No. 18-451

IN THE
# Supreme Court of the United States

ALOHA BED & BREAKFAST,
A HAWAI'I SOLE PROPRIETORSHIP,
*Petitioner*,
v.
DIANE CERVELLI, ET AL.,
*Respondents*,
v.
WILLIAM D. HOSHIJO, AS EXECUTIVE DIRECTOR OF THE
HAWAI'I CIVIL RIGHTS COMMISSION,
*Intervenor-Respondent.*

**On Petition for Writ of Certiorari to the Intermediate Court of Appeals of Hawai'i**

## MOTION FOR LEAVE TO FILE AND BRIEF OF AMICUS CURIAE FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONER

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**MOTION OF FOUNDATION FOR MORAL LAW FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF PETITIONER**

The Foundation for Moral Law ("the Foundation") respectfully moves for leave of the Court to file the accompanying *amicus* brief under Supreme Court Rule 37.2(b).

The Foundation is a national public-interest organization based in Montgomery, Alabama, dedicated to the strict interpretation of the Constitution as written and intended by the Framers and the right to acknowledge God in the public arena. The Foundation believes that religious liberty is the most valuable right protected by the Constitution and desires to bring the Court's attention to the important religious liberty implications in this case.

On October 12, 2018, the Foundation notified Petitioner that the Foundation intended to file an *amicus* brief and asked for its consent. The Petitioner consented and also advised the Foundation that it had filed blanket consent. The Foundation notified Respondent and Intervenor-Respondent of intent to file on November 8, 2018. Respondent and Respondent-Intervenor have declined to consent because timely notice had not been given.

Because the failure to give timely notice was inadvertent and because Respondent and Respondent-Intervenor have alleged no prejudice from the late notice, the Foundation respectfully

requests that the Court grant leave to file its *amicus* brief.

Respectfully submitted,

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## INTEREST OF AMICUS CURIAE[1]

*Amicus Curiae* Foundation for Moral Law ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to the defense of religious liberty and the strict interpretation of the Constitution as written and intended by its Framers. The Foundation has an interest in this case because it believes that Petitioner's case is an example of a recurring problem in the clash between religious liberty and same-sex relations and that religious liberty should prevail.

## SUMMARY OF ARGUMENT

Phyllis Young, a devout Roman Catholic of modest means, uses her home as the Aloha Bed & Breakfast and operates it as she lives, in accordance with her Roman Catholic beliefs. She therefore does not rent rooms to couples who use those rooms to engage in sexual relations outside traditional marriage.

She holds no animus against homosexuals. She applies her policy to homosexuals and heterosexuals alike. A single homosexual is welcome to rent a room from her, and even her own daughter and her

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[1] Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief. As stated in the motion, Respondent and Intervenor-Respondent have declined to consent because timely notice was not received.

daughter's boyfriend, when they visit, are required to stay in separate rooms.

In 2007, when same-sex marriage was still illegal in Hawai'i, Ms. Young declined to rent a room to a lesbian couple from California. For following her religious beliefs, she has been subjected to quasi-criminal administrative proceedings and sanctions and eleven years of complex litigation, and she will probably be forced to close down her bed and breakfast and lose her home -- unless this Court grants her relief.

This Court should grant Ms. Young relief for several reasons. First, when she refused to allow two homosexuals to use a room in her home in 2007, the legal state of marriage in Hawai'i was confusing, and the traditional Judeo-Christian view of marriage had been the reigning paradigm in that State since at least 1840. Consequently, bringing quasi-criminal charges against Ms. Young when the law was unclear raises vagueness concerns. In addition, requiring Ms. Young to let same-sex couples use her home under these circumstances violates her first freedom – free exercise of religion. This Court should take this opportunity to reexamine its prior decision in *Employment Division v. Smith* and once again afford strict scrutiny review to laws burdening the free exercise of religion. Finally, even if this Court does not overrule *Smith*, it should take this opportunity to enforce *Smith*'s hybrids-right doctrine, which the lower courts have ignored and which is at issue in this case.

## ARGUMENT

### I. The traditional Judeo-Christian view of marriage has occupied a favored position in American law.

The traditional view of marriage as between one man and one woman has been so ensconced in American law that American courts have, until recently, refused to even recognize alternatives. In *Reynolds v. United States,* 98 U.S. 145 (1878), this Court held that the Free Exercise Clause does not protect the right to engage in polygamous marriage. In *Davis v. Beason,* 133 U.S. 333 (1890), the Court affirmed its holding in *Reynolds,* saying polygamy is not protected by the Free Exercise Clause because it is a crime "by the laws of all civilized and Christian countries." *Id.* at 341. The right to engage in other forms of marriage is not recognized because the Judeo-Christian view of marriage between one man and one woman is firmly part of our legal system, and "Christianity is part of the common law[.]" Joseph Story, *A Discourse Pronounced Upon the Inauguration of the Author, as Dane Professor of Law at Harvard University* 20 (1829); *cf.*, *Updegraph v. Commonwealth,* 11 Serg. & Rawle 394, 400 (Pa. 1824); *People v. Ruggles,* 8 Johns. 290, 294-95 (N.Y. 1811) (opinion by Chancellor Kent); *Vidal v. Girard's Executors,* 43 U.S. 127, 2 How. 127, 198 (1844) (opinion by Justice Story).

Traditional marriage as between one man and one woman was recognized by the early law of the Kingdom of Hawai'i. After the various tribes of

Hawai'i were united into one kingdom in the early 1800s, the Kingdom adopted its Constitution of 1840. This Constitution began with a "Declaration of Rights, Both of the People and Chiefs," which stated:

> God hath made of one blood all nations of men to dwell on the earth," [quoting *Acts* 17:26] in unity and blessedness. God has also bestowed certain rights alike on all men and all chiefs, and all people of all lands.
>
> These are some of the rights which He has given alike to every man and every chief of correct deportment; life, limb, liberty, freedom from oppression; the earnings of his hands and the productions of his mind, not however to those who act in violation of laws.
>
> God has also established government, and rule for the purpose of peace; but in making laws for the nation it is by no means proper to enact laws for the protection of the rulers only, without also providing protection for their subjects; neither is it proper to enact laws to enrich the chiefs only, without regard to enriching their subjects also, and hereafter there shall by no means be any laws enacted which are at variance with what is above expressed, neither shall any tax be assessed, nor any service or labor required of any man, in a manner which is at variance with the above sentiments.

Haw. Const. 1840.[2]

After this Declaration, the Constitution of Hawai'i then proclaimed:

> It is our design to regulate our kingdom according to the above principles and thus seek the greatest prosperity both of all the chiefs and all of the people of these Hawai'ian Islands. But we are aware that we cannot ourselves alone accomplish such an object--God must be our aid, for it is His province alone to give perfect protection and prosperity.--Wherefore we first present our supplication to HIM, that he will guide us to right measures and sustain us in our work.
>
> It is therefore our fixed decree,
>
> I. That no law shall be enacted which is at variance with the word of the Lord Jehovah, or at variance with the general spirit of His word. All laws of the Islands shall be in consistency with the general spirit of God's law....

*Id.*

It is not surprising, therefore, that until recently Hawai'i law has traditionally not recognized same-sex marriage, and that the people of Hawai'i sought to keep marriage limited to one man and one woman. The Kingdom of Hawai'i Penal Code of 1850, Chapter

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[2] *Available at* http://www.hawaii-nation.org/constitution-1840.html (last visited Nov. 8, 2018).

XIII, which included additional provisions from 1862, contained prohibitions against polygamy, adultery, fornication, incest, and sodomy. Section 11 provided:

> Whoever commits sodomy, that is, the crime against nature, either with mankind or any beast, shall be punished by a fine not exceeding one thousand dollars, and by imprisonment at hard labor not more than twenty years.[3]

## II. Hawai'i law requiring bed and breakfasts to rent to same-sex customers is void for vagueness.

A brief recounting of the recent history of the same-sex marriage controversy in Hawai'i will be helpful in understanding why people of reasonable understanding would find the legal status of same-sex marriage Hawai'i's confusing and void for vagueness.

After the Hawai'i Supreme Court in *Baehr v. Milke,* 852 P.2d 44 (Haw. 1993), held Hawai'i's marriage laws unconstitutionally discriminatory, Judge Kevin Chang ruled in 1996 that the State of Hawai'i had not met its evidentiary burden to show that the marriage statute furthers compelling state interests and is narrowly drawn. But two years later,

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[3] *The Penal Code of the Hawaiian Kingdom, Compiled from the Penal Code of 1850, Chapter XIII* (Government Press, Honolulu, Oahu 1869) p. 22. Portions of Chapter XIII are 1862 additions, but Section 11 appears to be from the original Penal Code of 1850.

the people of Hawai'i in 1998 approved a constitutional amendment granting the Legislature the power to limit marriage to opposite-sex couples.[4] The effect of this amendment was to reverse Judge Chang's ruling and validate Haw. Rev. Stat. § 572-1, which limited marital status to opposite-sex couples. **This was the state of the law in 2007 when Ms. Young declined to rent a room in her bed and breakfast to a same-sex couple.** It remained the state of the law until 2011 when civil unions became legal and until 2013 when Hawai'i enacted the Hawai'i Marriage Equality Act, which allowed same-sex marriage.

Despite *Obergefell v Hodges,* 135 S.Ct. 2584 (2015), the Court should not turn a blind eye to the past, recognizing that same-sex marriage was not recognized in most of the United States and was not recognized under Hawai'i law when Ms. Young opened and operated her bed and breakfast in her home, and was not recognized under Hawai'i law in 2007 when she refused to rent a room in her home to a same-sex couple. We ask the Court to recognize that Ms. Young operated her bed and breakfast in a manner that she thought was consistent with not only her religious beliefs and those of her Roman Catholic faith, but also with the United States Constitution, the Hawai'i Constitution, and Hawai'i law. She believed, reasonably and in good faith, that the "Mrs. Murphy" exception in Section 505 exempted her from a requirement to rent rooms to same-sex couples. She had no knowledge, and no way of

[4] Mark Niesse, *Hawaii Is Latest Civil Unions Battleground*, Fox News (Feb. 22, 2009), goo.gl/62GDMZ.

knowing, that the Hawai'i courts would rule that Section 489 rather than Section 505 applied to her business, because no Hawai'i court had previously so ruled.

According to *Connally v. General Construction Co.,* 269 U.S. 385 (1926), *Skilling v. United States,* 561 U.S. 358 (2010), and other cases, under the Due Process Clause of the Fourteenth Amendment a law is void for vagueness if it does not provide fair notice of what is punishable and what is not. This doctrine has more recently been reaffirmed in *Johnson v. United States,* 135 S.Ct. 2551 (2015), and *Sessions v. Dimaya,* 138 S.Ct. 1204 (2018). As the Court said in *Connally*,

> [T]he terms of a penal statute [...] must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties… and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

269 U.S. at 391.

*A.B. Small Co. v. American Sugar Ref. Co.,* 267 U.S. 233 (1925), suggests that the vagueness doctrine is not limited to criminal cases, and the opprobrium and costs involved in the case at hand (in effect

forcing Ms. Young to close down her business if the sanctions are not lifted) is at least quasi-criminal.

It is true that, as Justice Holmes observed in *Nash v. United States,* 229 U.S. 373, 377 (1913), there are circumstances in which people have to guess at the precise meaning of the law. But that is not the case here. Hawai'i has two statutes, 515 which contains a "Mrs. Murphy" exception and 489 which does not. The ambiguity of these two conflicting statutes is completely unnecessary; the ambiguity was created by the Legislature and could easily have been corrected by the Legislature.

Even if this Court were to conclude that 489 rather than 515 applies to the situation at hand, it is a unconstitutional Due Process violation to hold Ms. Young liable for her alleged violation of a law as ambiguous as this.

## III. Because religious freedom is the first and foremost right of the Bill of Rights, infringements upon free exercise of religion should be accorded "strict scrutiny."

Religious liberty is the first of all human rights because rights themselves are the gift of God.

The foundational document of the American nation, the Declaration of Independence, recognizes the "laws of nature and of nature's God" and says the rights of human beings are "unalienable" because they are "endowed by their Creator." Justice Douglas

wrote in *Zorach v. Clauson,* 343 U.S. 306, 313 (1952) that "We are a religious people whose institutions presuppose a Supreme Being," and in *McGowan v Maryland,* 366 U.S. 420, 562 (1961) he wrote in dissent,

> The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect.

Professor Leo Pfeffer called the Free Exercise Clause the "favored child" of the First Amendment. Leo Pfeffer, *Church, State and Freedom* 74 (1953). Chief Justice Burger seemed to share that view: "One can only hope that at some future date the Court will come to a more enlightened and tolerant view of the First Amendment's guarantee of free exercise of religion ...." *Meek v. Pittinger,* 421 U.S. 349, 387 (1975) (Burger, C.J., concurring in judgment in part and dissenting in part).

Professor Lawrence Tribe wrote that the First Amendment religion clauses embody two basic principles: separation (the Establishment Clause) and voluntarism (the Free Exercise Clause). "Of the two principles," he said, "voluntarism may be the more fundamental," and therefore, "the free exercise principle should be dominant in any conflict with the anti-establishment principle." Lawrence H. Tribe,

*American Constitutional Law* 833 (1978).[5] Voluntarism is central to the case at hand, for Hawai'i's ruling has the effect of compelling Ms. Young to act involuntarily in contravention of her most basic beliefs. This is a violation of the right to free exercise at its very core.

This Court appeared to accord strict scrutiny in early free exercise cases. In *Cantwell v. Connecticut,* 310 U.S. 296 (1940), the Court held:

> ...the [first] amendment raises two concepts -- freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be. Certain conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.

310 U.S. at 303-04. The Court seems to say even as early as *Cantwell* that infringements on free exercise are subject to some higher standard than lower-tier reasonable relationship to a legitimate state purpose.

The strict scrutiny test was further articulated in *Sherbert v. Verner,* 374 U.S. 398 (1963), and developed into a three-part test in *Wisconsin v. Yoder,* 406 U.S. 205 (1972). But in *Employment*

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[5] *Cf.* 2d ed. at 1160.

*Division v. Smith,* 494 U.S. 872 (1990), the Court appeared to limit *Yoder* to case in which either (1) the law was directly aimed at religion, or (2) the free exercise claim was asserted as a hybrid right alongside another right such as privacy or free speech.

Unlike *Yoder*, which was an almost-unanimous decision,[6] *Smith* was decided by a sharply divided Court. Justice Scalia wrote the majority opinion, joined by Chief Justice Rehnquist and Justices White, Stevens, and Kennedy. Justice Blackmun dissented, joined by Justices Brennan and Marshall, arguing that the strict scrutiny test must be preserved in free exercise cases. Justice O'Connor wrote a concurrence that sounded much more like a dissent: she excoriated the majority for departing from the strict scrutiny test but concurred because she believed there was a compelling interest in regulating controlled substances that could not be achieved by less restrictive means.

*Smith* received harsh criticism from the beginning. A massive coalition of organizations, ranging from liberal groups like the American Civil Liberties Union and People for the American Way to more conservative groups like the National Association of Evangelicals, the United States Catholic Conference, and the Southern Baptist

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[6] Only Justice Douglas dissented, and he dissented only in part. He did not dispute the tripartite strict scrutiny test but dissented only because he felt there might be a conflict between the rights of the parents and those of the child which had not been fully articulated in the case.

Convention, joined together to denounce the decision and call for a return to the *Yoder* standard. Congress responded by passing the Religious Freedom Restoration Act of 1993, 42 U.S. Code §2000bb-3, in the House by a voice vote and in the Senate 97-3, which was signed into law by President Clinton, and which was struck down as applied to the states by a vote of 6 to 3 in *Boerne v Flores*, 521 U.S. 507 (1997), but unanimously upheld as applied to the federal government in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418 (2006).

Following *Flores,* in 2000 the American Civil Liberties Union worked with a coalition of organizations to secure passage of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§2000cc et seq. RLUIPA prohibits the imposition of burdens on the free exercise rights of prisoners and limits the use of zoning laws to restrict religious institutions' use of their property.

Twenty-one states have adopted state versions of the Religious Freedom Restoration Act requiring their state governments to apply the compelling-interest/less-restrictive-means test, and ten additional states have incorporated the principles of the Act by state court decision.[7]

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[7] States which have adopted "mini-RFRA" statutes include Connecticut, Rhode Island, Pennsylvania, Virginia, South Carolina, Florida, Alabama, Mississippi, Louisiana, Tennessee, Kentucky, Illinois, Indiana, Missouri, Kansas, Oklahoma, Texas, New Mexico, Arizona, and Idaho. Similar proposals are pending in other states. The state courts of another ten states (Alaska, Hawaii, Ohio, Maine, Massachusetts, Michigan,

Scholars have likewise criticized *Smith*. One of the most noteworthy is Professor Michael McConnell, who cogently observes that the Court effectively decided *Smith* on its own, as none of the parties had asked the Court to depart from the *Yoder* test in deciding the case.[8] Jane Rutherford, writing in the *William and Mary Bill of Rights Journal,* argues that *Smith* leads to the unfortunate result of subjecting minority faiths to the power of the majority and decreasing the rights of minorities to express their individual spirituality.[9] John Witte, Jr., of Emory University, writing in the *Notre Dame Law Review,* demonstrates that *Smith* is at odds with the basic principles that underlie the religion clauses,

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Minnesota, Montana, Washington, and Wisconsin) have incorporated the principles of the Act by state court decision. *See State Religious Freedom Restoration Acts*, National Conference of State Legislatures (May 4, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.

[8] Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109 (1990). Professor McConnell also notes that "over a hundred constitutional scholars" had petitioned the Court for a rehearing which was denied. *Id.* at 1111. See also Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990).

[9] Jane Rutherford, *Religion, Rationality, and Special Treatment*, 9 Wm. & Mary Bill Rts J. 303 (2001).

especially liberty of conscience, free exercise, pluralism, and separationism.[10]

Aden and Strang document the failure of lower federal courts to follow *Smith* by routinely ignoring the "hybrid rights" exception.[11] According to Aden and Strang,

> One would assume, *a priori*, that the Supreme Court's pronouncement in *Smith*—that when a plaintiff pleads or brings both a free exercise claim with another constitutional claim the combination claim is still viable post-*Smith*—is the law. In fact, litigants assumed just that, but the appellate courts have been thoroughly unreceptive to hybrid right claims.[12]

After discussing numerous federal circuit court cases in which hybrid rights claims have been denied, Aden and Strang suggest reasons the circuit courts have not followed: (1) the fact that the hybrid exception was created in what many view as a post-hoc attempt to distinguish controlling precedent; (2) the compelling interest test in the realm of free

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[10] John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 Notre Dame L. Rev. 371, 376-78, 388, 442-43 (1966).

[11] Stephen H. Aden and Lee J. Strang, *When a 'Rule' Doesn't Rule: the Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception,"* 108 Penn St. L. Rev. 573 (2002).

[12] *Id.* at 587.

exercise jurisprudence was never "compelling," and hybrid claims simply suffer a continuation of that reluctance to excuse conduct because of religious belief; (3) the difficulty in determining the proper burdens and procedures to assert a hybrid claim-the analytical difficulty in conceptualizing how hybrid claims fit into free exercise jurisprudence; and (4) growing hostility to exemptions from state anti-discrimination laws with ever increasing numbers of protected classes.[13]

Additional reasons may be "the courts' deeply ingrained reticence to grant exemptions based on religious claims,"[14] "a more 'progressive' attitude toward persons with traditional religious beliefs (especially evangelical Christians) seeking exemption from laws or regulations synchronous with the judges' leanings,"[15] and "the increasing regulation of private life by state governments through anti-discrimination statutes."[16]

In summary, *Employment Division v. Smith*:

* Was adopted *sua sponte* without request, argument, or briefing from the parties.

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[13] *Id.* at 602.

[14] *Id.* at 602-03.

[15] *Id.* at 604.

[16] *Id.*

* Was adopted by a bare majority over a strong dissenting opinion by three Justices and a concurring opinion that rejected the *Smith* rationale and concurred only in the result.

* Rests upon a strained attempt to reconcile its reasoning with that of *Yoder* and other decisions.

* Was sharply criticized by a wide spectrum of the legal and religious community of the nation.

* Was criticized by a wide spectrum of constitutional scholars.

* Was repudiated by an overwhelming vote of Congress in adopting the Religious Freedom Restoration Act which was signed into law by President Clinton but partially invalidated by this Court in *Flores*.

* Was repudiated by (thus far) thirty-one states through the adoption of mini-RFRA statutes or state constitutional amendment or state court decisions.

* Has been ignored, strained, or limited by many circuit courts and other courts.

* Has proven unfair and unworkable in practice.

* Is manifestly contrary to the Framers' elevated view of religious liberty by reducing this most-cherished right to mere lower-tier status.

Because of all of these factors, it is clearly time for this Court to reconsider *Employment Division v. Smith.*

## IV. This case clearly qualifies as a hybrid-rights exception to *Smith.*

If the Court is not going to reconsider *Smith* at this time, then the Court should put some "teeth" into *Smith's* hybrid-rights doctrine and apply that doctrine to this case.

*Smith's* hybrid-rights doctrine asserts that strict scrutiny must be applied to a free exercise of religion claim when that claim is raised in tandem with a claimed violation of another constitutional right. Ms. Young has claimed not only a violation of her free exercise of religion but also a violation of her right to property, her right to contract, and her right to freedom of association, all of which arise outside and independent of her free exercise of religion claim.

Her right to property is infringed by denying her the right to use her property as she sees fit. Along with life and liberty, property is one of the basic rights asserted by John Locke, whose views greatly influenced America's Founding Fathers. It is inherent in the God-given unalienable right to "pursuit of happiness" recognized as a self-evident truth in the Declaration of Independence, and its violation is the basis of some of the grievances asserted in the Declaration including "Quartering large bodies of armed troops among us" (*cf.* the Third Amendment) and "imposes Taxes upon us without

our Consent." *The Declaration of Independence*, ¶¶ 16, 19 (U.S. 1776). Property rights are protected by the Due Process Clauses of the Fifth and Fourteenth Amendments and by the Takings Clause of the Fifth Amendment.[17]

Ms. Young's constitutional right of liberty of contract includes the right not to contract as well. Liberty of contract is part of the liberty guaranteed by the Fifth and Fourteenth Amendments and the Contracts Clause of Article I Section 10 of the Constitution. Decisions such as *West Coast Hotel v. Parrish,* 300 U.S. 379 (1937), say liberty of contract is merely a subset of liberty and perhaps have the effect of downgrading liberty of contract to a lower tier right, but they do not eliminate the right. *See, e.g.*, *Craigmiles v. Giles,* 312 F.3d 220 (6th Cir. 2002).

The *Smith* hybrid-rights doctrine never said the hybrid right must be an upper-tier fundamental right. If it did, the doctrine would make no sense, because such rights can stand on their own independent of a free exercise claim. As Justice Souter said in his concurring opinion in *Church of the*

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[17] For those who might say that Ms. Young has the option of avoiding the restriction by closing down her bed and breakfast, we respond that (1) as a retired person with limited income and limited employment options, Ms. Young would probably lose her home if she lost the income from her bed and breakfast, and (2) under the doctrine of *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Thomas v. Review Bd.*, 450 U.S. 707 (1981), a person cannot be forced to choose between (a) submitting to a violation of her constitutional rights and (b) giving up a substantial right or benefit such as the right to own and operate a business.

*Lukumi Babalu Aye, Inc., v. City of Hialeah,* 508 U.S. 520 (1993) concerning the hybrid-rights doctrine,

> [T]he distinction *Smith* draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the Smith rule, and, indeed, the hybrid exception would cover the situation exemplified by Smith, since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what Smith calls the hybrid cases to have mentioned the Free Exercise Clause at all.[18]

While the Foundation strongly disagrees with any assertion that free exercise of religion is anything less than a fundamental right, we suggest that the Court's meaning was that when a free exercise claim is asserted in tandem with a non-fundamental right, the combined weight of the two rights requires that they be treated together as a fundamental right entitled to strict scrutiny. Accordingly, we urge this Court to either reconsider the entire *Smith* doctrine and/or hold that Ms. Young's hybrid free exercise claim must be accorded strict scrutiny.

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[18] *Hialeah*, 508 U.S. at 566-67 (Souter, J., concurring in part and concurring in judgment).

However, freedom of association—which includes the right not to associate with persons or for purposes which one finds objectionable—is an upper tier strict scrutiny right when it is (1) expressive association or (2) intimate association. *Roberts v. U.S. Jaycees,* 468 U.S. 609 (1984). And the association in Ms. Young's bed and breakfast is intimate. Unlike guests in a motel or hotel, Ms. Young's guests stay in bedrooms in the same home where Ms. Young lives and sleeps, the same bedrooms and beds Ms. Young's children used when they lived in her home and continue to use when they come home to visit their parents. They share a common living room and other facilities, eat at the same table, and share common meals. They often engage in intimate conversations and develop close friendships with the Youngs and with one another. Ms. Young holds a weekly Bible study in her home and invites her guests to attend and participate.

Ms. Young's right to engage in this type of intimate association, coupled with her right to free exercise of religion, certainly deserves strict scrutiny. And yet the hearing officer refused to consider Ms. Young's constitutional claims, which she raised in her motion for summary judgment. Rather, the hearing officer granted the plaintiffs' motion for summary judgment under Section 489 and therefore ruled that Ms. Young's motion for summary judgment under Section 515 (which included her constitutional claims) was moot and would not be considered. This cavalier refusal to consider Ms.

Young's free exercise claim is a due process violation and is tantamount to hostility to her religious beliefs.

## CONCLUSION

In his *Obergefell* dissent, Justice Alito warned that the *Obergefell* precedent "will be used to vilify Americans who are unwilling to assent to the new orthodoxy." *Obergefell v. Hodges,* 135 S.Ct. 2584, 2642 (2015) (Alito, J., dissenting). He added,

> I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.

*Id.* at 2642-43.

Today, a mere three years after *Obergefell,* the situation is even worse than Justice Alito envisioned. If the Hawai'i Civil Rights Commission's ruling is allowed to stand, Ms. Young will be prohibited from following her religious and moral beliefs—even in her own home.

To prevent this from happening and to protect religious liberty, we urge this Court to grant this petition for writ of certiorari.

Respectfully submitted,

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