No. 18-451

IN THE

Supreme Court of the United States

ALOHA BED & BREAKFAST,
A HAWAI`I SOLE PROPRIETORSHIP,
Petitioner,

v.

DIANE CERVELLI AND TAEKO BUFFORD,
Respondents,

WILLIAM HOSHIJO, AS EXECUTIVE DIRECTOR OF THE
HAWAI`I CIVIL RIGHTS COMMISSION,
Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
INTERMEDIATE COURT OF APPEALS OF HAWAI`I

RESPONDENTS DIANE CERVELLI AND TAEKO BUFFORD'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a state statute that prohibits discrimination by any place of public accommodation is void for vagueness under the Fourteenth Amendment's Due Process Clause as applied to Aloha Bed & Breakfast where the statute expressly applies to an establishment that provides lodging to transient guests and omits any exception for an owner-occupied establishment renting rooms.

2. Whether the enforcement of a law prohibiting discrimination by any place of public accommodation according to its plain terms constitutes a government campaign of hostility to religion prohibited by the First Amendment's Free Exercise Clause.

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STATEMENT OF JURISDICTION

This Court lacks jurisdiction under 28 U.S.C. § 1257(a) because there is no final judgment. The circuit court only granted partial summary judgment and thereafter stayed that order and further proceedings while Petitioner Aloha Bed & Breakfast ("Aloha B&B") pursued an interlocutory appeal. App.40a-49a. There has been no appeal from final judgment and no appellate ruling concerning a statute-of-limitations defense on which Aloha B&B previously filed a motion to dismiss.

INTRODUCTION

This case arises from the routine interpretation of a state statute by a state court giving effect to its plain language. The statute here, Hawai'i's public accommodations law, provides clear notice of what constitutes a place of public accommodation: it includes an inn, hotel, motel, or other establishment that provides lodging to transient guests. Aloha B&B freely admits it is an establishment that provides lodging to transient guests and further admits that it discriminated against Diane Cervelli and Taeko Bufford based solely on their sexual orientation.

Aloha B&B, however, nevertheless argues that there is a so-called "Mrs. Murphy" exemption in the public accommodations law that permits such discrimination where an establishment provides lodging to transient guests, the owner resides on the premises, and the owner rents out, specifically, four rooms or less. For such a highly specific exemption to exist, one would expect it to appear in the public accommodations law. Yet no such exemption can be found anywhere within the four corners of that law. Indeed, the Hawai'i Legislature conspicuously

omitted such an exemption in crafting its scope. In ruling on this case, the Hawai'i Intermediate Court of Appeals also properly refused to permit Aloha B&B to "borrow" such an exemption from an entirely separate law governing housing accommodations and import it into the public accommodations law, from which it was squarely omitted.

This straightforward, prosaic, and correct exercise of statutory interpretation forms the entire basis of Aloha B&B's constitutional claims. As a threshold matter, however, this Court lacks jurisdiction to review these claims because there is no final judgment. Aloha B&B appealed only an interlocutory decision. There has been no appeal from a final judgment to the Hawai'i Intermediate Court of Appeals or the Hawai'i Supreme Court. Notably, Aloha B&B previously filed a motion to dismiss this action on statute-of-limitations grounds, which the circuit court denied and which no appellate court has reviewed.

The substance of Aloha B&B's petition to this Court fares no better. First, Aloha B&B asserts that the public accommodations law is unconstitutionally vague. If anyone has been deprived of "fair notice" here, it is the state courts, not Aloha B&B, because such a vagueness claim was never properly presented below. In any event, any claim of unfair surprise by Aloha B&B is belied by the plain language of the public accommodations law, which applies with laser precision and without exception to the commercial activity of providing lodging to transient guests. A party's meritless disagreement with a state court's interpretation of state law does not constitute a

constitutional violation, much less present an issue appropriate for this Court's review.

Second, Aloha B&B asserts a free exercise claim based on an imagined "campaign" by the Hawai'i Civil Rights Commission ("Commission") to "punish" its proprietor because of her religious beliefs. Not only was this argument also never timely raised below, it lacks any footing in reality. Instead, it rests on the same erroneous notion that a "Mrs. Murphy" exemption exists in the public accommodations law, which every court to consider the issue has confirmed is contrary to the plain language of the law. The petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

I. Factual Background

A. Aloha B&B's Commercial Business Activities

Aloha B&B is a commercial business perched on a ridge in the Hawai'i Kai area of Honolulu with sweeping panoramic views of the Pacific Ocean. It provides overnight accommodation, breakfast, swimming pool access, and other amenities in exchange for a fee. The business is the sole proprietorship of Ms. Phyllis Young, who registered the trade name of Aloha Bed & Breakfast with the State of Hawai'i Department of Commerce and Consumer Affairs. Record on Appeal ("R.") 828. Although Ms. Young owns at least two properties, she lives in the house out of which Aloha B&B operates, whose value was already approaching one million dollars several years ago, while leasing out her more modest property for rent. R.727, 731.

Aloha B&B does not provide a place for its customers to permanently reside. App.4a. The median length of stay is four to five days. *Id.* More than 95 percent of customers stay for less than two weeks; and, the vast majority of customers live out-of-state and are visitors to Hawai'i. *Id.* Aloha B&B also charges and collects transient accommodations tax, which only providers of transient accommodations must pay. *Id.*

Ms. Young does not hold herself out as the "landlord" of Aloha B&B's customers. *Id.* Although Ms. Young could choose to rent out rooms to those seeking housing, she prefers to provide lodging to transient guests. That facilitates her ability to impose restrictions on these guests, such as prohibiting the cooking of food on the premises and limiting the duration of their stay. R.1364.

Aloha B&B is open to the general public as customers. Anyone may contact the business to a book a stay. In processing reservation requests, Aloha B&B does not inquire into the background of its prospective customers. App.30a. It has also solicited the general public for business through multiple channels, including by paid advertising, third-party booking websites, and its own website. App.4a. The latter contains graphics stating "Best Choice Hawaii Hotel" and "Best Choice Oahu Hotels." *Id.*

Between 100 to 200 customers patronize Aloha B&B annually. *Id.* Given that volume and the nature of the business, Ms. Young understandably cannot recall basic information about customers. App.31a. She explained the generally fleeting nature of her interactions with them: "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." R.1407.

B. Aloha B&B's Discriminatory Business Practices

In 2007, Ms. Cervelli and Ms. Bufford ("Plaintiffs"), who resided in California, began planning a trip to visit a friend in Hawai'i Kai. App.5a. They needed to stay near their friend, because they would be relying on her for local transportation, and she could not travel far from home given health issues with her newborn baby. R.697. Apart from Aloha B&B, there were no hotels, motels, or inns available in Hawai'i Kai. R.1360.

Ms. Cervelli emailed Aloha B&B to inquire if a room was available. App.5a. Ms. Young responded that Aloha B&B could accommodate a six-night stay. *Id.* Ms. Cervelli subsequently called Aloha B&B to book the reservation. *Id.* During that call, Ms. Young asked if anyone would be staying with Ms. Cervelli and then asked for the second person's name. *Id.*; R.698. When Ms. Cervelli responded, "her name is Taeko Bufford," Ms. Young asked pointedly, "Are you lesbians?" R.698; App.5a. Ms. Cervelli was shocked by the question, but answered truthfully that they were. R.698; App.5a. Ms. Young then refused to rent the room, stating that she was very uncomfortable having lesbians in her house. R.698; App.5a. Although Aloha B&B suggests that Ms. Young ended the conversation "politely," she terminated the conversation by hanging up on Ms. Cervelli: "I was abrupt, and I hung up on her." R.884.

Distressed, shamed, and humiliated by what had transpired, Ms. Cervelli began to cry. App.5a.

She called Ms. Bufford in tears and relayed to her what had happened. *Id.* In disbelief, Ms. Bufford called Ms. Young back and attempted to reserve a room. *Id.* Ms. Young again refused a reservation. *Id.* Ms. Bufford asked if the refusal was because Ms. Bufford and Ms. Cervelli were lesbians, to which Ms. Young replied, "yes." *Id.* Ms. Young referred to her religious beliefs in discussing her refusal. *Id.*

Ms. Young and Ms. Bufford had a second conversation in which Ms. Young again reiterated her religious beliefs as the basis for the refusal. *Id.* Concerned that Ms. Cervelli and Ms. Bufford might pursue legal action against Aloha B&B, Ms. Young offered to provide Ms. Bufford the name of a friend from her Bible study with whom they could attempt to reserve a room. R.761; App.75a. Ms. Young believed that, by doing so, Ms. Bufford and Ms. Cervelli might be less upset with her. R.765. Given their interactions, Ms. Bufford did not feel that she could trust Ms. Young or her friend. App.75a.

Ms. Cervelli and Ms. Bufford subsequently filed complaints with the Hawai'i Civil Rights Commission. The Commission conducted a statutorily required investigation. Haw. Rev. Stat. § 368-13. Ms. Young stated during an interview that her religious belief is that same-sex relationships are "detestable in [her] eyes" and "defile[] our land." App.84a. She also subsequently stated at her deposition in this lawsuit that homosexuality "must be seen as an objective disorder." R.781-82. According to Ms. Young, 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 there. For example, she also owns an apartment, but

she would not rent it to a same-sex couple, because that too would violate her religious beliefs. R.1415.

Throughout this litigation, Aloha B&B has admitted that it refused Ms. Cervelli and Ms. Bufford solely because of their sexual orientation, not for any other reason, and confirmed that there is nothing any same-sex couple could do to book a room at Aloha B&B. App.6a; R.759 ("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."), 775-77 (Ms. Young confirming that "there is nothing that a same-sex couple could do in order to book a room with one bed").

II. Procedural Background

1. Ms. Cervelli and Ms. Bufford filed a civil action in the state circuit court after requesting and receiving their right-to-sue notices from the Commission. App.6a. The complaint alleged only one cause of action: discrimination in public accommodations in violation of Hawai'i Revised Statutes 489-3 (hereafter, "public accommodations law"). That law prohibits discrimination on the basis of not only sexual orientation but also on the basis of race, religion, disability, and other protected characteristics. Respondent William D. Hoshijo, in his official capacity as Executive Director of the Commission, subsequently filed a motion to intervene. Haw. Rev. Stat. § 368-12. Notably, Aloha B&B did not file any opposition to the motion. The circuit court granted the unopposed motion.

Aloha B&B filed a motion to dismiss the complaint with prejudice on statute-of-limitations

grounds. But Plaintiffs had complied with every applicable time limitation: they filed charges with the Commission within 180 days, as required by statute, Haw. Rev. Stat. § 368-11(c), and they filed this civil action within 90 days after receiving their right-to-sue notices from the Commission, as also required by statute, Haw. Rev. Stat. § 368-12. Aloha B&B nevertheless argued that the general two-year statute-of-limitations applicable to personal injuries, Haw. Rev. Stat. § 657-7, imposed a further, additional requirement that Plaintiffs purportedly needed to satisfy. Plaintiffs and the Commission (collectively "Respondents") filed separate briefs opposing the motion. The circuit court denied the motion to dismiss. Aloha B&B then sought leave for an interlocutory appeal of that order, which the circuit court denied. There has been no appellate ruling on Aloha B&B's statute-of-limitations defense.

After engaging in discovery, the parties filed summary judgment motions. Respondents sought partial summary judgment with respect to liability, including Aloha B&B's asserted state and federal constitutional defenses, and requested declaratory and injunctive relief. They did not move for summary judgment with respect to damages. Aloha B&B filed a cross-motion for summary judgment. It argued that it was not liable for violating the public accommodations law based on the "Mrs. Murphy" exemption from the separate *housing* law—even though Ms. Cervelli and Ms. Bufford never brought a claim under the housing law. Haw. Rev. Stat. §§ 515-3 (hereafter, "housing law"), 515-4(a)(2) ("Section 515-3 [the housing law] does not apply . . . [t]o the rental of a room or up to four rooms in a housing accommodation by an individual if the individual

resides therein."). The circuit court heard oral argument from counsel on both statutory and constitutional issues.

After considering all arguments, the circuit court granted Respondents' motion for partial summary judgment and denied Aloha B&B's motion for summary judgment. It found that Aloha B&B constituted a place of public accommodation, both as a provider of "lodging to transient guests" and as a provider of "services relating to travel." Haw. Rev. Stat. § 489-2.

The circuit court did not award damages of any kind, not even potential statutory damages of $1,000. Haw. Rev. Stat. § 489-7.5. Plaintiffs also did not file a motion for attorneys' fees. Rather, the parties filed a stipulation extending the time for any such motion if one is to be filed—including by Aloha B&B, which has also sought attorneys' fees against Ms. Cervelli and Ms. Bufford. R.219. Although Ms. Young asserts that this litigation will "bankrupt" her, Pet. 3, no court has ordered her to pay a single cent. Moreover, regardless of this litigation, nothing prevents Ms. Young from generating income by renting any of her multiple spare rooms to those seeking housing—as many Americans do—and thereby avail herself of the "Mrs. Murphy" exemption in the housing law. Nor, for that matter, is she prevented from setting non-discriminatory limits for all customers of Aloha B&B, including on access to the computer in her room, or from renting single-occupancy rooms to customers.

The circuit court granted Aloha B&B leave to take an interlocutory appeal of the order granting Respondents' motion for partial summary judgment. It simultaneously stayed circuit court proceedings

and enforcement of the injunction until the conclusion of the appeal.

2. The Intermediate Court of Appeals affirmed the circuit court's interlocutory decision. It only did so after first notifying the parties that it did not believe oral argument was necessary—but giving them an opportunity to explain why they believed that oral argument should be retained. Every party, including Aloha B&B, waived the right to file the required motion under state rules for retention of oral argument. Haw. R. App. P. 34(c) ("any party may . . . file a motion for retention of oral argument" within ten days after the court's notice).

On the merits, the Intermediate Court of Appeals held that it was "clear based on the plain statutory language that Aloha B&B is a 'place of public accommodation.'" App.15a. It emphasized that Aloha B&B falls "squarely" within the enumerated example covering "[a]n inn, hotel, motel, or other establishment that provides lodging to transient guests." App.16a; Haw. Rev. Stat. § 489-2. There was no dispute on that issue because "Aloha B&B admitted that it 'does provide lodging to transient guests.'" App.16a. The court held that the public accommodations law "perfectly" describes Aloha B&B and "directly addresses the precise conduct at issue in this case." App.23a. It thus did not need to rely on the circuit court's additional determination that Aloha B&B was also a provider of services relating to travel, which was never challenged on appeal.

The Intermediate Court of Appeals also rejected Aloha B&B's statutory argument premised on the "Mrs. Murphy" exemption in the housing law.

Hawai‘i’s public accommodations law was modeled in relevant part on the federal public accommodations provision in the Civil Rights Act of 1964. App.19a. While the federal law includes a “Mrs. Murphy” exemption, the Hawai‘i Legislature “conspicuously omitted” it from Hawai‘i’s public accommodations law, which was enacted more than two decades later. App.20a; *compare* Haw. Rev. Stat. § 489-2 (defining place of public accommodation to include “[a]n inn, hotel, motel, or other establishment that provides lodging to transient guests”) *with* 42 U.S.C. § 2000a(b)(1) (defining place of public accommodation to include “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”).

The Intermediate Court of Appeals rejected Aloha B&B’s contention that there was any conflict between the public accommodations law and the housing law, even if a claim had been asserted under the latter. It held that the purpose of the “Mrs. Murphy” exemption in the housing law—which was referred to as the “tight living” exemption in Hawai‘i—was to “permit *landlords* to follow their individual value systems in selecting *tenants* to live in the landlords’ own homes.” App.22a (internal quotes omitted). As reflected by the six-night length of their requested stay, Ms. Cervelli and Ms. Bufford had no desire to make Aloha B&B their home or residence.

The Intermediate Court of Appeals also rejected Aloha B&B’s state and federal constitutional

defenses, including its claim that application of the public accommodations law violated a right to privacy, intimate association, or the free exercise of religion. With respect to the latter, Aloha B&B had argued that the law imposed a substantial burden on Ms. Young's sincere religious beliefs and that strict scrutiny was warranted under the state free exercise clause. The Intermediate Court of Appeals assumed without deciding that such scrutiny applied; and concluded that the public accommodations law was narrowly tailored to furthering a compelling state interest in nondiscrimination.

3. The Hawai'i Supreme Court denied Aloha B&B's application for a writ of certiorari to review the Intermediate Court of Appeals' decision on the interlocutory appeal. Its application was the first time in this litigation that Aloha B&B argued that it lacked fair notice that it was subject to the public accommodations law.

REASONS FOR DENYING THE PETITION

I. This Court Lacks Jurisdiction to Review the Interlocutory Decision Here.

As relevant here, this Court's jurisdiction is limited to "final judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). "To be reviewable by this Court, a state-court judgment must be final in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps." *Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75, 81 (1997) (internal quotes omitted). In other words, "[i]t must be the final word of a final court." *Id.*

(internal quotes omitted). The final judgment rule avoids unnecessary and premature review and thereby preserves the appropriate balance between state and federal interests.

There is no final judgment here. It remains well-settled law that "'the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up—for example, where liability has been determined and all that needs to be adjudicated is the amount of damages.'" Stephen M. Shapiro et al., *Supreme Court Practice* 157 (10th ed. 2013) (quoting *Republic Nat. Gas Co.* v. *Oklahoma*, 334 U.S. 62, 68 (1948)).

Although this Court in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), identified "exceptional categories" of decisions that can be deemed final on a federal issue despite the pendency of further lower court proceedings, *Johnson v. California*, 541 U.S. 428, 429-30 (2004) (per curiam), Aloha B&B makes no effort to show that any such exception applies here. Any attempt would be futile for two reasons.

First, Aloha B&B may seek to raise additional state law issues in an appeal from final judgment that, if successful, could render review of the federal issue in this action unnecessary. It previously sought dismissal of the complaint with prejudice on statute-of-limitations grounds and even sought to take an interlocutory appeal on that issue. Although the circuit court denied leave for that interlocutory appeal, Aloha B&B could attempt to raise its statute-of-limitations argument in an appeal from final judgment. If that argument prevails over Respondents' objections (including waiver), Aloha

B&B would presumably also take the position that this action no longer presents any federal issues.

Second, the jurisdictional defect here is not merely that Aloha B&B seeks this Court's review of an interlocutory decision; rather, it is that review is sought of an interlocutory decision that the highest state court has not reviewed. The Hawai'i Supreme Court declined discretionary review of this case in its current posture, but nothing prevents it from accepting review of an appeal from final judgment addressing statute-of-limitations issues. To be sure, Aloha B&B would still need to persuade the Hawai'i Supreme Court that there were properly presented issues warranting that court's review, which the parties would need to litigate, but nothing excuses Aloha B&B from its obligation to exhaust those avenues before jurisdiction is vested in this Court.

The current posture of this case defeats any exception Aloha B&B might seek to invoke under *Cox*. For example, the outcome of further state court proceedings is not "preordained" given that, among other things, there has been no appellate review of the statute-of-limitations defense that Aloha B&B raised. That is in stark contrast to the case cited by *Cox* as illustrative of this exception, where "the appellant had no defense other than his federal claim." 420 U.S. at 479. For similar reasons, Aloha B&B also cannot show that the federal issue "will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480. Finally, simply permitting the proceedings below to conclude would not "seriously erode federal policy." *Id.* at 483. The claimed erosion also cannot be "common to all decisions" implicating similar issues or otherwise the

exception would swallow the rule. *Johnson*, 541 U.S. at 430. In sum, there is no requisite finality here.

II. Aloha B&B's Void-for-Vagueness Argument Does Not Warrant Review.

A. Aloha B&B Failed to Preserve Its Void-for-Vagueness Argument.

Aloha B&B argues that this Court should review whether application of the public accommodations law is void for vagueness but Aloha B&B failed to timely raise that issue below. As "a court of review, not of first view," *Cutter v. Wilkinson,* 544 U.S. 709, 718 n.7 (2005), this Court will not grant certiorari where "the question presented was not pressed or passed upon below," *United States v. Williams*, 504 U.S. 36, 41 (1992) (internal quotes omitted). The federal issue must be presented with "fair precision and in due time." *Adams v. Robertson*, 520 U.S. 83, 87 (1997) (internal quotes omitted). Where a "state court is silent on a federal question," the party invoking this Court's jurisdiction bears a high burden of overcoming the presumption that "the issue was not properly presented." *Id.* at 86-87. Typically, "a failure to raise a federal question often accounts for the failure of the state court to decide the matter." Shapiro, *Supreme Court Practice* 188.

Aloha B&B failed to timely raise its vagueness argument in the proceedings below and with fair precision. *See Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549-50 (1987) (holding that vagueness challenge to public accommodations law was not properly presented in state court). Accordingly, that issue is not properly before this Court.

1. Perhaps most importantly, Aloha B&B failed to argue that application of the public accommodations law was unconstitutionally vague in its opposition to Respondents' motion for partial summary judgment. R.1245-71. Because the circuit court permitted interlocutory appeal based on its grant of partial summary judgment, Aloha B&B's opposition to partial summary judgment was the critical moment in litigation when it needed to raise all the reasons why it believed partial summary judgment should not be granted—or waive them. *Haw. Ventures, LLC v. Otaka, Inc.*, 114 Haw. 438, 472 n.17 & 500 (2007); *Querubin v. Thronas*, 107 Haw. 48, 61 n.5 (2005).

But nowhere in Aloha B&B's opposition did it argue that application of the public accommodations law was unconstitutionally vague. That omission dooms its petition here. Indeed, the word "vague" does not appear in any of Aloha B&B's briefs to the circuit court at any point in time, much less in its opposition brief to summary judgment. Thus, the federal issue that Aloha B&B now seeks to present here was not timely presented below. Nor was it presented with fair precision. To illustrate, Aloha B&B's urging of a "strict vagueness test," Pet. 21, was never articulated below and only made its first appearance in this entire litigation when Aloha B&B filed its petition with this Court.

2. Even if Aloha B&B had timely raised its vagueness argument in circuit court proceedings, it would have also had to present that argument to the Intermediate Court of Appeals; but it did not do so. On appeal, Aloha B&B advanced a fundamentally different due process argument than the one it has

presented here. Rather than arguing vagueness, it instead argued that where two criminal laws regulate the "same act" but one punishes the act as a felony and the other as a misdemeanor, "it violates due process and equal protection to impose the greater of the two possible punishments." App.125a. Not only was that argument raised for the first time on appeal, Aloha B&B's objection to the government's choice to regulate housing and public accommodations differently does not preserve Aloha B&B's vagueness argument on which it now seeks review.

3. Aloha B&B's application for a writ of certiorari to the Hawai'i Supreme Court could not resuscitate a void-for-vagueness claim that it had already failed to preserve. And, even there, it did not urge a "strict vagueness test" but rather appeared to suggest a test of unintelligibility, citing authority for the proposition that "legal distinctions cannot be incomprehensible." App.141a. As discussed below, regardless of what vagueness standard is applied, the public accommodations law provided ample notice that it applied to a provider of lodging to transient guests like Aloha B&B.

B. Aloha B&B's Meritless Disagreement with the Intermediate Court of Appeals' Interpretation of State Law Does Not Warrant This Court's Review.

At bottom, Aloha B&B's vagueness argument reduces to a meritless disagreement with a state court's interpretation of its own state statute, which does not warrant this Court's review.

1. The Intermediate Court of Appeals correctly determined that Aloha B&B was subject to the public accommodations law, and its reasoning

undermines the basis for any claim of vagueness. The court held that it was "clear" from "plain statutory language" that Aloha B&B constitutes a "place of public accommodation." App.15a. That term is defined to include any business whose offerings are "made available to the general public as customers, clients, or visitors." Haw. Rev. Stat. § 489-2. Aloha B&B indisputably offers its services to the general public as customers. App.15a.

Moreover, the public accommodations law enumerates specific examples of places of public accommodation, including "[a]n inn, hotel, motel, or other establishment that provides lodging to transient guests." Haw. Rev. Stat. § 489-2. The Intermediate Court of Appeals held that this language "perfectly" describes Aloha B&B and "directly addresses the precise conduct at issue in this case." App.23a. Aloha B&B agreed: it freely admitted that it "does provide lodging to transient guests." App.16a. Its insinuation to this Court that it had "no way to know what the law demands" and was instead "left to guess," Pet. 16, is impossible to reconcile with this admission and the plain language of the public accommodations law.

2. The Intermediate Court of Appeals also correctly held that the public accommodations law contains no "Mrs. Murphy" exemption. App.17a-24a. A review of Chapter 489 of the Hawai'i Revised Statutes, which contains the prohibition against discrimination in public accommodations, confirms that no such exemption exists. Haw. Rev. Stat. §§ 489-1 to 489-23. That alone is fatal to Aloha B&B's vagueness argument: even if the due process clause automatically excuses one's violation of a civil law

based on a purportedly "reasonable" but erroneous belief that one need not comply, it is hardly reasonable to rely on an exemption that does not exist within the four corners of a statute.

Aloha B&B's unprecedented argument that it could "borrow" the exemption from the housing law, Haw. Rev. Stat. § 515-4(a)(2)—and import it into the public accommodations law, Haw. Rev. Stat. § 489-2, from which it was omitted—was even more unreasonable and correctly rejected below. First, the Hawai'i Legislature patterned its public accommodations law on the public accommodation provision of the federal Civil Rights Act of 1964 in relevant part, but it "conspicuously omitted" the "Mrs. Murphy" exemption. App.20a (comparing relevant statutory language side-by-side). As the Intermediate Court of Appeals recognized, that omission shows that "no such exemption would apply to discrimination in public accommodations." App.19a. Indeed, the presence of a "Mrs. Murphy" exemption in the federal public accommodations law shows that it is *necessary* if owner-occupied rentals are to be carved out of the law. App.21a.

Strikingly, Aloha B&B agreed below that there is no "Mrs. Murphy" exemption in the public accommodations law. In opposing partial summary judgment, it stated: "The absence of a 'Mrs. Murphy' exemption in the public accommodations law weighs in Mrs. Young's favor." R.1263 (capitalization omitted). It argued that "[t]he Mrs. Murphy's exemption in the federal public accommodation law merely recognized what the Constitution requires." *Id.*

Second, even if the "Mrs. Murphy" exemption from Hawai'i's housing law could be cut-and-pasted into the public accommodations law, it would not make Aloha B&B's position any more reasonable: it only creates an exception from liability to the *housing* law. Haw. Rev. Stat. § 515-4(a)(2) (stating that "*Section 515-3* does not apply" to the exceptions listed; emphasis added). 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. *Watson v. Fraternal Order of Eagles*, 915 F.2d 235, 240 (6th Cir. 1990). Aloha B&B confuses an exemption from liability under one statute for immunity to violate other statutes.

Because the scope of the "Mrs. Murphy" exemption in the housing law only affects whether one is liable under "Section 515-3," Haw. Rev. Stat. § 515-4(a), it cannot help Aloha B&B, which was found liable under the public accommodations law. But even if the housing law were somehow relevant, the Intermediate Court of Appeals also found no conflict with the public accommodations law. The "Mrs. Murphy" exemption in the housing law addresses the rental of rooms in a "housing accommodation," which is defined as one's "home or residence." Haw. Rev. Stat. §§ 515-2, 515-4(a)(2). Those terms do not indicate lodging for transient guests. Indeed, if anything, they indicate the opposite. *Cf.* Webster's Third New International Dictionary (2002) (defining "residence" as specifically *excluding* "a place of temporary sojourn or transient visit").

Moreover, the purpose of the "tight living" exemption in the housing law was to "permit

landlords to follow their individual value systems in selecting *tenants* to live in the landlords' own homes." App.22a (internal quotes omitted). In contrast, the public accommodations law addresses accommodations that are "made available to the general public *as customers, clients, or visitors*"—rather than housing made available to the general public *as tenants*. Haw. Rev. Stat. § 489-2 (emphasis added).

In sum, although Aloha B&B never presented a vagueness claim, the Intermediate Court of Appeals' analysis—which interpreted the statutes according to "the fair import of its terms," App.18a (quoting Haw. Rev. Stat. § 515-1)—eviscerates the underpinning of any claim of unfair notice.

3. The Intermediate Court of Appeals' interpretation of state law is not appropriate for this Court's review—lest every court decision interpreting a statute become a federal constitutional issue. Courts are routinely called upon to interpret the scope of public accommodation laws. *See, e.g.*, *Dean v. Ashling*, 409 F.2d 754, 755-56 (5th Cir. 1969) (interpreting whether a trailer park constitutes an "establishment which provides lodging to transient guests" under the public accommodation provision of the Civil Rights Act of 1964). But that does not make every case presenting such an issue into a federal constitutional violation for the losing party.

Outside the context of public accommodations as well, the task of interpreting statutory language is a core judicial function that courts perform on a daily basis across the nation. Even in the criminal context, which this is decidedly not, a statute is not unconstitutionally vague based on "the mere fact that

close cases can be envisioned" because "[c]lose cases can be imagined under virtually any statute." *United States v. Williams*, 553 U.S. 285, 305-06 (2008). This Court cannot and should not accept review of every case based on the losing party's mere dissatisfaction with a court's statutory interpretation. Doing so would also raise federalism concerns, particularly in a case like this: the void-for-vagueness doctrine is not a backdoor for federal courts to second-guess the correctness of state courts interpreting their own state laws, based on nothing more than a losing party's meritless objections.

C. There Is No Conflict in Authority Presented Here Concerning the Void-for-Vagueness Doctrine.

There is no conflict presented here concerning the void-for-vagueness doctrine between the decision of the Intermediate Court of Appeals, on the one hand, and any decision of either this Court or any federal court of appeals, on the other.

1. As a threshold matter, because Aloha B&B failed to timely present a vagueness argument in state court, there cannot logically be any conflict arising from an issue that was never properly before the Intermediate Court of Appeals in the first instance.

2. To the extent that Aloha B&B nevertheless contends that the reasoning behind the Intermediate Court of Appeals' statutory interpretation falls below the vagueness standards of the due process clause, that too is meritless. In *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), this Court applied the void-for-vagueness doctrine to a public accommodations law and confirmed the

applicable standard: there is no due process violation so long as the law is not "so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." *Id.* at 628 (internal quotes omitted). This Court had "little trouble" in concluding that the state public accommodations law did not implicate vagueness concerns "either on its face or as construed" by the state court. *Id.* at 629. And it did so even though the Jaycees argued that it was a "private" organization—just as Aloha B&B argues that it operates from a "private" home. *Id.* at 630. For all the reasons discussed above, the public accommodations law here is neither unintelligible nor does it simply leave one to guess at its meaning.

Aloha B&B argues that the imposition of "significant penalties" in the civil context elevates the degree of notice required. *Cf. Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982) (holding that civil laws are subject to less demanding vagueness standards than criminal laws). But that only highlights the vehicle problems inherent in its petition. There has been no award of damages here, not even the potential $1,000 in statutory damages. Haw. Rev. Stat. § 489-7.5.

Nor is there any merit to Aloha B&B's contention that a "strict vagueness test" is warranted based on her asserted rights to privacy, intimate association, and free exercise of religion. As the Intermediate Court of Appeals correctly held, the public accommodations law's regulation of Aloha B&B's commercial business activities does not violate any of those rights. For example, Ms. Young argued that she has a "right to be left alone" in her home.

But, as the court explained, "given Young's choice to use her home for business purposes as a place of public accommodation, it is no longer a purely private home." App.26a. Indeed, like other home-based businesses such as those of accountants, therapists, and others, "the success of Aloha B&B's business requires that Young not be left alone." *Id.*

3. The decision of the Intermediate Court of Appeals also does not conflict with either of this Court's decisions relied upon by Aloha B&B. First, *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012), concerned an agency that reversed course in policy and sought to impose liability for past events that it previously deemed lawful. Before, the FCC had an indecency policy that focused on whether the material "dwell[ed]" on the offending content, but it later adopted a policy in which fleeting expletives were unlawful. *Id.* at 254. Given that reversal in policy, this Court held that broadcasters lacked fair notice they could be held liable for fleeting expletives that occurred when the earlier policy was in effect.

Here, however, there was never any agency "policy" that the public accommodations law contained a "Mrs. Murphy" exemption, much less a reversal in policy. Indeed, it was not an agency that found Aloha B&B liable for violating the public accommodations law; that determination was made by state courts applying state statutes. And to the extent that the Commission's position here is relevant, it has been consistent that the public accommodations law contains no "Mrs. Murphy" exemption. The Hawai'i state courts came to the same conclusion. There is also no authority, administrative or otherwise, for Aloha B&B's novel

argument that it could "borrow" an exemption under one statute and apply it to another statute, contrary to the language of the exemption.

Second, the government restriction on speech that this Court found void for vagueness in *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991), is nothing like the public accommodations law here. This Court held that it was reasonable for an attorney to rely on a safe harbor provision because of its language: the rule provided that an attorney was permitted to make statements under that provision "[n]otwithstanding subsection 1 and 2(a-f)"—the parts of the rule imposing the speech restriction. *Id.* at 1048. Here, as discussed, the "Mrs. Murphy" exemption in the housing law only creates an exemption *from the housing law*, not the public accommodations law: it states that "Section 515-3 [the housing law] does not apply" to the exceptions listed. Haw. Rev. Stat. § 515-4(a)(2). That alone distinguishes *Gentile*.

The speech restriction in *Gentile* also used language (such as "general" and "elaboration") that this Court found vague in context, but there is no vague language here in the public accommodations law, which employs language that "perfectly" describes Aloha B&B. App.23a; *see also Roberts*, 468 U.S at 628-30. Ms. Young's professed subjective belief that she did not perceive Aloha B&B as being subject to public accommodations law is no more of a defense here than in any other case where a party disagrees with a court's statutory interpretation.

4. Aloha B&B's scattershot reliance on various federal appellate decisions also does not reveal any conflict. Aloha B&B speculates that (a) Hawai‘i courts "apparently" do not apply

constitutional vagueness standards to civil laws, whereas (b) the Second, Third, Fourth, Fifth, and D.C. Circuits would supposedly apply a "strict vagueness test" to the public accommodations law here. Pet. 28-30.

Neither assertion is supported. As noted, Aloha B&B never timely pressed any vagueness claim in state court, even though Hawai'i courts routinely apply constitutional vagueness standards to civil laws. *See, e.g.*, *Davis v. Four Seasons Hotel Ltd.*, 122 Haw. 423, 451 (2010). And none of the federal appellate decisions cited by Aloha B&B concerns a public accommodations law at all, much less purport to disagree with this Court's vagueness analysis in *Roberts*. Instead, these decisions generally involve agencies unreasonably imposing liability and penalties, whereas here, a state court correctly found statutory liability, and the appropriate remedy has not yet been determined.

III. Aloha B&B's Free Exercise Arguments Do Not Warrant Review.

A. Aloha B&B Failed to Preserve the Free Exercise Arguments on Which It Now Seeks Review.

The version of the free exercise defense on which Aloha B&B now seeks review bears little resemblance to version of the free exercise defense it raised below. When Respondents moved for partial summary judgment, they argued that the public accommodations law was constitutional under the federal free exercise clause as a neutral law of general applicability. Aloha B&B did not disagree in its opposition brief nor on appeal. App.32a-33a. Because all issues for this Court's review must be timely

presented and with precision, *Adams*, 520 U.S. at 87, Aloha B&B has forfeited its belated argument to the contrary, particularly based on reasoning never properly presented below.

Similarly, Aloha B&B did not argue in its opposition to summary judgment that there was a free exercise violation based on any purported government hostility to religion. That choice makes sense: an agency seeking to enforce a statute it is charged to enforce is simply doing its job, and, as discussed below, Aloha B&B points to nothing further to substantiate its claim of anti-religion bias.

B. The Public Accommodations Law Does Not Violate the Free Exercise Clause.

Aloha B&B's free exercise claim on which it now seeks review rests upon the same erroneous premise as its vagueness claim: that the public accommodations law contains a "Mrs. Murphy" exemption. Because that premise is false for all the reasons discussed above, Aloha B&B's free exercise claim also necessarily fails.

The Hawai'i Legislature's choice to include a "Mrs. Murphy" exemption in the housing law, but to omit it from the public accommodations law, does not constitute religious "gerrymandering." Pet. 31. The government may reasonably choose to treat housing and public accommodations differently based on the different considerations implicated in regulating long-term living arrangements versus the transient guests of a hospitality business. That distinction is not based on religion. Just as the Hawai'i Legislature may engage in reasonable line-drawing around the contours of an exception—such as by limiting the number of rooms one may rent under the "Mrs.

Murphy" exemption in the housing law to four, rather three or five—so too may it engage in reasonable line-drawing differentiating between housing and transient lodging. That an "exemption is permitted . . . is not to say that it is constitutionally required." *Emp't Div. v. Smith*, 494 U.S. 872, 890 (1990).

This case is nothing like the situation in *Church of the Lukumi Babalu Aye Inc. v. City of Hialeah*, 508 U.S. 520 (1993). There, "almost the only conduct subject to [the laws] [was] the religious exercise of Santeria church members" while "almost all secular" conduct was excluded. *Id.* at 535, 542. Here, the public accommodations law broadly applies to the full gamut of places of public accommodation and in no way targets religious practices. Indeed, the general duty to guarantee access to places of public accommodation is "firmly rooted in ancient Anglo-American tradition" and all innkeepers were "'bound . . . to take in all travelers and wayfaring persons.'" *See Bell v. Maryland*, 378 U.S. 226, 296-97 (1964) (Goldberg, J., concurring).

The public accommodations law applies despite Ms. Young's religious beliefs—not because of them. The free exercise of religion "do[es] not allow business owners . . . to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018).

There is no occasion to apply heightened scrutiny here, and the only reason the Intermediate Court of Appeals addressed that issue was because Aloha B&B had argued that strict scrutiny was the appropriate test under the *state* free exercise clause.

App.33a. Assuming without deciding that strict scrutiny was the appropriate test, the Intermediate Court of Appeals correctly held, in any event, that the public accommodations law is narrowly tailored to further compelling government interests in nondiscrimination.

Aloha B&B argues that there cannot be a compelling interest here because of the "Mrs. Murphy" exemption in the housing law. But the government may advance a compelling interest in nondiscrimination in certain contexts without prohibiting every act of discrimination in every conceivable situation. For example, 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), does not mean the federal government has forfeited a compelling interest in nondiscrimination. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014) (recognizing that federal prohibitions on employment discrimination are "precisely tailored" to achieving a compelling interest).

Aloha B&B's suggestion that individuals suffering discrimination can simply be "referred" elsewhere would undermine the government's interest in nondiscrimination. The interest here is not merely whether transient guests have access to lodging, and concern for their welfare and safety, although here there were no other hotels, motels, or inns in Hawai'i Kai. R.1360. Rather, the government has a powerful interest in preventing the shock, humiliation, and other dignitary harms of being rejected by a place of public accommodation open to

all others—which are not erased merely because a hotel somewhere else is willing to provide a room. Public accommodation laws address "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 291-92 (1964) (Goldberg, J., concurring, citations omitted). "Discrimination is not simply dollars and cents, hamburgers, and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public." *Id.* at 292; *accord Masterpiece Cakeshop*, 138 S. Ct. at 1727, 1729 (rejecting exemptions that would "result[] in a community-wide stigma inconsistent with the history and dynamics of civil rights laws" and "impose a serious stigma on gay persons").

C. Aloha B&B's Imagined Government Campaign of Religious Hostility Is Wholly Unsupported.

Aloha B&B's accusation that the Commission engaged in a ten-year campaign of religious hostility is a work of pure fiction. To begin, it completely ignores that it was Ms. Cervelli and Ms. Bufford—private parties—who suffered discrimination by Aloha B&B and thereafter filed this civil action. And, unlike the authority relied upon by Aloha B&B, it was a circuit court—not the Commission—that found Aloha B&B liable for violating the public accommodations law. *Cf. Masterpiece Cakeshop*, 138 S. Ct. at 1730 (liability adjudicated by state agency).

The Commission's status of an intervenor in Ms. Cervelli and Ms. Young's lawsuit does not remotely evidence hostility to religion. The

Commission is charged with enforcement of the state's civil rights laws, Haw. Rev. Stat. § 368-3, and it thus has a responsibility to defend those laws against threatened constitutional invalidation. Other federal and state agencies also routinely defend the laws under their charge. Notably, the "Mrs. Murphy" exemption that Aloha B&B seeks to judicially graft onto the public accommodations law would also exempt discrimination based on any characteristic—including religion itself. Giving effect to the plain language of the public accommodations law, which omits a "Mrs. Murphy" exemption, is not hostile to religion. It is simply following the legislature's command—a command that equally bars discrimination against Muslims, for instance, by a bed-and-breakfast, hotel, or motel.

Aloha B&B has no support for its assertion of religious hostility, and what it does cite reveals the weakness of its claim. For instance, Aloha B&B argues that the act of "convincing state courts" to adopt the plain meaning of a statute is evidence of "religious persecution and intolerance." Pet. 31. It also claims that the judicial branch of the State of Hawai'i conspired against it by (1) spending too much time giving consideration to Aloha B&B's arguments on appeal (even though the *average* time to disposition in the overloaded appellate system is 30 months, R.256), and (2) not holding oral argument after Aloha B&B declined to ask for it. Pet. 35. Its amici even accuse the judges on the Intermediate Court of Appeals of religious animus because they quoted statements by *Aloha B&B's own counsel* at the summary judgment hearing. App.7a. And those statements were directly relevant to the heightened scrutiny test that Aloha B&B itself urged under the

state free exercise clause. App.35a. If mere recitation of Aloha B&B's own words evidences religious hostility, it is difficult to see what would not.

In Aloha B&B's retelling of the facts, every routine litigation task takes on a sinister motive. A deposition of the named defendant conducted by private counsel for Plaintiffs is a purported "interrogat[ion]." Pet. 34. Authentication of the documents that Aloha B&B itself produced and affirmatively relied upon as the basis for its defense, including the requisite sincerity of its owner's religious beliefs under its state free exercise defense, transforms into "critic[ism of] the Catholic Church's teaching about sex and marriage." *Id.* A court's statutory interpretation of whether a bed-and-breakfast constitutes an establishment that provides lodging to transient guests is deemed "persecution." Pet. 31. None of this is true, nor appropriate for this Court's review.

Furthermore, contrary to Aloha B&B's suggestion, the concept of nondiscrimination on the basis of sexual orientation was not first articulated by this Court in 2015 when it held that same-sex couples could not be excluded from marriage. Pet. 35 (citing *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)). In Hawai'i, the public accommodations law expressly prohibited discrimination based on a sexual orientation nearly a decade earlier. Haw. Rev. Stat. § 489-2. And Aloha B&B has never disputed that it discriminated against Ms. Cervelli and Ms. Bufford based on sexual orientation. Indeed, its position is that there is a constitutional right for it to do so.

Finally, the suggestion by Aloha B&B that this Court should grant, vacate, and remand in light of

Masterpiece Cakeshop is meritless. The well-established proposition that the government may not take action based on religious hostility was confirmed long ago. *Lukumi,* 508 U.S. at 547. But Aloha B&B neither timely raised any claim of religious hostility, nor identified any factual basis for that claim. In any event, all parties discussed *Masterpiece Cakeshop* in their briefing to the Hawai'i Supreme Court, which nonetheless declined to review the Intermediate Court of Appeals' decision on the interlocutory appeal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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