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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAI'I

DIANE CERVELLI and TAEKO BUFFORD,) CIVIL NO. 11-1-3103-12 ECN
) (Other Civil Action)
Plaintiffs,)
) **DEFENDANT'S MOTION FOR**
WILLIAM D. HOSHIJO, as Executive) **SUMMARY JUDGMENT;**
Director of the Hawai'i Civil Rights) **MEMORANDUM IN SUPPORT OF**
Commission,) **MOTION; DECLARATION OF**
) **(Caption continued next page)**

Plaintiff-Intervenor,
v.
ALOHA BED & BREAKFAST, a Hawai'i
sole proprietorship,
Defendant

) **PHYLLIS YOUNG; DECLARATION**
) **OF SHAWN A LUIZ; EXHIBITS "1"-**
) **"19"; NOTICE OF HEARING MOTION;**
) **CERTIFICATE OF SERVICE**

) HEARING:

) DATE: _____

) TIME: _____

) JUDGE: Edwin C. Nacino

) Trial Date: November 4, 2013

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COMES NOW Defendant ALOHA BED & BREAKFAST, a Hawai'i sole proprietorship, above-named, and hereby files its motion for summary judgment in accordance with Hawai'i Rules of the Circuit Courts, Rule 7, and in accordance with Hawai'i Rules of Civil Procedure, Rules 7 and 56, the Memorandum in Support, the attached exhibits, declaration of counsel and the records and files herein.

Dated: Honolulu, Hawai'i, February 20, 2013.



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ALOHA BED & BREAKFAST

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAI'I

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WILLIAM D. HOSHIJO, as Executive)	MEMORANDUM IN SUPPORT OF
Director of the Hawai'i Civil Rights)	DEFENDANT'S SUMMARY
Commission,)	JUDGMENT MOTION
)	
Plaintiff-Intervenor,)	
)	
v.)	
)	
ALOHA BED & BREAKFAST, a Hawai'i)	
sole proprietorship,)	
Defendant)	
.)	
_____)	

MEMORANDUM IN SUPPORT OF DEFENDANT'S
SUMMARY JUDGMENT MOTION

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Introduction

At the center of this lawsuit stands a house. It sits on a quiet street and is a typical family home. It contains 1,926 square feet and has four bedrooms, two and a half bathrooms, a family room, dining room, living room, and kitchen. It is functional, and comfortable, but not extravagant. The house is similar to countless others. To the casual observer there would not appear to be anything special about this house. But the house *is* special. It is *home* to Don and Phyllis Young. It is very special to *them*, just as the homes of the Judge, attorneys, and other litigants in this case are special to them. Don and Phyllis have owned their home for 35 years. They forged the bonds of their marriage there. They raised their children there. They laughed and played there. They entertained there. Their memories are there, in this house, their family home.

Now in their retirement years, the Youngs rent up to three rooms in their home from time to time to supplement their income and pay the mortgage. Mrs. Young calls her rental business Aloha Bed & Breakfast (“Aloha”). The Youngs still live there, in their family home. It is still the gathering place for their (now) adult son and daughter and their families. But in addition to providing shelter and memories at every turn, it now provides a small amount of income.

In this action, Plaintiffs Diane Cervelli and Taeko Bufford (the “Plaintiffs”) allege that Mrs. Young refused to rent them a room in her home because of their sexual orientation. Mrs. Young admits this. Renting to a cohabitating same-sex couple violates her sincerely held religious beliefs. Despite this, Plaintiffs filed a complaint, alleging that Mrs. Young violated Hawai’i Revised Statutes, Chapter 489 (the “Public Accommodations Law”), which prohibits discrimination on the basis of sexual orientation in places of public accommodation. (Ex. 1, *Complaint, passim.*)

The Plaintiffs' complaint against Aloha fails as a matter of law for three reasons. First, Aloha is not subject to the Public Accommodations Law. Rather, it is the home and residence of Mr. and Mrs. Young. So the rental of rooms in Aloha is subject to Hawai'i Revised Statutes, Chapter 515 (the "Fair Housing Law"), not the Public Accommodations Law. And the Fair Housing Law exempts Aloha from discrimination claims. *See infra*, Part I. Second, constitutional principles forbid the State from forcing Mrs. Young to rent a room in her own home to someone she does not want to, and thus the constitutional avoidance doctrine demonstrates that Aloha is not subject to the Public Accommodations law. *See infra*, Part II. Third, even if Aloha were subject to the Public Accommodations Law, applying that statute to compel Mrs. Young to rent a room to unwanted guests would violate myriad state and federal constitutional rights, including the right to privacy, intimate association, and free exercise of religion. *See infra*, Part III.

Statement of Facts

Mr. and Mrs. Young reside in their family home at 909 Kahauloa Place, Honolulu, HI. (*Declaration of Phyllis Young* ("Young Decl."), ¶ 1.) It contains 1,926 square feet and has 10 ½ rooms. (*Young Decl.*, ¶¶ 2-3.) There are 4 bedrooms, 2 ½ bathrooms, a family room, dining room, living room, and kitchen. (*Young Decl.*, ¶ 3.) Mr. and Mrs. Young have owned this house for 35 years. (*Young Decl.*, ¶ 4.) It is their family home, where they raised their children and are visited by their grandchildren. (*Young Decl.*, ¶¶ 5-7.) Mrs. Young sometimes rents a room, or two or three, of her home. (*Young Decl.*, ¶ 7.) Mrs. Young calls her rental business "Aloha Bed & Breakfast." (*Young Decl.*, ¶ 8.) Aloha has no checking account. (*Young Decl.*, ¶ 9.) All payments for rooms in Aloha are made payable to Mrs. Young. (*Young Decl.*, ¶ 9.)

Unlike hotels, Aloha has no employees. (*Young Decl.*, ¶ 10.) There is no clerk, or office into which members of the public enter. (*Young Decl.*, ¶¶ 10-11.) In fact, people may not enter

Mrs. Young's home without her permission. (*Young Decl.*, ¶ 12.) She generally keeps her door locked, just like other homeowners. (*Young Decl.*, ¶ 12.) No one has ever even knocked on her door and asked to stay in Aloha. (*Young Decl.*, ¶ 13.) "Aloha" is not listed in the phone book. (Ex. 20, ¶ 14.) The residence's listing is under the name of Don and Phyllis Young. (*Young Decl.*, ¶ 14.) When someone phones, Mrs. Young answers with some variation of, "Hello, this is Phyllis." (*Young Decl.*, ¶ 15.) She does not reference Aloha when answering the phone. (*Young Decl.*, ¶ 15.)

Mrs. Young tries to make each guest's visit to Aloha special. For instance, she and her husband sometimes share dinner or wine with her guests. (*Young Decl.*, ¶¶ 17-18.) She allows children staying in Aloha to play with her own children's and grandchildren's toys and books. (*Young Decl.*, ¶ 18.) Mrs. Young has, on occasion, prayed with her guests. (*Young Decl.*, ¶ 19.) She has invited them to attend the Thursday night Bible study she and her husband host in their home. (*Young Decl.*, ¶ 20.) She has also shared Christian-themed movies with her guests. (*Young Decl.*, ¶ 21.) Sometimes Mrs. Young takes guests to Costco with her. (*Young Decl.*, ¶ 22.) Mrs. Young notes that "people come in as guests and leave as friends." (*Young Decl.*, ¶ 23.) Guests frequently hug her husband and her when their stay is finished. (*Young Decl.*, ¶ 24.) Guests also regularly invite Mrs. Young and her husband to visit them and stay for free. (*Young Decl.*, ¶ 25.)

At any given time, Mrs. Young will rent between one and three rooms in her home. (*Young Decl.*, ¶ 7.) She never has rented more than three rooms. (*Young Decl.*, ¶ 7.) Mrs. Young gives her guests a key that opens all doors to her home. (*Young Decl.*, ¶ 12.) Guests use Mrs. Young's personal washing machine and dryer. (*Young Decl.*, ¶ 27.) She, her husband, and her guests all share the living space of the house, including the family room, bathrooms and kitchen. (*Young Decl.*, ¶ 26.) The Youngs and their guests "rub shoulders" in the house. For instance,

sometimes they find themselves relaxing in the family room at the same time. (*Young Decl.*, ¶ 26.) Mrs. Young stores some of her personal belongings in the closet of each room she rents to her guests. (*Young Decl.*, ¶ 28.) She also allows guests to use her personal computer, located in her own bedroom. (*Young Decl.*, ¶ 27.) Because of the intimate living arrangements Mrs. Young shares with her guests, she is selective in determining who she will welcome into her home. (*Young Decl.*, ¶ 29.) And she will not allow couples to stay in Aloha if allowing them to do so would violate her sincerely held religious convictions. (*Young Decl.*, ¶ 30.)

The Plaintiffs asked to rent a room in Mrs. Young's home. (*Young Decl.*, ¶ 31.) Mrs. Young declined because allowing a lesbian couple to share a room with only one bed in her home violates Mrs. Young's sincerely held religious beliefs. (*Young Decl.*, ¶¶ 32-33.) The Plaintiffs complained to the Civil Rights Commission and then filed this lawsuit.¹ If Mrs. Young is subjected to the Public Accommodations Law, she will cease renting rooms rather than violate her religious beliefs. (*Young Decl.*, ¶ 34.) The Youngs may then lose their home, as they cannot pay the mortgage without renting rooms in their home. (*Young Decl.*, ¶ 35.)

Argument

Standard of Review

“Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Amfac, Inc. v. Waikiki Beachcomber Inv. Co.*, 74 Haw. 85, 104, 839 P.2d 10, 22,

¹ Aloha moved to dismiss the Plaintiffs' complaint because the two year statute of limitations had run. *See* Haw. Rev. Stat. § 657-7. (*Defendant's Mot. to Dismiss*, Doc. 10, Jan. 10, 2012.) The Court denied Aloha's motion. (*Order*, Doc. 21, Feb. 21, 2012.) Aloha does not raise its statute of limitations defense in this motion for summary judgment, but does preserve the defense, and the Court's denial of it, for appeal.

recons. den., 74 Haw. 650, 843 P.2d 144 (Haw. 1992); *see also* Haw. R. of Civ. Pro. Rule 56(c). “A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties.” *Hulsman v. Hemmeter Dev. Corp.*, 65 Haw. 58, 61, 647 P.2d 713, 716 (1982); *Foytik v. Chandler*, 88 Haw. 307, 314, 966 P.2d 619, 626 (1998). “The evidence must be viewed in the light most favorable to the non-moving party.” *Coon v. City and County of Honolulu*, 98 Haw. 233, 244, 47 P.3d 348, 359 (Haw. 2004). The moving party bears the burden “to show the absence of any genuine issue as to all material facts, which, under applicable principles of substantive law, entitles the moving party to judgment as a matter of law.” *French v. Hawai’i Pizza Hut, Inc.*, 105 Haw. 462, 470, 99 P.3d 1046, 1054 (Haw. 2004). Aloha meets this standard. Summary judgment is appropriate.

I. Aloha Is Subject To the Fair Housing Law, Not the Public Accommodations Law.

The Plaintiffs allege that Aloha discriminated against them on the basis of their sexual orientation, in violation of Hawai’i’s Public Accommodations Law, which is codified at Hawai’i Revised Statutes, Chapter 489. (Ex. 1 at ¶¶ 29-39.) The threshold question is whether Aloha is a public accommodation subject to that statute. If not, the Plaintiffs’ claims fail as a matter of law.

Aloha is not a public accommodation subject to Chapter 489. Rather, Aloha is a private residence whose owner rents rooms within it. Such real estate transactions are subject to the Fair Housing Law, codified at Hawai’i Revised Statutes Chapter 515 *et seq.* Aloha therefore cannot be found to have engaged in illegal discrimination under the Public Accommodations Law. Further, Aloha has not engaged in illegal discrimination under the Fair Housing Law. Summary judgment in favor of Aloha is therefore warranted.

The Fair Housing Law, which is codified at Hawai’i Revised Statutes Chapter 515, applies to all real estate transactions, Haw. Rev. Stat. § 515-3, which it defines to include “the

sale, exchange, *rental, or lease of real property*[,]” Haw. Rev. Stat. § 515-2 (emphasis added). While the Public Accommodations Law is concerned with businesses generally open to the public, *see* Haw. Rev. Stat. § 489-2, the Fair Housing Law is concerned with more modest “housing accommodation[s],” which it defines as including “any improved or unimproved real property, or part thereof, which is used or occupied . . . *as the home or residence of one or more individuals.*” Haw. Rev. Stat. § 515-2 (emphasis added). So, for example, the Public Accommodations Law applies to inns, hotels, and motels—indeed, it lists them as “public accommodations.” Haw. Rev. Stat. § 489-2. They are open to the public. Anyone can walk through their doors, at any hour of the day or night, without any invitation from the owner. Often they have a restaurant into which the public may come during normal dining hours to purchase food and eat their meals whether they have rented a room or not. Their doors are rarely if ever locked and they stand open to all comers. They are public accommodations.

But Aloha is different. It is a private home. Mrs. Young and her husband live there. Her grandchildren visit there. Her belongings are there. The public may not walk through its doors without invitation. Rather, Aloha’s doors are locked. The only people who may enter are those who the Youngs invite inside. Aloha is thus notably different from an inn or hotel. It is what Chapter 515 calls a “housing accommodation,” Haw. Rev. Stat. § 515-2, “occupied . . . as the home or residence of one or more individuals[,]” *id.* And the rental of rooms within it is subject to Chapter 515’s provisions relating to the “rental or lease” of such property, *id.*, not Chapter 489’s provisions relating to public accommodations.

A. The Text of the Law Confirms That Aloha Is Subject To the Fair Housing Law, Not the Public Accommodations Law.

The Fair Housing Law prohibits discriminatory selling, leasing, and rental practices. Haw. Rev. Stat. § 515-3. But it “does not apply [] [t]o the rental of a room or up to four rooms in

a housing accommodation by an owner or lessor if the owner or lessor resides in the housing accommodation.² Haw. Rev. Stat. § 515-4(a)(2). This comports with the “Mrs. Murphy” exemption in federal law, which exempts those who rent four or fewer rooms in their own homes from the provisions of Title VIII of the Civil Rights Act of 1968. 42 U.S.C. § 3603(b)(2).³

The conditions to receive a “Mrs. Murphy’s” exemption, as codified in both federal and Hawai’i law, perfectly describe Aloha. Its owner, Mrs. Young, resides within it. And when she rents, she rents no more than three rooms. Mrs. Young, and Aloha, therefore qualifies for a “Mrs. Murphy’s” exemption under both federal law and Hawai’i’s Fair Housing Law.

This is significant. It clarifies that Aloha is exempt from the applicable antidiscrimination law. It also demonstrates that Hawai’i’s legislature contemplated that homeowners who sometimes rent rooms, like the Youngs do, are subject to the Fair Housing Law, which addresses them and their situation, instead of the Public Accommodations Law, which does not.

B. Principles of Statutory Construction Confirm That Aloha Is Subject To the Fair Housing Law, Not the Public Accommodations Law.

It strains believability to suppose that the legislature intended in Chapter 515 to give property owners like Mrs. Young immunity from laws prohibiting discrimination on the basis of sexual orientation, only to make them subject to such laws in Chapter 489. It is even more unbelievable to think that the legislature intended to classify as “illegal discrimination” in Chapter 489 *the very same act* it said was not illegal discrimination in Chapter 515, namely, the renting of fewer than five rooms in a housing accommodation. As applied to Aloha, the

² A “housing accommodation” includes “any improved or unimproved real property, or part thereof, which is used or occupied, or is intended, arranged, or designed to be used or occupied, as the home or residence of one or more individuals.” Haw. Rev. Stat. § 515-2.

³ This is known as “Mrs. Murphy” exemption because the law would not reach the proverbial “Mrs. Murphy’s boardinghouse.” *U.S. v. Space Hunters, Inc.*, 429 F.3d 416, 425 (2d Cir. 2005) (quoting 114 Cong. Rec. 2495, 3345 (1968)).

nondiscrimination provisions in the Public Accommodations Law and the Fair Housing Law stand in conflict with one another. One cannot be applied without abrogating the other.

Hawai'i courts recognize that where—as here—there is an irreconcilable conflict between a general statute and a specific one, the specific statute controls. *Wong v. Takeuchi*, 88 Haw. 46, 53, 961 P.2d 611, 618 (Haw. 1998) (*quoting State v. Vallesteros*, 84 Hawai'i 295, 303, 933 P.2d 632, 640, *recons. den.*, 84 Hawai'i 496, 936 P.2d 191 (Haw. 1997)). As applied to Aloha, the Public Accommodations Law is general while the Fair Housing Law, which addresses Aloha's actual situation, is specific. The Fair Housing Law's specific exemption to the antidiscrimination provision for owners who rent fewer than five rooms of the home where they themselves reside is controlling: Aloha is subject to the Fair Housing Law, not the Public Accommodations Law.⁴

C. Honolulu's Land Use Ordinance Confirms That Aloha Is Subject To the Fair Housing Law, Not the Public Accommodations Law.

Honolulu's Land Use Ordinance defines a “bed and breakfast *home*” as a house “in which overnight accommodations are provided to guests for compensation, for periods of less than 30 days, in the same detached dwelling as that occupied by an owner, lessee, operator or proprietor of the detached dwelling.” LUO § 21-10.1 (emphasis added). A “detached dwelling” is “a building containing one or two dwelling units, entirely surrounded by yards or other separation from buildings on adjacent lots.”*Id.* A “dwelling unit” is “a room or rooms connected together, constituting an independent housekeeping unit for a family and containing a single kitchen.” *Id.* Aloha perfectly fits the statutory definition for a “bed and breakfast home.” But it does not fit the definition for a hotel, which is “a building or group of buildings containing

⁴ Plaintiff Bufford sent Mrs. Young an email admitting that an exemption from the antidiscrimination law was available to Mrs. Young. *See* Exs. 3, 5. This admission against interest demonstrates that she knew that a private home was not a public accommodation.

lodging and/or dwelling units offering transient accommodations, and a lobby, clerk's desk or counter with 24 hour clerk service, and facilities for registration and keeping of records relating to hotel guests." LUO § 21-10.1. Aloha does not have those things. *See* Statement of Facts. So Aloha is zoned as a home, not a hotel. *Hotels* are subject to the Public Accommodations Law. But a bed and breakfast home is equivalent to a "housing accommodation" as defined in the Fair Housing Law. Aloha is subject to the Fair Housing Law, not the Public Accommodations Law.

D. Persuasive Case Law Shows That The Public Accommodations Law Does Not Apply.

The federal Americans with Disabilities Act (the "ADA"), codified at 42 U.S.C. §§ 12181-89, prohibits public accommodations from discriminating on the basis of disability. 42 U.S.C. § 12182(a). But the Ninth Circuit Court of Appeals ruled that entities are not subject to the ADA, even when they meet the ADA's definition of public accommodation, if they are not open to the general public but require an invitation from the owner to enter. *Jankey v. Twentieth Century Fox Film Corp.*, 212 F.3d 1159, 1161 (9th Cir. 2000).

Jankey is persuasive. Twentieth Century Fox operated a film and production facility, which only Fox employees and their guests could enter it. *Id.* An Automatic Teller Machine (ATM), commissary, and store were inside. *Id.* The ADA defines restaurants, sales and rental establishments, and banks or other service establishments as "public accommodations" falling within its parameters. *Id.* The plaintiff, who was confined to a wheelchair, often visited the facility on a visitor's pass. *Id.* He alleged that because the ATM, commissary, and store were not wheelchair accessible, Fox violated the ADA. *Id.* The Ninth Circuit ruled otherwise. Although the ATM, commissary, and store fit within the ADA's definition of public accommodation, the Ninth Circuit ruled that they were not public accommodations subject to the ADA because they

were not open to the general public. *Id.* The court noted that another federal statute exempted establishments not open to the public from complying with the antidiscrimination laws. *Id.*

Jankey thus establishes that federal public accommodations law does not include entities that the general public may not enter without invitation, particularly where another federal statute exempts those entities from antidiscrimination law. Similarly, here, the general public may not enter Aloha without an invitation from Mrs. Young, and another Hawai'i statute specifically exempts housing accommodations from antidiscrimination laws when their owner resides within them and they rent four or fewer rooms. *See infra* Part I.A. This Court should follow the Ninth Circuit's lead and rule that the Public Accommodations Law cannot apply to Aloha.

In sum, the Plaintiffs allege only that Aloha violated the Public Accommodations Law. But Aloha is not subject to the Public Accommodations Law. Further, Aloha is exempt from the only antidiscrimination law that arguably applies to it. The Plaintiffs' claims therefore fail as a matter of law and summary judgment in Aloha's favor is appropriate.

II. Hawai'i's Antidiscrimination Laws Should Be Interpreted to Avoid Constitutional Difficulties Rising From Intimate Association Guarantees.

Both the United States and Hawai'i Constitutions protect the right to intimate association in our own homes. The source of this right is found, among other places, in the First, Third, Fourth, and Fourteenth Amendments to the United States Constitution, as well as Article I, Sections 4, 5, 6, 7, and 18 of the Hawai'i Constitution. "[T]he freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty[.]" *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987). The Court "ha[s] not attempted to mark the precise boundaries of this type of constitutional protection." *Id.* But "cohabitation" is a protected intimate association. *Id.* (noting that "cohabitation with relatives" is protected and that "we have not held that constitutional protection is restricted to relationships

among family members.”). The Court looks to “such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship” to determine whether a relationship is an intimate association. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984). Relationships without those qualities, “such as a large business enterprise[,]” are not intimate associations. Relevant factors for deciding whether an association is an intimate one “include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent.” *Id.*

It is difficult to imagine an intimate association greater than the one we have with those with whom we choose to share our homes. Indeed, constitutional provisions provide great protection from State intrusion into our homes. The Fourth Amendment to the federal Constitution and Article I, Section 7 of the Hawai’i Constitution prohibit the State from entering our home without our permission unless it obtains a court warrant. The Third Amendment to the federal Constitution and Article I, Section 18 of the Hawai’i Constitution prohibit the State from forcing us to take soldiers into our homes during peacetime. “[I]t is beyond dispute that the home is entitled to special protection as the center of the private lives of our people.” *Minnesota v. Carter*, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring).

Not only do constitutional principles prevent the State bursting uninvited into our homes or quartering soldiers in our homes, they also protect us from being forced to take guests into our homes. As the Supreme Court recognized, “[w]e are at our most vulnerable when we are asleep because we cannot monitor our own safety or the security of our belongings.” *Minnesota v. Olson*, 495 U.S. 91, 99 (1990). We naturally want to maintain “a high degree of selectivity,” *Roberts*, 468 U.S. at 620, in determining with whom we share our homes. Constitutional protection for intimate associations guarantees our right to do so.

Subjecting Aloha to the Public Accommodations Law would violate this constitutional guarantee by forcing Mrs. Young to share her private home with housemates she does not desire. Constitutional guarantees cannot tolerate this level of State intrusion into our homes.

The Ninth Circuit Court of Appeal's recent decision in *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216 (9th Cir. 2012), is instructive. An online service ("Roommate") asked users to identify their sex, sexual orientation, and familial status. *Id.* at 1218. Roommate also asked users to identify their preferences for their roommates' sex, sexual orientation, and familial status. *Id.* It used those responses to match roommates. *Id.* The plaintiffs sued, alleging that Roommate's practices violated the federal Fair Housing Act (the "FHA"), 42 U.S.C. 3601 *et seq.*, which prohibits discrimination on the basis of "race, color, religion, sex, familial status, or national origin" in the "sale or rental of a dwelling."⁵ *Id.* That case thus presented the same question that this case does: may the State apply nondiscrimination statutes against private homeowners to compel them to take all comers into their homes as housemates?

The Ninth Circuit held that nondiscrimination laws would raise severe intimate associational concerns if applied to homeowners inviting roommates into their private homes. *Id.* at 1222. The court recognized that "it's hard to imagine a relationship more intimate than that between roommates, who share living rooms, dining rooms, kitchens, bathrooms, and even bedrooms." *Id.* at 1221. It further explained that "[h]olding that the FHA applies inside a home or apartment would allow the government to restrict our ability to choose roommates compatible with our lifestyles." *Id.* at 1221. Because "[t]aking on a roommate means giving him full access to the space where we are most vulnerable[.]" such a decision "would be a serious invasion of

⁵ 42 U.S.C. § 3604(b). The FHA defines "dwelling" as "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families." 42 U.S.C. § 3602(b). This is materially similar to Hawai'i's Fair Housing Law's "housing accommodation," which is defined above.

privacy, autonomy and security.” *Id.* That is why the Department of Housing and Urban Development dismissed a complaint against a young woman who advertised that she was “looking for a female christian roommate.” *Id.* at 1222 (*citing Fair Hous. Ctr. of W. Mich. v. Tricia*, No. 05-10-1738-8 (Oct. 28, 2010) (Determination of No Reasonable Cause)).

To avoid these constitutional concerns, the Ninth Circuit interpreted the FHA so that it did not apply to private homeowners sharing space with others in their own homes. *Id.* at 1222. This followed the “well-established principle that statutes will be interpreted to avoid constitutional difficulties.” *Id.* (*citing Frisby v. Schultz*, 487 U.S. 474, 483 (1988)). This Court should likewise interpret Hawai’i’s nondiscrimination laws so as not to violate intimate association guarantees. Mrs. Young accepts serial roommates into her private home. She shares living space with them. They have access to her house and belongings. The same intimate association concerns identified by the Ninth Circuit in *Fair Housing Council* are present here.

The constitutional avoidance doctrine is even more warranted here because (as discussed below) the constitutional right to privacy, one source of the right to intimate associations in a person’s own home, is even stronger under Hawai’i’s Constitution than under the United States Constitution. *State v. Kam*, 69 Haw. 483, 491, 748 P.2d 372, 377 (Haw. 1988).

This Court can avoid these constitutional problems by recognizing that Aloha is subject to the State’s Fair Housing Law, not the Public Accommodations Law. *See supra*, Part I. Under the Fair Housing Law, Aloha has a “Mrs. Murphy” exemption from the nondiscrimination requirement. Haw. Rev. Stat. § 515-4. Interpreting the law this way avoids the constitutional problems caused by the State compelling a homeowner to accept a housemate she does not want.

III. Subjecting Aloha To the Public Accommodations Law Violates Multiple Constitutional Rights and Fails the Required Strict Scrutiny Review.

Applying the Public Accommodations Law to Mrs. Young's home violates many rights under the United States Constitution and the Hawai'i Constitution. Because such an application cannot survive strict scrutiny review, the Plaintiffs' claims must fail as a matter of law.

A. Strict Scrutiny Applies To Burdens On Privacy Rights.

Hawai'i's Constitution provides that "[t]he right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest." Haw. Const. art. 1, § 6. The Hawai'i Constitution must be construed with regard to the intent of the framers and the people adopting it. *State v. Miyasaki*, 62 Haw. 269, 281, 614 P.2d 915, 922 (Haw. 1980). The framers declared that the right to privacy is "the most important right of all—the right to be left alone"—and stated that "it is treated as a fundamental right subject to interference only when a compelling state interest is demonstrated." *Kam*, 69 Haw. at 493, 748 P.2d at 378 (*citing* Stand. Comm. Rep. No. 69, in 1 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 674–75 (1980) *and* Committee of the Whole Rep. No. 15, at 1024)). They also explained that "this privacy concept encompasses the notion that in certain highly personal and intimate matters, the individual should be afforded freedom of choice absent a compelling state interest [i.e., the strict scrutiny standard]." *Id.* (*citing* Committee of the Whole Rep. No. 15, at 1024).

People have a right to privacy in their own home. *See State v. Matias*, 51 Haw. 62, 66, 451 P.2d 257, 260 (Haw. 1969) (finding that even an overnight guest had a right to privacy in his place of lodging). The Hawai'i Supreme Court ruled in *Matias* that a right to privacy exists "wherever" people "may legitimately be and reasonably expect freedom from governmental intrusion[.]" *Id.* The Hawai'i Constitution explicitly guarantees the people the right to be "secure in their . . . houses" against State intrusion. Haw. Const. art. 1, § 7. The constitutional,

fundamental right to privacy therefore extends to homes, including Mrs. Young's home. Strict scrutiny must apply.

B. Strict Scrutiny Applies To Burdens On Intimate Association Rights.

As discussed in Section II above, constitutional rights of intimate association will not tolerate the State forcing a homeowner to accept a housemate with whom she does not want to share her residence. The Plaintiffs allege that Mrs. Young discriminated against them by refusing to allow them to stay in her private home. Because applying the Public Accommodations Law to Mrs. Young would force her to accept anyone protected by that statute as an overnight guest in her home, this would impose a direct and substantial burden on her intimate association rights. Strict scrutiny thus applies. *See Louisiana Debating & Literary Ass'n v. City of New Orleans*, 42 F.3d 1483, 1498 (5th Cir. 1995) (discussing *Rotary Club of Duarte*, 481 U.S. at 544). Moreover, application of this heightened standard is bolstered by the Hawai'i Constitution's strong protection of privacy rights, as discussed in the previous section.

C. Strict Scrutiny Applies To Burdens On Free Exercise Rights Under the Hawai'i Constitution.

Applying the Public Accommodations Law would substantially burden Mrs. Young's free exercise rights. A substantial burden on free exercise exists where the State pressures a person to violate her religious convictions by conditioning a benefit or right on faith-violating conduct. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717-18 (1981). By forcing Mrs. Young "to choose between following the precepts of her religion and forfeiting [the right to rent rooms], on the one hand, and abandoning one of the precepts of her religion in order to [maintain that right], on the other hand," this application of the Public Accommodations Law would impose a substantial "burden upon the free exercise of

religion.” See *Sherbert*, 374 U.S. at 404; see also *Thomas*, 450 U.S. at 717-18 (“While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.”).

Strict scrutiny should apply to this burden on free exercise rights under the Hawai’i Constitution. This was the standard that prevailed for both state and federal free exercise claims until 1990, when the U.S. Supreme Court limited the federal constitutional protection in some cases, stating that “the right of free exercise [under the United States Constitution] does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the grounds that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).” *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990).

In response, twenty-nine States insisted that all laws burdening their citizens’ free exercise of religion must survive heightened review. Eighteen States enacted Religious Freedom Restoration Acts, which restored strict scrutiny for laws burdening the free exercise of religion.⁶ Another twelve States’ supreme courts have interpreted their state constitutions’ free exercise protections to require heightened constitutional scrutiny.⁷ Hawai’i has not definitively decided whether it will follow *Smith*’s approach or the twenty-nine States that have adopted an approach

⁶ Ala. Const. art. I, § 3.01; Ariz. Rev. Stat. Ann. § 41-1493; Conn. Gen. Stat. Ann. § 52-571b; Fla. Stat. Ann. §§ 761.01-05; Idaho Code Ann. § 73-402; 775 Ill. Comp. Stat. Ann. 35/1-99; Mo. Rev. Stat. § 1.302; N.M. Stat. Ann. §§ 28-22-1 to -5; Okla. Stat. Ann. tit. 51, § 251; 71 Pa. Stat. Ann. § 2404; R.I. Gen. Laws §§ 42-80.1-1 to -4; S.C. Code Ann. §§ 1-32-10 to -60; Tex. Civ. Prac. & Rem. Code Ann. §§ 110.001 to .012; La. Rev. Stat. Ann. § 13:5233; Tenn. Code Ann. § 4-1-407; VA. Code Ann. § 57-2.02.

⁷ *Fortin v. The Roman Catholic Bishop of Portland*, 871 A.2d 1208 (Me. 2005); *Larson v. Cooper*, 90 P.3d 125, 131 (Ala. 2004); *Valley Christian School v. Mont. High School Ass’n*, 86 P.3d 554 (Mont. 2004); *Odenthal v. Minnesota Conf. of Seventh-Day Adventists*, 649 N.W.2d 426, 442 (Minn. 2002); *City Chapel Evangelical Free Inc. v. City of South Bend ex rel. Dept. of Redevelopment*, 744 N.E.2d 443, 445-51 (Ind. 2001); *Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000); *Open Door Baptist Church v. Clark County*, 995 P.2d 33, 39 (Wa. 2000); *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 466 (N.Y. 2006); *McCready v. Hoffius*, 586 N.W.2d 723, 729 (Mich. 1998); *State v. Miller*, 549 N.W.2d 235, 238-42 (Wis. 1996); *Attorney General v. Desilets*, 636 N.E.2d 233, 235-41 (Mass. 1994).

more protective of religious liberty. But there are at least two reasons why this Court should find that strict scrutiny applies to a Free Exercise claim under the Hawai'i Constitution.

First, and most important, the Hawai'i Supreme Court has already indicated how it will proceed when the scrutiny question is presented to it. In *Korean Buddhist Dae Won Sa Temple of Hawai'i v. Sullivan*, 87 Haw. 217, 247, 953 P.2d 1315, 1345 (Haw. 1998), the Court said it would apply strict scrutiny to laws burdening free exercise rights. *Id.* Although the Court's statement is dicta, it provides explicit guidance to lower courts and should be followed here. Because the Public Accommodations Law, as applied to Aloha, burdens Mrs. Young's free exercise rights, and because the Hawai'i Supreme Court has given such clear guidance as to the level of scrutiny it would apply to laws burdening such rights, this Court should apply strict scrutiny.

Second, the Hawai'i Supreme Court has "long recognized" that it is "free to give broader protection under the Hawai'i Constitution than that given by the federal constitution." *State v. Viglielmo*, 105 Haw. 197, 211, 95 P.3d 952, 966 (Haw. 2004) (citations omitted). It has regularly done so with various state constitutional rights. *See, e.g., Kam*, 69 Haw. at 491, 748 P.2d at 377 (privacy rights); *State v. Rogan*, 91 Haw. 405, 423, 984 P.2d 1231, 1249 (Haw. 1999) (double jeopardy rights); *State v. Santiago*, 53 Haw. 254, 266, 492 P.2d 657, 664 (Haw. 1971) (freedom from self-incrimination); *State v. Hoey*, 77 Haw. 17, 36, 881 P.2d 504, 523 (Haw. 1994) (custodial interrogation rights). And the Hawai'i Supreme Court has already signaled in *Korean Buddhist* that broader protection exists under the state Free Exercise Clause and that strict scrutiny applies to laws burdening those rights.⁸

⁸ A departure under the Hawai'i Constitution from the federal free exercise standards adopted in *Smith* is additionally warranted because *Smith* is flawed and has been resoundingly criticized. *See, e.g.,* Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1111 (1990); Douglas W. Kmiec, *The Original Understanding of the Free Exercise Clause and Religious Diversity*, 59 UMKC L. REV. 591, 592-93 (1991).

D. Strict Scrutiny Applies To Burdens On Free Exercise Rights Under the United States Constitution Because Other Constitutional Rights Are Also Burdened.

In *Smith*, the U.S. Supreme Court explained that it applies strict scrutiny to laws burdening First Amendment free exercise rights when some other constitutional right is also burdened. *Smith*, 494 U.S. at 881. As discussed above, applying the Public Accommodations Law here would burden privacy and intimate association rights in addition to free exercise rights. Thus, strict scrutiny applies to the federal free exercise analysis.

Additionally, this application of the Public Accommodations Law will burden Mrs. Young's property rights under the Fifth Amendment to the United States Constitution and Article 1, Section 5 of the Hawai'i Constitution, both of which prohibit the taking of property by the State.⁹ Because of her religious beliefs, Mrs. Young will be forced to cease renting rooms if the Public Accommodations Law is applied to her. This amounts to a taking of her right to rent her property. Also, the Youngs may lose their home, since they cannot pay their mortgage without their rental income. This too will amount to a taking of the Youngs' property.

E. The Public Accommodations Law Fails Strict Scrutiny.

To survive strict scrutiny, the State must demonstrate that the law furthers a "compelling state interest" and is "narrowly tailored" to that interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). Narrow tailoring requires that the State employ "the least restrictive means" for achieving its compelling interest. *Thomas*, 450 U.S. at 718.

Strict scrutiny requires a particularized focus. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006) (discussing cases showing that strict scrutiny analysis demands a particularized focus on the parties and circumstances). The relevant

⁹ These constitutional property rights not only bolster free exercise claims; they provide an independent constitutional reason why the Public Accommodations Law cannot apply here.

government interest for strict scrutiny analysis thus is not the State's general interest in prohibiting discrimination, but its particular interest in forcing Mrs. Young to allow same-sex couples to rent a room in her home. *See Attorney Gen. v. Desilets*, 418 Mass. 316, 325-26, 636 N.E.2d 233, 238 (1994) ("The general objective of eliminating discrimination . . . cannot alone provide a compelling State interest that justifies the application of that section in disregard of the defendants' right to free exercise of their religion. The analysis must be more focused."). But *this*—forcing a homeowner to rent a room in her own home to a same-sex couple—would permit exactly what the constitutional rights of privacy and intimate association forbid. Overriding the Constitution in this manner is not even a legitimate interest, let alone a compelling one. The Public Accommodations Law, as applied to Mrs. Young and Aloha, must fail strict scrutiny.

Even if, contrary to U.S. Supreme Court guidance, the relevant interest is characterized more broadly—as ensuring that entities providing goods or services to the public treat same-sex couples the same as opposite-sex couples—the Plaintiffs cannot show that the State considers this to be a compelling government interest. "[A] law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (alterations omitted). Here, because same-sex couples may not marry each other in Hawai'i, *see* Haw. Rev. Stat. § 572-1, the State and its political subdivisions treat same-sex couples differently than opposite-sex couples for myriad marriage-related purposes when providing services to the public. The State, quite plainly then, does not consider there to be a compelling government interest in eliminating a form of differential treatment that it authorizes and practices in its own operations.

Furthermore, even if the relevant interest is characterized even more broadly—such as ensuring that everyone has a place to stay in public accommodations—applying the Public

Accommodations Law to Mrs. Young is not the least restrictive means to achieve the interest. It is simply not necessary to force private homeowners to accept guests into their private homes to ensure that everyone has a place to stay in public accommodations. The State's interest is readily achieved through nondiscrimination laws applied to inns, hotels, and other establishments open to the general public. Applying the law to private homeowners and intruding into their choice of who to share their home with goes too far. It is not narrowly tailored and fails strict scrutiny.

Because the Public Accommodations Law as applied to Aloha cannot satisfy strict scrutiny review, it is unconstitutional as applied, thus warranting summary judgment for Aloha.

Conclusion

This Court should grant summary judgment for Aloha. It is not a place of public accommodation subject to the Public Accommodations Law. It is Mr. and Mrs. Young's private home. As such, it is subject to the Fair Housing Act, which exempts it from antidiscrimination prohibitions. But even if the Public Accommodations Law did apply to Aloha, this application of the law cannot survive strict scrutiny review, and therefore cannot undergird the Plaintiffs' claims. Defendant Aloha Bed & Breakfast therefore respectfully asks this Court to grant its motion for summary judgment.

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