 468 U.S. at 624; *N.Y. State Club Ass'n*, 487 U.S. at 4 & 14 n.5 (upholding constitutionality of a public accommodations law, even though it exempted public educational facilities from coverage). Likewise, the inability of same-sex couples to marry in various states has not precluded courts from finding a compelling state interest in eliminating discrimination on the basis of sexual orientation. *Gay Rights Coal.*, 536 A.2d at 37; *Christian Legal Soc'y*, 2006 U.S.

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[12] Defendant's argument was meritless even prior to this change in law. A state's law regarding marriage does not vitiate its separate commitments to ending sexual orientation discrimination. *See Levin v. Yeshiva Univ.*, 754 N.E.2d 1099, 1111 (N.Y. 2002) (Kaye, C.J., concurring in part). Analogously, the fact that a state may treat unmarried couples differently from married couples for some purposes does not bear upon its ability or commitment to prohibit marital status discrimination in other contexts. *See Swanner*, 874 P.2d at 283; *Smith*, 12 Cal. 4th at 1160.

[13] Title VII also contains an exemption allowing a religious corporation, association, educational institution, or society to discriminate on the basis of religion. 42 U.S.C. § 2000e-1.

Dist. LEXIS 27347, at *27-28; *Presbytery of New Jersey of the Orthodox Presbyterian Church*, 902 F. Supp. at 521. The government is not required to solve all problems at once.

The circumstances here are nothing like those present in the case relied upon by Defendant, *Church of the Lukumi Babalu Aye*, 508 U.S. at 546-47, which dealt with a law effectively riddled with exemptions. 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 hunting or fishing for sport, euthanasia of unwanted animals, and destruction of animals removed from their owners, among many others. *Id.* at 543-44. "The underinclusion [was] substantial, not inconsequential." *Id.* at 543. In those circumstances, it was apparent that the law was motivated by an impermissible purpose (in that case, targeting animal sacrifice by Santeria worshippers). *Id.* at 540-42. Here, the coverage of the public accommodations law is sweeping in scope, reflecting Hawaii's deep commitment to eliminating discrimination.

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.[14] Its attempt to circumvent—and undermine—the State's civil rights protections should be rejected. Plaintiffs and Plaintiff-Intervenor therefore respectfully request that this court affirm the grant of partial summary judgment to them and the denial of summary judgment to Defendant in all respects.

DATED: Honolulu, HI, November 27, 2013.

/s/ Lindsay N. McAneeley
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DATED: Honolulu, HI, November 26, 2013.

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[14] Defendant's last-ditch argument that it cannot be sued is wholly without merit. Defendant admits that it has always used the trade name of Aloha Bed & Breakfast. The name of the business and of the sole proprietor "are but two names for one person." *Credit Assocs. v. Carlbom*, 98 Hawai'i 462, 466, 50 P.3d 431, 435 (App. 2002) (internal quotation marks omitted); *see* ROA 25 (complaint alleging Defendant is a "sole proprietorship that operates under the trade name Aloha Bed & Breakfast" in which "Phyllis Young is the sole proprietor"). Accordingly, "a judgment against the trade name is the same as a judgment against the individual, sole proprietor." *Id.*, 98 Hawai'i at 465-66, 50 P.3d at 434-35 (internal quotation marks omitted).

CAAP-13-0000806

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI‘I

DIANE CERVELLI and TAEKO BUFFORD, Plaintiffs-Appellees, and WILLIAM D. HOSHIJO, as Executive Director of the Hawai‘i Civil Rights Commission, Plaintiff-Intervenor-Appellee, vs. ALOHA BED & BREAKFAST, a Hawai‘i sole proprietorship, Defendant-Appellant.	CIVIL NO. 11-1-3103-12 ECN (Other Civil Action) APPEAL FROM (1) ORDER GRANTING THE PARTIES’ STIPULATED APPLICATION FOR APPEAL FROM INTERLOCUTORY ORDER, FILED MAY 9, 2013; AND (2) ORDER GRANTING PLAINTIFFS’ AND PLAINTIFF-INTERVENOR’S MOTION FOR PARTIAL SUMMARY JUDGMENT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DENYING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT, FILED APRIL 15, 2013 Circuit Court of the First Circuit State of Hawaii Honorable Edwin C. Nacino

STATEMENT OF RELATED CASES

Plaintiffs-Appellees DIANE CERVELLI and TAEKO BUFFORD and Plaintiff-Intervenor-Appellee WILLIAM D. HOSHIJO, as Executive Director of the Hawai‘i Civil Rights Commission, are unaware of any related cases.

DATED: Honolulu, Hawai‘i, November 27, 2013.

/s/ Lindsay N. McAneeley
JAY S. HANDLIN
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PETER C. RENN (Admitted *Pro Hac Vice*)

Attorneys for Plaintiffs-Appellees

CAAP-13-0000806

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI'I

DIANE CERVELLI and TAEKO BUFFORD, Plaintiffs-Appellees, and WILLIAM D. HOSHIJO, as Executive Director of the Hawai'i Civil Rights Commission, Plaintiff-Intervenor-Appellee, vs. ALOHA BED & BREAKFAST, a Hawai'i sole proprietorship, Defendant-Appellant.	CIVIL NO. 11-1-3103-12 ECN (Other Civil Action) APPEAL FROM (1) ORDER GRANTING THE PARTIES' STIPULATED APPLICATION FOR APPEAL FROM INTERLOCUTORY ORDER, FILED MAY 9, 2013; AND (2) ORDER GRANTING PLAINTIFFS' AND PLAINTIFF-INTERVENOR'S MOTION FOR PARTIAL SUMMARY JUDGMENT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, FILED APRIL 15, 2013 Circuit Court of the First Circuit State of Hawaii Honorable Edwin C. Nacino

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above *Answering Brief of Plaintiffs-Appellees Diane Cervelli and Taeko Bufford and Plaintiff-Intervenor-Appellee William D. Hoshijo* was served upon the following, in the manner and on the date indicated below:

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DATED: Honolulu, Hawai‘i, November 27, 2013.

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