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 D. 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

BRIEF OF RESPONDENT WILLIAM D. HOSHIJO, AS EXECUTIVE DIRECTOR OF THE HAWAI'I CIVIL RIGHTS COMMISSION IN OPPOSITION

NEAL KUMAR KATYAL
MITCHELL P. REICH
HOGAN LOVELLS US LLP
555 Thirteenth St., NW
Washington, DC 20004
(202) 637-5600

CLARE E. CONNORS
Attorney General of the State of Hawai'i
CLYDE J. WADSWORTH
Solicitor General
Counsel of Record
KALIKO'ONALANI D. FERNANDES
Deputy Solicitor General
DEPARTMENT OF THE ATTORNEY GENERAL, STATE OF HAWAII
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1360
clyde.j.wadsworth@hawaii.gov

Counsel for Respondent

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to review whether a Hawai‘i intermediate court engaged in a "novel" construction of Hawai‘i law, when Aloha Bed & Breakfast did not timely or properly raise this claim before the state courts.

2. Whether this Court's review is warranted on Aloha Bed & Breakfast's claim—also not properly raised in the Hawai‘i courts—that the Hawai‘i Civil Rights Commission engaged in a "campaign" against Aloha Bed & Breakfast by enforcing Hawaii's public accommodations law according to its plain terms.

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INTRODUCTION

Petitioner Aloha Bed & Breakfast ("Aloha B&B") is a commercial business offering lodging to transient guests in Honolulu, Hawai‘i. As such, it is subject to the state's public accommodations law, which bars discrimination on the basis of sexual orientation and other enumerated traits. Aloha B&B denied lodging to Respondents Diane Cervelli and Taeko Bufford, a same-sex couple, based solely on their sexual orientation. Accordingly, the Hawai‘i court of appeals affirmed an interlocutory order of the state circuit court concluding that Aloha B&B was liable for violating the state's public accommodations law.

Before this Court, Aloha B&B tries to reframe the liability issue, arguing it lacked fair notice that refusing service to a same-sex couple because of their sexual orientation violated Hawaii's public accommodations law. That question is not properly before the Court and does not warrant its review. To begin, Aloha B&B failed to timely and properly raise its fair notice claim before the Hawai‘i court of appeals. That failure prevents this Court from considering the claim now. The fact that Aloha B&B's fair notice claim was not timely and properly raised also exposes Aloha B&B's purported conflict in authority as illusory. The Hawai‘i court of appeals, not having been presented with a fair notice claim, said nothing about fair notice. Its decision, therefore, could not possibly have conflicted with this Court's or the circuits' authority on fair notice.

Aloha B&B's fair notice claim also fails on the merits. Aloha B&B has *admitted* each of the elements that bring it squarely within Hawaii's public accommodations law. Its only argument for why it lacked fair notice hinges on an exemption in a completely different chapter of Hawai‘i law governing housing.

The exemption does not purport to excuse compliance with Hawaii's separate public accommodations law, and, in fact, makes no reference to the public accommodations law at all. No party, moreover, has even alleged that Aloha B&B violated Hawaii's housing law. Under these circumstances, there is no basis for Aloha B&B's fair notice claim, and no reason for this Court's review.

Aloha B&B's free exercise claim also does not warrant this Court's review. Aloha B&B failed to properly raise the claim below, and does not even allege a split of authority on this question. And Aloha B&B's highly factbound claim that the Hawai'i Civil Rights Commission was hostile to Aloha B&B's owner's religion is wholly unfounded and unsupported; on the contrary, the Commission gave respectful consideration to the religious beliefs of Aloha B&B's owner throughout the Hawai'i proceedings.

The petition for certiorari should be denied.

STATEMENT

I. STATUTORY BACKGROUND

Hawaii's public accommodations law, codified at Hawai'i Revised Statutes ("HRS") Chapter 489, was enacted in 1986. At the time of the events in question, it prohibited "[u]nfair discriminatory practices that deny, or attempt to deny, a person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation on the basis of race, sex, including gender identity or expression, sexual orientation, color,

religion, ancestry, or disability." Haw. Rev. Stat. § 489-3 (2008).[1]

A "place of public accommodation" is defined as "a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the general public as customers, clients, or visitors." Haw. Rev. Stat. § 489-2. The definition of a "place of public accommodation" specifically includes "[a]n inn, hotel, motel, or other establishment that provides lodging to transient guests." *Id.*

Sexual orientation was added to the public accommodations law's list of protected characteristics in 2006. The Hawai'i Legislature noted that the State's employment and housing laws prohibited discrimination based on sexual orientation, and "[j]ust as a person should not be denied a job or a home because of the person's sexual orientation * * * a person should not be denied service at a restaurant or store because of the person's sexual orientation." 2006 Haw. Sess. Laws Act 76.

Housing discrimination is governed by a wholly different chapter of Hawai'i law—HRS Chapter 515. That chapter bars, *inter alia*, refusals to "engage in a real estate transaction with a person" because of a protected characteristic. Haw. Rev. Stat. § 515-3. A

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[1] HRS § 489-3 currently prohibits "[u]nfair discriminatory practices that deny, or attempt to deny, a person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation on the basis of race; sex, including gender identity or expression; sexual orientation; color; religion; ancestry; or disability, including the use of a service animal."

"real estate transaction" includes "the sale, exchange, rental, or lease of real property." Haw. Rev. Stat. § 515-2.

There is an exemption to the housing law's non-discrimination provision—referred to by Aloha B&B as the "Mrs. Murphy" exemption—which provides that "Section 515-3 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." Haw. Rev. Stat. § 515-4(a)(2) (2006).[2] For purposes of this provision, a "[h]ousing accommodation" is defined as "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. By its plain terms, this exemption does not apply to the transient accommodations covered by the public accommodations law. Pet. App. 21a-23a. Transient accommodations provide short-term lodging to transient guests, not a "home or residence." Haw. Rev. Stat. § 515-2; *see* H. Stand. Comm. Rep. No. 874, in 1967 House Journal, at 819 (describing the "Mrs. Murphy" exemption as the "tight living" exemption); 2005 Haw. Sess. Laws Act 214 ("Housing laws presently permit landlords to follow their individual value systems in selecting tenants to live in the landlords' own homes"). And there is no comparable exemption in the public accommodations law itself.

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[2] Subsequent to the events at issue, the "Mrs. Murphy" exemption was amended to apply to "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." Haw. Rev. Stat. § 515-4(a)(2).

II. FACTUAL BACKGROUND

Aloha B&B is a commercial business offering overnight accommodations in Honolulu, Hawai‘i. It is a sole proprietorship of Phyllis Young. Aloha B&B operates out of a home in which Young resides, located on a ridge in an area of Honolulu known as Hawai‘i Kai. Pet. App. 3a-4a.

Aloha B&B offers three rooms for overnight lodging, and charges its customers a nightly rate plus general excise tax. It also charges its customers a transient accommodations tax, which only providers of transient accommodations are required to pay to the State of Hawai‘i. In addition to a room, Aloha B&B customers are provided breakfast, swimming pool access, wireless internet, and other amenities. Pet. App. 4a.

An average of 100 to 200 customers patronize Aloha B&B every year. Nearly all of Aloha B&B's customers—approximately 99 percent—are travelers visiting Hawai‘i. The median length of stay is four to five days. Approximately 95 percent of customers stay for less than two weeks, and a majority stay for less than a week. Aloha B&B does not provide customers a permanent residence, and Young has never described herself as a landlord to her customers. Pet. App. 4a.

Aloha B&B advertises its business to the general public. On its website, Aloha B&B described itself as a "Best Choice Hawaii Hotel" and "Best Choice Oahu Hotels," and provided a phone number and email address for prospective customers to contact the business. Aloha B&B has also advertised through various third-party websites in order to generate business. Pet. App. 4a-5a.

In 2007, Respondent Diane Cervelli emailed Aloha B&B to inquire about room availability during a trip

she and Respondent Taeko Bufford had been planning from California to Hawai‘i to visit a friend. Cervelli and Bufford—two women in a committed relationship—wanted to stay near their friend, who lived in Hawai‘i Kai. Young responded to Cervelli's email on the same day, informing her that a room at Aloha B&B was available for six nights. Pet. App. 5a.

A few weeks later, Cervelli called Aloha B&B to book the room and spoke with Young. After Cervelli indicated that another woman named "Taeko" would be staying with her at Aloha B&B, Young asked Cervelli if they were lesbians. Cervelli said "yes," and Young refused to accept Cervelli's reservation. Young then hung up on Cervelli. Pet. App. 5a.

Through tears, Cervelli informed Bufford of what had transpired. Bufford called Aloha B&B, seeking to reserve the room Young had indicated was available, but Young again refused. Bufford asked if Young was refusing the reservation because she and Cervelli were lesbians, and Young said "yes," citing her religious beliefs. Pet. App. 5a.

In a second conversation, Young told Bufford that, while she was unwilling to permit Cervelli and Bufford to stay at Aloha B&B, she could give them the name of a friend who also offered overnight accommodations. Pet. App. 75a. Young later testified—and Aloha B&B admitted—that Cervelli and Bufford's sexual orientation was the only reason that Young refused their reservation. Pet. App. 15a. Young stated that it would not have made a difference to her if Cervelli and Bufford were legally married, Supp. App. 1a, and that it would violate her religious beliefs for a same-sex couple to stay in any property that she owned, regardless of whether she lived on the property, Supp App. 2a-3a.

III. PROCEDURAL HISTORY

Cervelli and Bufford filed complaints with the Hawai‘i Civil Rights Commission, alleging discrimination based on sexual orientation in a place of public accommodation. The Commission conducted an investigation, and found reasonable cause to believe that Aloha B&B had committed an unlawful discriminatory practice in violation of Hawaii's public accommodations law. Cervelli and Bufford then requested and received notices of right to sue from the Commission, and the Commission closed its cases. Pet. App. 6a.

Cervelli and Bufford filed a complaint in state circuit court, alleging a single claim for discrimination in public accommodations in violation of HRS Chapter 489. Respondent William D. Hoshijo, in his official capacity as Executive Director of the Commission, moved to intervene as a plaintiff pursuant to the Commission's statutory right to seek intervention in civil actions of general importance, *see* Haw. Rev. Stat. § 368-12, and the circuit court granted the motion. Pet. App. 6a-7a.

Cervelli, Bufford, and Hoshijo ("Respondents") filed a motion for partial summary judgment with respect to liability, and declaratory and injunctive relief. Aloha B&B filed a cross-motion for summary judgment, arguing that it is not subject to Hawaii's public accommodations law, and that the "Mrs. Murphy" exemption in Hawaii's housing law governs its conduct instead. Pet. App. 7a.

At the hearing on the parties' cross-motions, counsel for Aloha B&B admitted that Aloha B&B "does provide lodging to transient guests." Pet. App. 7a. After considering the parties' arguments, including argument regarding Aloha B&B's constitutional defenses,

Supp. App. 5a-9a, the circuit court granted Respondents' motion for partial summary judgment and denied Aloha B&B's motion for summary judgment, concluding that Aloha B&B violated Hawaii's public accommodations law and injunctive relief was appropriate. Pet. App. 42a-43a. The issue of damages was not part of the summary judgment proceedings. Pet. App. 7a-8a.

The parties filed a stipulated application for an interlocutory appeal from the circuit court's order. Pet. App. 8a-9a. The application was granted and the action was stayed in its entirety—including enforcement of the injunction—until conclusion of the appeal. Pet. App. 48a-49a.

Aloha B&B then filed an interlocutory appeal with the Hawai‘i Intermediate Court of Appeals, which affirmed. The court of appeals concluded that Aloha B&B is a place of public accommodation subject to Hawaii's public accommodations law. The court of appeals noted that the statutory definition of "place of public accommodation" specifically includes "[a]n inn, hotel, motel, or other establishment that provides lodging to transient guests," Haw. Rev. Stat. § 489-2, and Aloha B&B had admitted that it provides lodging to transient guests. The court of appeals also noted that, based on the undisputed evidence, Aloha B&B does not provide permanent housing, Young does not consider herself a landlord to Aloha B&B customers, and Aloha B&B pays a tax only required of transient accommodations. Pet. App. 15a-16a.

The court of appeals rejected Aloha B&B's argument that Hawaii's housing law, rather than the public accommodations law, governed its conduct, and that its refusal to provide Cervelli and Bufford with lodging was therefore permitted under the housing law's "Mrs. Murphy" exemption. Pet. App. 17a-18a. The court of

appeals concluded that the Hawai‘i Legislature did not intend for a "Mrs. Murphy" exemption to apply to establishments—like Aloha B&B—that provide lodging to transient guests, finding it significant that despite patterning Hawaii's public accommodations law after the public accommodations provisions of the Civil Rights Act of 1964, the Hawai‘i Legislature "conspicuously omitted" the federal law's "Mrs. Murphy" exemption for establishments providing lodging to transient guests, *see* 42 U.S.C. § 2000a(b)(1), from Hawaii's law, Pet. App. 19a-20a.

The court of appeals also determined that the public accommodations law and the housing law were not, as Aloha B&B contended, in irreconcilable conflict. Citing to the Hawai‘i Legislature's understanding of the "Mrs. Murphy" exemption in the housing law as a "tight living" exemption applicable in the context of a landlord-tenant relationship, the court of appeals concluded that the exemption applies to long-term living arrangements, not the short-term lodging of transient guests covered by the public accommodations law. Pet. App. 21a-22a.

The court of appeals then addressed Aloha B&B's constitutional claims, concluding that application of the public accommodations law to Aloha B&B's conduct would not violate any right to privacy or intimate association. Pet. App. 25a-31a. The court of appeals also rejected Aloha B&B's free exercise claim, noting that Aloha B&B had not disputed that the public accommodations law is a neutral law of general applicability, and even if the court were to apply strict scrutiny to a free exercise claim under the Hawai‘i constitution, the public accommodations law would survive. Pet. App. 31a-36a.

Aloha B&B then filed an application for a writ of certiorari with the Hawai‘i Supreme Court. There, Aloha B&B raised a fair notice claim for the first time, contending that Young did not have the "slightest hint" that her business was subject to the public accommodations law. Pet. App. 140a. In her reply brief in support of certiorari, Aloha B&B raised yet another new argument, contending for the first time that the Commission's enforcement actions were motivated by religious hostility. Pet. App. 146a-150a.

The Hawai‘i Supreme Court denied Aloha B&B's request for further review. Pet. App. 38a-40a.

ARGUMENT

I. CERTIORARI IS NOT WARRANTED ON ALOHA B&B'S FAIR NOTICE CLAIM.

Having failed to convince the Hawai‘i courts of its interpretation of Hawaii's public accommodations law, Aloha B&B has repackaged its statutory argument under state law as a constitutional due process claim, contending that it lacked fair notice that refusing service to Cervelli and Bufford because of their sexual orientation violated the public accommodations law. This argument suffers from myriad flaws. Aloha B&B failed to timely and properly raise this claim before the Hawai‘i courts, resulting in forfeiture of the claim, and leaving this Court without jurisdiction to consider it. Unsurprisingly—given that the question was not even presented to the Hawai‘i court of appeals—there is no split between that decision and any other court on this question. And, on the merits, the claim is wholly insubstantial. Certiorari, accordingly, should be denied.

A. This Court Lacks Jurisdiction to Consider Aloha B&B's Fair Notice Claim.

It is well established that "in reviewing state court judgments under 28 U.S.C. § 1257," this Court "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision [the Court] ha[s] been asked to review." *Adams* v. *Robertson*, 520 U.S. 83, 86 (1997); *see also Bd. of Dirs. of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U.S. 537, 550 (1987).

Aloha B&B asks this Court to consider a fair notice claim that it never raised before the Hawai'i court of appeals, "the state court that rendered the decision [the Court] ha[s] been asked to review." *Adams*, 520 U.S. at 86; *see* Pet. i. During those proceedings (and during the proceedings before the Hawai'i circuit court), Aloha B&B never argued that it lacked fair notice of the applicability of Hawaii's public accommodations law. Aloha B&B waited until its application for a writ of certiorari to the Hawai'i Supreme Court to raise its fair notice claim for the first time, Pet. App. 140a, despite it being clear from the very start of the case that Hawaii's public accommodations law was the central provision at issue. Even after the circuit court rejected Aloha B&B's argument about the housing law's "Mrs. Murphy" exemption and concluded that Aloha B&B had violated the public accommodations law, *see* Pet. App. 42a-43a, Aloha B&B did not raise a fair notice claim in its interlocutory appeal to the Hawai'i court of appeals.

The Hawai'i court of appeals, accordingly, did not decide a fair notice claim. It said nothing about fair notice. *See* Pet. App. 1a-37a. As this Court has made clear, "[w]hen the highest state court [to render a decision] is silent on a federal question," the Court

"assume[s] that the issue was not properly presented." *Adams*, 520 U.S. at 86. That assumption can only be defeated "by demonstrating that the state court had a fair opportunity to address the federal question that is sought to be presented." *Id.* at 87 (internal quotation marks and citation omitted).

Aloha B&B has not met this burden. It did not present its fair notice claim in any form to the Hawai'i court of appeals. While Aloha B&B mentioned due process in its briefing before that court, it did so only to assert a claim entirely distinct from the fair notice claim it asserts now. Before the court of appeals, Aloha B&B argued that a due process violation resulted from "the same act" being "subject to two different statutes, each with a different punishment." Pet. App. 124a-125a. Aloha B&B based this argument on *State* v. *Modica*, 567 P.2d 420 (Haw. 1977), a Hawai'i Supreme Court case that held, in the criminal context, that a defendant's due process and equal protection rights would be violated "where the same act committed under the same circumstances is punishable either as a felony or as a misdemeanor" and the defendant is convicted of the felony. *Id.* at 422. The *Modica* court made clear that the case did not involve any claim of unconstitutional vagueness, *id.* at 421, the basis of a fair notice claim. Aloha B&B's reliance on *Modica*, therefore, could not possibly have provided the Hawai'i court of appeals "a fair opportunity to address the federal question that is sought to be presented here." *Adams*, 520 U.S. at 87 (internal quotation marks and citation omitted).

Aloha B&B did subsequently raise an alleged lack of fair notice in its application to the Hawai'i Supreme Court for a writ of certiorari. Pet. App. 140a. But by that time, the claim had long since been waived under

state law. *See, e.g.*, *Kau* v. *City & Cty. of Honolulu*, 92 P.3d 477, 483 n.6 (Haw. 2004) ("Legal issues not raised in the trial court are ordinarily deemed waived on appeal."). And as Aloha B&B acknowledges, it seeks review of the decision of the Hawai'i court of appeals, not the discretionary denial by the Hawai'i Supreme Court.

Before this Court, Aloha B&B has done "nothing to demonstrate that [it] complied with the applicable state rules" for raising its fair notice claim, or "to explain why the failure to comply with those rules would not be an adequate and independent ground for the state court to disregard that claim." *Adams*, 520 U.S. at 87-88. Nor has Aloha B&B demonstrated that it "presented [its] federal claim with fair precision and in due time." *Id.* at 88 (internal quotation marks omitted). As a result, Aloha B&B's fair notice claim cannot be considered.

B. There is No Conflict Between the Hawai'i Court of Appeals' Decision and Fair Notice Precedent from the Circuits.

Aloha B&B's asserted conflict between the Hawai'i court of appeals' decision, and fair notice precedent from the circuits, is illusory.

1. There cannot possibly be any conflict between the Hawai'i court of appeals' decision and precedent from the circuits on fair notice because there is no decision from the Hawai'i court of appeals on fair notice. Aloha B&B never raised a fair notice claim before the Hawai'i court of appeals. *See supra* Section I.A. Without any fair notice claim to consider, the Hawai'i court of appeals said nothing about fair notice that could possibly conflict with the circuits' fair notice precedent.

2. Given its failure to raise its fair notice claim before the Hawai‘i court of appeals, Aloha B&B bases its conflict argument not on any statement in the Hawai‘i court of appeals' decision, but on a statement by the Hawai‘i Supreme Court in an entirely different case. Pet. 28-29. Even assuming that a state court's action in a different case could create a conflict in this case, Aloha B&B's argument about what Hawai‘i courts "apparently" do—subjecting "only criminal statutes to fair-notice inquiries," Pet. 28—is demonstrably false. Aloha B&B ignores the numerous Hawai‘i cases in which the Hawai‘i Supreme Court has subjected civil laws to scrutiny for unconstitutional vagueness. *See, e.g.*, *Paul* v. *Dep't of Transp., State of Haw.,* 168 P.3d 546, 561-562 (Haw. 2007); *Gardens at W. Maui Vacation Club* v. *Cty. of Maui*, 978 P.2d 772, 781-782 (Haw. 1999). The only case Aloha B&B cites, *State* v. *Kalama*, 8 P.3d 1224 (Haw. 2000), merely held that "penal statutes" are subject to vagueness challenges—hardly a surprise, since the case involved a criminal statute. That case in no way suggested that civil laws are exempt from scrutiny, let alone overruled the court's numerous precedents to the contrary. *Id.* at 1227-28.

3. Aloha B&B also contends that two of the circuit cases it cites are "indistinguishable" from this case. Pet. 29-30. Both are readily distinguishable. In the first, *United States* v. *Hoechst Celanese Corp.*, 128 F.3d 216 (4th Cir. 1997), a plant owner "had reason to believe that its interpretation of [a regulation's] exemption * * * was accurate" because a state agency charged with enforcing the regulation took action regarding other plants that supported the plant owner's interpretation of the exemption, and the relevant EPA regional office did nothing to invalidate the state agency's action. *Id.* at 225-226. Given that Aloha B&B

has not pointed to any agency determination supporting its interpretation of Hawaii's public accommodations law or the housing law's "Mrs. Murphy" exemption, the Fourth Circuit's conclusion in *Hoechst Celanese* is irrelevant.

The second case, *General Electric Co.* v. *EPA*, 53 F.3d 1324 (D.C. Cir. 1995), did conclude—as Aloha B&B notes—that the EPA's interpretation of certain regulations was "so far from a reasonable person's understanding of the regulations that they could not have fairly informed [the petitioner] of the agency's perspective," *id.* at 1330, but that cannot possibly describe this case. The Hawai'i court of appeals applied the plain language of Hawaii's public accommodations law and the housing law's "Mrs. Murphy" exemption as written, and in no way departed from a reasonable person's understanding of those laws. *See infra* Section I.C. Hence, even if Aloha B&B had raised a fair notice argument, and the Hawai'i court of appeals had rejected it, there is no reason to believe that the D.C. Circuit—or any other circuit—would have reached a different conclusion.

C. Aloha B&B's Fair Notice Claim Lacks Merit.

Even leaving aside the jurisdictional problem and the absence of a conflict with circuit precedent, review of Aloha B&B's fair notice claim should be denied because it is meritless.

1. Although Aloha B&B frames its argument in terms of "vagueness" and "fair notice," at bottom, Aloha B&B is challenging a state court's interpretation of its own state law. This Court grants state courts considerable deference in construing their own laws, and has invalidated such interpretations on fair

notice grounds only in rare and egregious circumstances. *See, e.g.*, *Metrish* v. *Lancaster*, 569 U.S. 351, 359 (2013). Aloha B&B, accordingly, must meet a very high bar.

2. The vagueness doctrine also subjects civil enactments to a less demanding standard than criminal statutes. *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-499 (1982); *Winters* v. *New York*, 333 U.S. 507, 515 (1948). A civil statute violates due process if it is "so vague and indefinite as really to be no rule or standard at all." *A.B. Small Co.* v. *Am. Sugar Ref. Co.*, 267 U.S. 233, 239 (1925); *see also Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402 (1966) ("standardless" laws fail to satisfy due process).

a. Hawaii's public accommodations law easily satisfies that standard. It sets forth clear principles for determining the establishments and the conduct it governs, *see* Haw. Rev. Stat. §§ 489-2, -3, and Aloha B&B itself does not appear to dispute that it falls within the public accommodations law's terms. Aloha B&B offers its services and accommodations to the general public, consistent with the definition of a "place of public accommodation" in HRS § 489-2. It also specifically falls within one of the examples of a "place of public accommodation" in HRS § 489-2, namely "[a]n inn, hotel, motel, or other establishment that provides lodging to transient guests." Aloha B&B has not pointed to any ambiguity in that language. In fact, Aloha B&B has *admitted* that it "provide[s] lodging to transient guests," Pet. App. 7a, undermining any assertion that it did not understand that it qualified as a "place of public accommodation," subject to the public accommodations law. If Aloha B&B did not understand itself as providing transient

accommodations, it would not have registered for a transient accommodations tax license and charged its customers that tax. *See* Pet. App. 4a.

Aloha B&B has also admitted that Cervelli and Bufford's sexual orientation was the only reason for Young's refusal to accept their reservation. Pet. App. 6a, 15a. That plainly violates the public accommodations law's nondiscrimination provision. *See* Haw. Rev. Stat. § 489-3 (2008).

Because the public accommodations law's "statutory terms are clear in their application" to Aloha B&B's conduct, "[Aloha B&B's] vagueness challenge must fail." *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 21 (2010).

b. Perhaps recognizing the clarity of the public accommodations law, Aloha B&B focuses its fair notice argument on an exemption in an entirely *different* law—the housing law's "Mrs. Murphy" exemption. That exemption does not shield Aloha B&B from violation of the separate public accommodations law—as the Hawai'i court of appeals held—and Hawai'i law gives any person a reasonable opportunity to understand that.

The housing law's "Mrs. Murphy" exemption, by its plain terms, excuses compliance with only a single section of the housing law: "Section 515-3." Haw. Rev. Stat. § 515-4(a)(2) (2006). The exemption makes no reference to the public accommodations law (and vice versa), and nothing within the exemption remotely suggests that it permits noncompliance with the public accommodations law's nondiscrimination provision. Given the lack of connection between the "Mrs. Murphy" exemption and the public accommodations law, Aloha B&B's interpretation of the exemption makes no sense in the context of this case, where only a violation of the

public accommodations law was alleged to have occurred, and where Aloha B&B has effectively conceded that it falls within the public accommodations law's terms. Nothing in the "Mrs. Murphy" exemption encouraged Aloha B&B's apparent view of that exemption as an all-purpose, general immunity from all of Hawaii's nondiscrimination laws.

Nor did anything in the "Mrs. Murphy" exemption suggest to Aloha B&B that its conduct was subject to the housing law, and not the public accommodations law. The "Mrs. Murphy" exemption applies to "the rental of a room or up to four rooms in a housing accommodation," Haw. Rev. Stat. § 515-4(a)(2) (2006), and a "housing accommodation" is defined as "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 (emphasis added). Aloha B&B does not offer its customers a "home or residence." Pet. App. 4a. Those terms have a sufficiently clear meaning; both refer to a long-term living arrangement, not a six-night stay by travelers like Cervelli and Bufford.[3] The couple was planning a visit to Hawai'i from their home in California, and neither had any intention of renting a room and living with Young at Aloha B&B. As a result, the housing law's "Mrs. Murphy" exemption—what the Hawai'i Legislature referred to as the "tight

[3] Dictionaries confirm the ordinary meaning of these terms. *See Village of Hoffman Estates*, 455 U.S. at 501 n.18. "Residence" is defined as *excluding* "a place of temporary sojourn or transient visit." Webster's Third New International Dictionary (2002). Black's Law Dictionary (10th ed. 2014) also defines "residence" as "[t]he act or fact of living in a given place for some time," as, for example, "a year's residence in New Jersey."

living" exemption—clearly had no relevance to Cervelli and Bufford's temporary, short-term stay, just as the Hawai'i court of appeals determined.

It is beyond dispute, moreover, that the public accommodations law does not itself contain any exemption of the sort Aloha B&B has claimed. The Hawai'i Legislature, in fact, intentionally declined to include a "Mrs. Murphy" exemption in the public accommodations law. *See supra* pp. 8-9. It is wholly unreasonable to assume that a law is subject to an exemption not only absent from its text, but purposefully omitted by the legislature.

3. Aloha B&B incorrectly argues that a "heightened" vagueness standard must be applied in this case because Hawaii's public accommodations law interferes with Young's rights to privacy, intimate association, and the free exercise of religion. Pet. 21. Because Young is the owner of a commercial business subject to a law of general applicability, she has not suffered any intrusion of those rights. *See Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018); *Emp't Div.* v. *Smith*, 494 U.S. 872, 879 (1990); *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 619-20 (1984); *id.* at 634 (O'Connor, J., concurring); *Marsh* v. *Alabama*, 326 U.S. 501, 506 (1946).

Moreover, even assuming that a heightened vagueness standard applied here, Aloha B&B's fair notice challenge would still fail. The heightened standard outlined in *Village of Hoffman Estates* requires that a law "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." 455 U.S. at 498 (quoting *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972)). Hawaii's public accommodations law, for the very same reasons noted above, *supra* Section I.C.2., easily

satisfies that standard. The Hawai‘i court of appeals, in finding Aloha B&B to have violated Hawaii's public accommodations law, simply applied the plain text of Hawai‘i law.

4. *FCC* v. *Fox Television Stations, Inc.*, 567 U.S. 239 (2012), and *Gentile* v. *State Bar of Nevada*, 501 U.S. 1030 (1991), are not to the contrary. *Fox Television* involved the FCC's application of a new policy regarding expletives and nudity to Fox and ABC. 567 U.S. at 249. The FCC had consistently stated that fleeting expletives and brief nudity—as opposed to repeated or lengthy instances of the same—could not constitute actionable indecency, but after the relevant conduct by Fox and ABC, the FCC "changed course," finding that fleeting expletives were, in fact, actionable. *Id.* at 248, 254. The FCC then applied that new policy to the fleeting expletives and brief nudity broadcast by Fox and ABC. *Id.* at 249-252. The Court concluded that the networks lacked fair notice of what conduct was prohibited in light of the FCC's "abrupt" regulatory change. *Id.* at 254.

Nothing like the "change in policy" at issue in *Fox Television* occurred in this case. *Id.* at 250. The Hawai‘i court of appeals applied Hawaii's public accommodations law as it had substantially existed since 1986 to Aloha B&B. Despite repeatedly contending that Hawai‘i law was "reinterpret[ed]" to "prohibit conduct that was previously authorized," Pet. 2, Aloha B&B has not pointed to anything substantiating that assertion. It has not identified a single relevant statutory or regulatory change, judicial precedent, or Commission determination indicating that the public accommodations law did not apply to a business like Aloha B&B before Aloha B&B's case was presented to the Hawai‘i courts. Aloha B&B, by its own admission,

provides lodging to transient guests, and at all relevant times, establishments "that provide[] lodging to transient guests" have explicitly fallen within the scope of Hawaii's public accommodations law. Haw. Rev. Stat. § 489-2. The Hawai'i court of appeals' rejection of Aloha B&B's attempt to escape the public accommodations law through an exemption to an entirely different chapter's nondiscrimination provision was not, as in *Fox Television*, a "revers[al]." 567 U.S. at 248.

Gentile involved the State Bar of Nevada's effort to discipline an attorney for statements he made to the press about his client's pending case. 501 U.S. at 1062. The relevant rule on pretrial publicity had a safe harbor permitting an attorney to "state without elaboration * * * the general nature of the claim or defense." *Id.* at 1061. This Court concluded that the rule failed to provide fair notice, given that an attorney seeking the safe harbor's protection "must guess at its contours." *Id.* at 1048. The terms "general" and "elaboration" in the safe harbor provision provided "insufficient guidance" because both are "classic terms of degree" with "no settled usage or tradition of interpretation in law" in the context at issue. *Id.* at 1048-49. This, according to the Court, left an attorney with "no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated." *Id.* at 1049.

Unlike the safe harbor provision in *Gentile*, Hawaii's public accommodations law does not force Aloha B&B to "guess at its contours." *Id.* at 1048. The contours of the public accommodations law, as applied to Aloha B&B, are clear: Aloha B&B falls neatly within one of the delineated categories of public accommodations—establishments "provid[ing] lodging to transient guests," Haw. Rev. Stat. § 489-2—without reference to any

unsettled "terms of degree," *Gentile*, 501 U.S. at 1048-49. Aloha B&B cannot plausibly contend that insufficient guidance was provided when the services it admits it offers bring it squarely within the law's unambiguous terms.

In support of its reliance on *Gentile*, all Aloha B&B offers is Young's "studied effort to comply with the law," which purportedly shows that Hawaii's public accommodations law is a "trap." Pet. 28. *Gentile* certainly referenced the attorney's "conscious effort" to comply with the disciplinary rule at issue, but the Court's determination that fair notice was lacking did not hinge solely on that effort. 501 U.S at 1049-51. Nowhere did the Court conclude that a failed but "studied effort" at compliance proves a law's unconstitutional vagueness. Aloha B&B's suggestion to the contrary substantially ignores this Court's fair notice analysis in *Gentile*.

II. CERTIORARI IS NOT WARRANTED ON ALOHA B&B'S FREE EXERCISE CLAIM.

Aloha B&B also contends that the Court should grant certiorari to review its claim that the Commission engaged in a "campaign to punish Mrs. Young for her religious beliefs." Pet. 30. Like Aloha B&B's fair notice argument, this claim was not timely raised or passed upon in the Hawai'i courts, and so it is forfeited. This claim also does not satisfy any of the traditional criteria of certiorari: Aloha B&B neither identifies a split of authority, nor suggests that this deeply factbound claim poses an issue of recurring importance. And, on the merits, Aloha B&B's claim is baseless. Aloha B&B has pointed to nothing the Commission did or said that evidenced even a shred of religious hostility. Certiorari should accordingly be denied on this question, as well.

A. Aloha B&B's Free Exercise Claim Was Not Properly Pressed Or Passed Upon Below.

In its petition, Aloha B&B contends that the Commission violated the Free Exercise Clause by engaging in a "campaign" against Aloha B&B under which it "work[ed] in concert with private plaintiffs in this case to ignore or constrict the Mrs. Murphy exception," applied that interpretation to "Mrs. Young's family home of 40 years," and "penalize[d] her severely." Pet. 30. Aloha B&B does not cite any prior filing in which it made this claim. Nor does it cite any portion of the Hawai'i court of appeals decision addressing that claim. *See* Pet. 10-12 (describing lower-court proceedings).

That is because none of Aloha B&B's lower-court filings until its reply brief in support of certiorari in the Hawai'i Supreme Court raised this claim. In the Hawai'i circuit court, the Hawai'i court of appeals, and its application for a writ of certiorari to the Hawai'i Supreme Court, Aloha B&B's sole argument premised on the Free Exercise Clause was that "application of HRS Chapter 489 to its conduct in this case violates Young's constitutional right to free exercise of religion." Pet. App. 31a; *see* Pet. App. 142a-145a, 133a-138a, 125a-132a, 119a-120a, 111a-115a, 88a-94a. The Hawai'i court of appeals understood Aloha B&B's free exercise claim the same way, rejecting it on the ground that "HRS Chapter 489 satisfies even strict scrutiny as applied to Aloha B&B's free exercise claim." Pet. App. 33a.

Aloha B&B has now abandoned that argument in favor of a markedly different claim: not that the statute violates its free exercise rights because it is too broadly tailored, but that the Commission violated its

free exercise rights by engaging in conduct motivated by religious hostility. Pet. 30; *see* Pet. App. 146a-150a. That newfound argument, however, has long since been forfeited under state law. This Court thus lacks jurisdiction to consider it. *See supra* Section I.A. Certiorari should be denied on that basis alone.

B. Aloha B&B Does Not Identify Any Split of Authority or Question of Broader Legal Significance.

Certiorari is also unwarranted because this late-breaking argument satisfies none of the traditional criteria for certiorari review. Aloha B&B does not claim any split of authority. Nor does it identify any lower-court opinion addressing a similar claim. Indeed, Aloha B&B does not cite a *single* lower-court opinion in the portion of its petition discussing its free exercise claim. *See* Pet. 30-37.

This claim also does not present an issue of broader legal significance. Aloha B&B's contention is that a single state commission engaged in conduct toward a single individual motivated by unlawful purpose. The resolution of that claim would turn on the application of a long-settled rule of law to the specific facts of this case. *See* Pet. 31 (arguing that the Commission's conduct violated this Court's central holding in *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993)). It would not clarify general legal principles, resolve lingering uncertainty in the law, or address a question frequently encountered by lower courts. This Court's review is not warranted to adjudicate this one-off, factbound claim—particularly where Aloha B&B did not properly raise it below and no lower court has addressed it.

C. Aloha B&B's Free Exercise Claim Lacks Merit.

Finally, certiorari should be denied because Aloha B&B's free exercise claim is entirely without merit. Aloha B&B has identified no respect in which the Commission evinced any religious hostility toward Aloha B&B or its owner.

Aloha B&B's principal free exercise argument is simply a repackaging of its fair notice claim: that the Commission was driven by religious animus because it "advance[d] an unprecedented interpretation of the Mrs. Murphy exemption" without providing Aloha B&B "fair notice." Pet. 31-32; *see id.* at 34-35 (same). That argument fails out of the gate for the same reason as the fair notice claim: The Commission's construction of Hawai'i law reflected the plain language of the "Mrs. Murphy" exemption and the clear distinction between the public accommodations law and the housing law. *See supra* Section I.C.2. Further, even if the Commission's interpretation of state law *were* novel, that would not demonstrate that it was motivated by religious hostility. The Commission's interpretation applies equally to all persons who offer public accommodations, and makes no distinctions on the basis of religion. *See Lukumi*, 508 U.S. at 531 ("a law that is neutral and of general applicability" does not violate the Free Exercise Clause "even if [it] has the incidental effect of burdening a particular religious practice").

Aloha B&B also contends that the Commission "selectively punish[ed] Mrs. Young *** while still letting others off scot-free." Pet. 33. Aloha B&B offers no evidence of selective enforcement, however, and there is none. Unlike in *Masterpiece Cakeshop*, the record in this case does not suggest that the Commission

engaged in differential treatment toward individuals with religious objections. *Cf.* 138 S. Ct. at 1730-31. And unlike in *Lukumi*, the Commission's interpretation of Hawai'i law does not effect a "religious gerrymander," by limiting or targeting the law at "conduct motivated by religious belief." *Lukumi*, 508 U.S. at 535, 545.[4]

Nor is there merit to Aloha B&B's claim that the Commission could have adopted "[m]ore narrowly-tailored options for guarding same-sex couples." Pet. 33. The only "option[]" Aloha B&B proposes—telling same-sex couples that they must "find * * * a room elsewhere," *id.*—is flatly forbidden by the State's public accommodations law, and would have imposed the "serious stigma on gay persons" that this Court has made clear the Constitution does not require. *Masterpiece Cakeshop*, 138 S. Ct. at 1727, 1729.

Equally meritless is Aloha B&B's suggestion that the Commission "interrogated" Young about her religious beliefs and "cited Mrs. Young's religious beliefs as a basis for punishing her." Pet. 34. What Aloha B&B refers to as an "interrogation" consisted, in its entirety, of the following question: "I hate to get too personal, but could you please describe for me those religious beliefs that precluded you from allowing [Cervelli and Bufford] to stay together in your home?" Pet. App. 84a. That neutral, respectful question by the

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[4] Aloha B&B contends that the Commission's interpretation "fails the generally-applicability test [*sic*]" because it draws a distinction between persons who provide rentals for "long-term" stays and those who provide them for "short-term" stays. Pet. 32. But that distinction has nothing to do with religion. Persons who rent rooms for short-term stays are no more likely to have religiously based objections than persons who do not. *Cf. Lukumi*, 508 U.S. at 542 ("All laws are selective to some extent.").

Commission during its investigation did not demonstrate religious animus or hostility of any kind. It was also plainly relevant to the case, given that Young was seeking a religious exemption from the State's nondiscrimination law. *Id.* at 79a. Young's own attorney responded to the question by stating, "It's okay. I think she's actually been waiting for you to ask that question." *Id.* at 84a.

Aloha B&B's contention that the Commission "cited Mrs. Young's religious beliefs as a basis for punishing her," Pet. 34, is equally insubstantial. In support of that claim, Aloha B&B points to the following paragraph from the background section of the Commission's notice of finding of reasonable cause: "Mrs. Young explained that she and her husband are strong Christians and that it would be against their belief system to allow Complainant and her partner to stay at their bed and breakfast as a couple." Pet. App. 86a. That was a neutral and accurate description of what occurred; it did not in any way state or imply that Young's religion was the basis for the Commission's finding. It also does not resemble the hostile and derogatory statements this Court found indicative of animus in *Masterpiece Cakeshop*. *See* 138 S. Ct. at 1729 (describing commissioner's statement that a person's reference to his religious beliefs was "one of the most despicable pieces of rhetoric that people can use.").[5]

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[5] Aloha B&B also cites several pages from the transcript of Young's deposition to support its claim of religious animus. Pet. 34 (citing Pet. App. 96a-104a). But that deposition was conducted by counsel for Cervelli and Bufford, not the Commission, and so cannot possibly demonstrate animus on the part of the Commission. And the portions of the deposition Aloha B&B cites focus on defining and understanding Young's religious beliefs,

D. A Remand In Light of *Masterpiece Cakeshop* Is Unwarranted.

As a last-ditch effort, Aloha B&B asks that the Court remand the case in light of *Masterpiece Cakeshop*. Pet. 37. For numerous reasons, the Court should decline. Aloha B&B did not properly raise its claim of religious hostility in the Hawai‘i courts, and so any claim based on *Masterpiece Cakeshop* has been forfeited. Furthermore, *Masterpiece Cakeshop* did not effect a change in the law material to Aloha B&B's claims; as Aloha B&B itself admits, its claims rest entirely on *Lukumi*'s well-settled rule (reiterated by *Masterpiece Cakeshop*) that the government may not take actions that "'stem from animosity to religion or distrust of its practices.'" *Masterpiece Cakeshop*, 138 S. Ct. at 1731 (quoting *Lukumi*, 508 U.S. at 547); *see* Pet. 31-33 (stating that "*Lukumi* bars" such conduct). Moreover, Aloha B&B has not made any showing of religious animus, and so any claim premised on *Lukumi* and *Masterpiece Cakeshop* would be bound to fail.

In addition, this Court's opinion in *Masterpiece Cakeshop* was issued over a month before the Hawai‘i Supreme Court denied Aloha B&B's petition for a writ of certiorari. Pet. App. 38a-39a. In its reply brief in support of certiorari, Aloha B&B spent several pages citing and discussing that decision. *See id.* at 148a-150a. The Hawai‘i Supreme Court thus had a full and fair opportunity to consider the case (subject to the state's waiver rules). There is no reason to require it to do so again.

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without any expression of animus or hostility. *See* Pet. App. 96a-104a.

III. THIS CASE IS A POOR VEHICLE FOR DECIDING THE QUESTIONS PRESENTED.

The petition should also be denied because this case is a poor vehicle for deciding the questions presented.

First, Aloha B&B failed to properly raise *both* of its merits claims in the Hawai‘i courts. That leaves this Court without jurisdiction to review either claim, *see supra* Sections I.A., II.A., and at the very least, poses a significant barrier to this Court's review of the merits.

Second, both of Aloha B&B's claims are highly fact-bound and intertwined with the law of a single state. In particular, Aloha B&B is contending that one state's intermediate court's interpretation of one state's law was too "novel," and that a single state commission had bad motives for a particular interpretation of state law. These arguments are meritless, but they also lack the broader significance necessary to warrant this Court's intervention.

Third, Aloha B&B premises many of its arguments on the contention that it has been "subjected * * * to severe punishment, including compensatory, treble, and punitive damages, statutory fines, and ruinous attorney fees and costs," Pet. 13, but none of that has actually been imposed on Aloha B&B or on Young. The Hawai‘i court of appeals' decision arose out of an interlocutory appeal, taken before determination of any of those issues. Pet. App. 7a-9a. When proceedings resume before the Hawai‘i circuit court, Aloha B&B will have an opportunity to argue that it should not be subject to the very damages, fines, fees, and costs that it repeatedly cites as reasons for this Court to grant certiorari. *See* Pet. i, 3, 13, 15. The interlocutory nature of this case, along with Aloha B&B's reliance on the portion of the case that has yet to be

resolved, make it particularly ill-suited for certiorari. *Cf.* 28 U.S.C. § 1257(a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

NEAL KUMAR KATYAL
MITCHELL P. REICH
HOGAN LOVELLS US LLP
555 Thirteenth St., NW
Washington, DC 20004
(202) 637-5600

CLARE E. CONNORS
Attorney General of the State of Hawai'i
CLYDE J. WADSWORTH
Solicitor General
Counsel of Record
KALIKO'ONALANI D. FERNANDES
Deputy Solicitor General
DEPARTMENT OF THE ATTORNEY GENERAL, STATE OF HAWAII
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1360
clyde.j.wadsworth@hawaii.gov

Counsel for Respondent

February 1, 2019

APPENDIX

APPENDIX

[ROA 883] CASE NAME: Taeko Bufford vs. Aloha Bed and Breakfast

NUMBER: PA-O-0564

BASIS: Sexual Orientation

CASE NAME: Diane Cervelli vs. Aloha Bed and Breakfast

NUMBER: PA-O-0563

BASIS: Sexual Orientation

INTERVIEW OF PHYLLIS YOUNG

INTERVIEW DATE: March 5, 2009

* * *

[ROA 887] What if Taeko Bufford and Diane Cervelli were legally married- would that make a difference? **You mean if they were married in some other State that recognized gay marriage? No. It would not matter to me. Absolutely, It is not a legal issue.**

* * *

[155] [ROA 1412] IN THE CIRCUIT COURT OF THE FIRST CIRCUIT STATE OF HAWAII

Civil No. 11-1-3103-12 ECN
[Other Civil Action]

DIANE CERVELLI and TAEKO BUFFORD,

Plaintiffs,

WILLIAM D. HOSHIJO, as Executive Director of the Hawaii Civil Rights Commission,

Plaintiff-Intervenor,

vs.

ALOHA BED & BREAKFAST, a Hawaii sole proprietorship,

Defendant.

DEPOSITION OF PHYLLIS A. YOUNG

VOLUME 2

Taken on behalf of the Plaintiffs Diane Cervelli and Taeko Bufford, at Carlsmith Ball LLP, American Savings Bank Tower, 1001 Bishop Street, Suite 2200, Honolulu, Hawaii, commencing at 1:03 p.m. on Thursday, July 26, 2012, pursuant to Notice.

BEFORE: SHARON L. ROSS, RPR, CRR, RMR, CSR No. 432

* * *

[189] [ROA 1415] Q. Well, you mentioned that you have a rental apartment. Do your religious beliefs

prevent you from renting that apartment to a same sex couple?

A. Again, I would have to say yes because it would be giving them the opportunity to have immoral sexual behavior in a place that we owned; and I would be accountable to God for that decision.

* * *

[1] IN THE CIRCUIT COURT OF THE
FIRST CIRCUIT STATE OF HAWAII

Civil No. 11-1-3103

DIANE CERVELLI, et al.,

Plaintiffs,

vs.

ALOHA BED & BREAKFAST,

Defendant.

Transcript of proceedings had before The Honorable Edwin C. Nacino, judge presiding, on Thursday, March 28, 2013, regarding the above-entitled matter; to wit, (1) Plaintiffs' and Plaintiff-Intervenor's Motion for Partial Summary Judgment; and (2) Defendant's Motion for Summary Judgment.

APPEARANCES:

PETER C. RENN, ESQ.
JAY S. HANDLIN, ESQ.
For Plaintiffs

ROBIN WURTZEL,
ATTORNEY AT LAW
For Plaintiff-Intervenor

JOSEPH E. LA RUE, ESQ.
L. JAMES HOCHBERG, JR., ESQ.
SHAWN A. LUIZ, ESQ.
For Defendant

REPORTED BY:
Leslie L. Takeda
Registered Professional Reporter
Certified Realtime Reporter
Hawaii CSR #423; California CSR #10010

* * *

[6] MR. RENN: The common thread across all their Constitutional defenses is that if there is a compelling State interest in prohibiting discrimination in public accommodation here, then that trumps whatever burden they might be able to prove in terms of intimate association, privacy, or free exercise. And the Hawaii supreme court did not mince any words in *State vs. Hoshijo*, another public accommodations case, when it said this is the evil of unequal treatment. It is no answer, as Defendants tried to do, to say, Well, you can go get a hamburger somewhere else. It's always been the case that theoretically you could try to access the good or the service somewhere else; but that doesn't erase the deep, deep dignitary harm, the humiliation that people experience when they have to go through discrimination. And that's the reason we prohibit it. And it's not just the Hawaii supreme court. The U.S. Supreme Court on numerous occasions when dealing with the federal public accommodation law has said this is a law that serves an interest of highest order; and that's why time and again it has held that those laws are Constitutional against attempts of Constitutional attack. And that's the interest that's vindicated here.

The only answer which they provide substantively [7] on this point is that, well, same-sex couples can't get married in Hawaii; but that is, perhaps, the ultimate non sequitur. A marriage – the institution of marriage is not a place of public accommodation; it is

not a restaurant; it is not a drugstore; it is not a hospital. You do not walk into it and get a service. And that is what matters here. Their claim is that the State doesn't sincerely care about protecting the dignitary harm that discrimination causes, but that's absolutely false. The State holds itself to the exact same standard as private businesses with respect to places of public accommodation, and that's what matters here. And I think that is a very clean basis on which to deny all of their Constitutional claims. But even if you were to go further and to look at the actual claims that they've presented, none of them present an actual argument about why the law should be struck down in its application here.

THE COURT: You mean the defenses that –

MR. RENN: I'm sorry. The defendants (sic). That's absolutely right, Your Honor.

The first argument they have is intimate association; but unselective, fleeting relationships of a business nature, with hundreds and hundreds of customers is not an intimate association. An intimate association, [8] we know, protects families. It protects the relationships between parents and their children, between spouses, between siblings. It protects, perhaps, the roommates who we live with at our home. But it certainly does not protect unselective business relationships that are as short as 72 hours in duration. No court has ever been willing to go that far, and it would be a tremendous leap to do so here in this case. That's the reality. They can't – you know, any one of these factors alone – size, selectivity, duration, purpose – show that this business relationship is not one of Constitutional dimension.

And let's just take size, for example. The Supreme Court in *Roberts vs. Jaycees* said that this right protects only the relationships we have with the necessarily few individuals with whom we form deep attachments in life. And it's undisputed that within the last couple of years alone Aloha Bed and Breakfast has served anywhere between 500 to 1,000 customers, so many so that as soon as they walk out the door the business owner can't remember even their names. That is not a right of intimate association.

Likewise, with respect to privacy, there is a firm limiting principle as to what privacy protects and does not protect. It absolutely does not protect the [9] relationships in which a third party is being injured. That is the one firm wall to which courts have always hewed, and it is not surmountable here. They argue that the home is special, and maybe so in certain cases; but it certainly – it's also equally true that there are countless numbers of activities that we prohibit in homes. You can't, for example, manufacture methamphetamine; you can't abuse your spouse; you can't engage in software privacy. The fact that something happens in the home doesn't mean that the State can't prohibit it and can't regulate it, let alone when the activity in question is commercial business activity, which is absolutely the province of the State to regulate. And as I mentioned at the outset, the firm limiting principle, which they cannot cross, is there is never a right of privacy when it causes harm to third parties. Your right of privacy must end at the point harm to third parties begins. And that's very clear in the *State vs. Kam* case. The reason why the home sometimes receives special protection is because what you do in your home, as a general matter, may not injure third parties. But in the case of discrimination, and in the case of a commercial business operating out

of a home, it absolutely injures third parties, and I think it's clear that there's no privacy right in that context.

* * *

[21] THE COURT: But, Counsel, if the Court was to rule in favor of Plaintiff on the 489 question, is that then precluding your client from exercising her free right of speech, to practice the religion she wants to practice, to state what she believes about homosexuality? How can you argue that to the Court when purely this business that the Youngs are in is purely of their own decision?

I know it's in the deposition someplace, where Mr. Renn did ask, Does your religion mandate you to run a bed and breakfast? This is something that the Youngs have decided, We want to make money and make a profit by opening our home to the public and renting out rooms in our abode. So the simple answer – and I know nothing is really simple. But if you want to maintain the type of privacy you're articulating to the Court, which I fully [22] agree and I think Mr. Renn and his clients would agree, that everyone has that right of privacy, to associate with whom they choose to, but when you make a decision to then step into the realm of business, such as what the Youngs have decided to do, you tell me why the State cannot regulate that type of activity with a statute such as 489.

MR. LA RUE: Thank you, Your Honor.

I think there's been a misunderstanding of what Mrs. Young is asserting is her religious belief. It's not to operate a bed and breakfast, by any means.

THE COURT: No.

MR. LA RUE: No, no, no, I know. But I think that was suggested in Plaintiffs' briefing at one point, and I want to make plain that's not a religious belief. But it's also not just to speak out against homosexuality. I'm not even sure if Mrs. Young does that. She may; I don't know. What her religious belief is, and what really is at issue in this case for free exercise purposes, she believes that it would be wrong for her to rent a room that's going to allow sexual activity to possibly occur that she believes is immoral, that violates her religious views. And, so, it's not – it's not even – she's not even making a statement, really, about gay people as much as she's making a [23] statement about her act in renting a room that would facilitate conduct that she believes is morally wrong.

THE COURT: No. And I –

MR. LA RUE: That's the religious objection, Your Honor.

* * *