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Clerk of the Court
Intermediate Court of Appeals, State of Hawai‘i
417 S. King Street
Honolulu, Hawai‘i 96813

Re: Case ID CAAP-13-0000806
Diane Cervelli and Taeko Bufford, Plaintiffs-Appellees,
and William D. Hoshijo, as Executive Director of the Hawai‘i
Civil Rights Commission, Plaintiff-Intervenor-Appellee, v.
Aloha Bed & Breakfast, a Hawai‘i sole proprietorship, Defendant-Appellant

Dear Clerk of the Intermediate Court of Appeals:

Pursuant to Hawai‘i Rule of Appellate Procedure 28(j), Plaintiffs-Appellees Diane Cervelli and Taeko Bufford and Plaintiff-Intervenor-Appellee William D. Hoshijo as Executive Director of the Hawai‘i Civil Rights Commission (collectively, “Plaintiffs-Appellees”) submit this response to the supplemental authority letter of Defendant-Appellant Aloha Bed & Breakfast (“Aloha B&B”) filed on July 25, 2014.

Plaintiffs-Appellees offer the following observations regarding the U.S. Supreme Court’s decision in *Burwell v. Hobby Lobby Stores, Inc.*, -- U.S. --, 2014 U.S. LEXIS 4505 (2014) (“*Hobby Lobby*”), and Aloha B&B’s statements about the decision’s purported relevance with regard to this appeal.

Applicability of Federal Statute. First, *Hobby Lobby* was decided under a federal law that applies only to the federal government and that does not apply to the states. The U.S. Supreme Court previously held that Congress had overstepped its constitutional authority in attempting to apply the Religious Freedom Restoration Act of 1993 (“RFRA”), 42 U.S.C. § 2000bb *et seq*., to the states. *Hobby Lobby*, slip op. at 6 (citing *City of Boerne v. Flores*, 521 U.S. 507, 533-34 (1997)).

“**Substantial” Burden.** Second, *Hobby Lobby* holds that, even where RFRA applies, the religious objector must demonstrate a “substantial” burden on its religious exercise. *Id.* at 32. The Court held that this standard was satisfied where the religious objectors faced taxes or

penalties of up to $475 million per year. *Id.* They faced those taxes or penalties regardless of what course of conduct they adopted in order to avoid the asserted conflict with their religious beliefs. *Id.*

Least Restrictive Means. Third, the Court held that RFRA imposed a new requirement—that the government use the "least restrictive means" to achieve its objective—which the Court held was even not required by case law interpreting the federal free exercise clause prior to *Employment Division v. Smith*. 494 U.S. 872 (1990). In that respect, "RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases." *Hobby Lobby*, slip. op. at 6 n.3. Aloha B&B relies upon this line of cases, *see* Appellee's Op. Br. at 24, which *Hobby Lobby* holds did not contain a "least restrictive means" requirement.

No "Shield" for Discrimination. Fourth, and perhaps most importantly, the Court held that its decision would provide no "shield" for discrimination even if "cloaked as religious practice." *Hobby Lobby*, slip op. at 46. On that issue, all nine justices agreed. To illustrate the point, the Court used the example of discrimination in hiring on the basis of race. It confirmed that (1) the government has a compelling interest in prohibiting such discrimination, and (2) the government's prohibition on discrimination is "precisely tailored" to achieve that critical goal. *Id.* That was true even though Title VII does not apply to employers with less than 15 employees. 42 U.S.C. § 2000e(b).

In addition, under the facts of *Hobby Lobby*, the Court held that the government could achieve its goal of providing contraceptive coverage to female employees without requiring employers to provide that coverage. The Court held the government could instead require insurers to provide the coverage (the costs for which would be offset by savings from pregnancy-related costs) and still achieve its objective "equally well." *Hobby Lobby*, slip op. at 43-44 n.38, 44. As noted above, however, the Court recognized that generally discrimination is different. The government's ability to achieve its compelling interest in antidiscrimination would be thwarted—and certainly not served "equally well"—if an employer could rely upon a religious objection to refuse to hire a person because of his or her race. *Id.* at 46.

Third Party Harms. Aloha B&B makes two points. First, it states that *Hobby Lobby* stands for the proposition that "the government cannot confer benefits on third parties at the expense of a religious objector," drawing upon hypothetical situations where the government's interests were (1) to make it more convenient for customers to buy alcohol, and (2) to increase tips for restaurant employees on a day of the week. The U.S. Supreme Court confirmed, however, that when what is at stake is preventing *harm* to third parties—as in the case of a job applicant rejected because of his or her race—the government satisfies even the test required by RFRA. *Id.* at 46.

Effect of Religious Exemption on Functioning of Overall System. Second, Aloha B&B agrees that there are situations where it is "untenable" to allow individuals to seek exemptions from neutral laws of general applicability. That was the case in *United States v. Lee*, 455 U.S. 252 (1982), where the Court rejected an employer's free exercise challenge to payment of social security taxes. The reason was because "mandatory participation is indispensable to the

fiscal vitality of the social security system." *Id.* at 258. *Hobby Lobby* confirmed that, even under the test required by RFRA, such an employer would still lose its challenge: allowing taxpayers to withhold taxes on religious grounds would lead to "chaos" given the enormous variety of government expenditures funded by tax dollars. Slip op. at 47.

The U.S. Supreme Court held that the healthcare system at issue in *Hobby Lobby* was not similarly threatened, because federal law did not create a pool of tax revenue for use in purchasing healthcare coverage. *Id.* However, the Court did not hold that the same would be true for granting *ad hoc* religious exemptions to an antidiscrimination law—particularly one designed to instill public confidence that individuals will be protected from discrimination in the enormous variety of places of public accommodations that they may encounter on a daily basis. *See* Plaintiffs-Appellees' Br. at 33-34.

Sincerely,

/s/ Jay S. Handlin

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