

No. 18-451

In the Supreme Court of the United States

ALOHA BED & BREAKFAST,
Petitioner,

v.

DIANE CERVELLI, *et al.*,
Respondents.

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

**MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF
AND BRIEF OF *AMICI* ETHICS & RELIGIOUS
LIBERTY COMMISSION, THE CHRISTIAN LIFE
COMMISSION OF THE MISSOURI BAPTIST
CONVENTION, AND FREEDOM OF CONSCIENCE
DEFENSE FUND IN SUPPORT OF PETITIONER**

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**MOTION FOR LEAVE TO FILE AN AMICI
CURIAE BRIEF IN SUPPORT OF PETITIONER**

Under Supreme Court Rules 21, 33 and 37, Ethics and Religious Liberty Commission, the Christian Life Commission of Missouri Baptist Convention, and Freedom of Conscience Defense Fund respectfully move this Court for leave to submit the attached *amici curiae* brief in support of Petitioner in Case No. 18-451.

This case involves issues paramount to religious persons and organizations who hold traditional biblical views of sexual morality and biblical marriage. *Amici* have a significant interest in these issues, and often file *Amici curiae* briefs on religious liberty issues before the Court. *See* Interests of Amici, page 1.

On October 11, 2018, Petitioner filed blanket consent for filing of amicus briefs in support of either or neither party. On November 8, 2018, counsel for *Amici* requested consent from Respondents. All Respondents denied the request on November 9, 2018, citing untimeliness. Respondents' counsel said they otherwise would have consented.

Wherefore, your *Amici* respectfully ask for leave to submit the attached brief in support of the petition for writ of certiorari.

Respectfully submitted,

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INTERESTS OF *AMICI*¹

Ethics and Religious Liberty Commission (ERLC) is the moral concerns and public policy entity of the Southern Baptist Convention (SBC), the nation's largest Protestant denomination, with over 50,000 churches and 15.8 million members. The ERLC addresses public policy affecting such issues as freedom of speech, religious liberty, marriage and family, the sanctity of human life, and ethics. The Constitution's guarantee of freedom from governmental interference in matters of privacy and faith is a crucial protection on which SBC members and adherents of other faith traditions depend as they follow the dictates of their conscience under God in the practice of their faith. Many Baptists and other people of faith on occasion open their homes to guests for rent.

Christian Life Commission ("CLC") of the **Missouri Baptist Convention** ("MBC") is the public policy entity of the MBC, comprised of nearly 2000 local churches affiliated with the SBC. Dr. John Yeats is Executive Director of the MBC. For over 20 years, he has been one of five elected officers of the SBC.

Freedom of Conscience Defense Fund (FCDF) is a team of experienced trial attorneys who provide pro

¹ No one other than *amici* and their counsel authored any part of this brief or made a monetary contribution to fund its preparation or submission. On October 11, 2018, Petitioner filed a blanket consent for the filing of amicus briefs in support of either or neither party. On, November 9, 2018, all respondents denied the request for consent by *amici*, dated November 8, 2018, on grounds of untimeliness. Consequently, a motion for leave to file this brief is included.

bono legal services and spearhead educational initiatives on issues related to religious freedom, bioethics and family values. FCDF defends the conscience rights and constitutional liberties of people of any faith or no faith.

INTRODUCTION AND SUMMARY OF ARGUMENT

To make ends meet, Phyllis Young rents three bedrooms in her family home, doing business as Aloha Bed & Breakfast (Aloha B&B). It is her primary source of income in retirement. She welcomes everyone as guests provided they abide by her “house rules,” including that only a married man and woman may cohabit a single bedroom. When a same-sex couple asked to make advance reservations for a single bedroom, Mrs. Young tried respectfully to refer them to another bed and breakfast, after explaining her Christian convictions and her house rules. She mentioned Hawai`i’s “Mrs. Murphy exemption,” which recognizes that those who rent up to four rooms in their own home have the discretion to select renters compatible with the owner’s lifestyle. Haw. Rev. Stat. § 515-4(a)(2) (2007). She referred the couple to a nearby friend who was happy to host them.

Mrs. Young is a devout Catholic who believes that she would be morally culpable for facilitating or approving the sinful sexual activity that she knowingly permits in her own home. She will not host anyone in a way that violates her faith. When her daughter came for overnights, Mrs. Young required the daughter to sleep in a separate bedroom from her live-in boyfriend. App.82a–84a, 95a–96a.

The Hawai`i Intermediate Court of Appeals refused to accommodate her religious conscience and instead treated her religious behavior as a “horrible evil” to be “suppressed” and “prevented.” The panel judicially rewrote the Mrs. Murphy exemption by holding that it applied only to long-term rentals. The Court then declared Mrs. Young’s family home to be a place of public accommodation, and held that acting on her religious beliefs was “invidious discrimination” against the same-sex couple. This renders her liable for compensatory, treble, and punitive damages, statutory fines, attorney fees and costs under a state public accommodation law.

ARGUMENT

I. This Court should grant the petition to “further elaborate” on the promises of *Obergefell* and *Masterpiece Cakeshop*.

A. *Obergefell* promised to honor and protect religious conscientious objectors.

In announcing a new constitutional right to same-sex marriage, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), promised religious believers and organizations that they would remain secure in their constitutional right to believe, teach and live out their sincere religious convictions about marriage and sexuality. The promise was unmistakable and unambiguous:

Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.” *Id.*, 2594

Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged (by the majority's decision.)" *Id.*, 2602

It must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered." *Id.*, 2607

B. *Masterpiece* promised to prohibit anti-religious hostility by government against religious conscientious objectors.

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), Justice Kennedy, writing again for the majority, fulfilled the promise of *Obergefell* by protecting Jack Phillips's Christian conscience from naked anti-religious animus:

At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. *Id.* 1727.

The neutral and respectful consideration to which Phillips was entitled was compromised here, however. The Civil Rights Commission's

treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.” *Id.* 1729

At several points during its meeting, commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado’s business community. One commissioner suggested that Phillips can believe “what he wants to believe,” but cannot act on his religious beliefs “if he decides to do business in the state.” *Id.* 1729

The commissioner stated: I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be — I mean, we — we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to — to use their religion to hurt others. *Id.* 1729

This Court repudiated the *animus* exposed by these caustic comparisons to some of the most evil acts in history. The Constitution forbids official cynicism against religious persons by those who police discrimination. Treating religious objectors as an evil because they object based on religious conscience is antithetical to Free Exercise.

C. *Masterpiece* promised “further elaboration” in future cases.

In *Masterpiece*, the Court found hostility in comments and arguments by the government “that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado’s business community. *Id.* 1729. One commissioner suggested that Phillips can believe “what he wants to believe,” but cannot act on his religious beliefs “if he decides to do business in the state.”

Further, this Court recognized the temptation for some government officials to demonize religious dissenters who refuse to bow the knee to a particular public policy. *Id.* 1729-32

Moreover, the Court anticipated future cases involving the inevitable collision between religious liberty and sexual liberty, but said courts must resolve them with mutual tolerance and respect. *Id.* 1732

This case provides the Court an opportunity to provide “further elaboration” on how government must respect the dignity interests of consumers while also respecting the dignity of sincere religious believers like Phyllis Young. *Id.*

II. Secular vocations in the marketplace deserve the same Free Exercise protections as sacred vocations in the ministry.

Religious liberty does not belong only to the church, mosque or synagogue. Free exercise of religion extends to individuals in the marketplace as well.

A. Many faiths teach that secular vocations are callings to blend work and witness.

Christian, Jewish, and Muslim teachers have all emphasized that one should fully integrate faith into every aspect of life. A true believer is called to live out his faith—including fundamental beliefs about sex, marriage, and the family—in every aspect of his life, including his workplace. To do otherwise is sinful and incurs divine disapproval. In their theology of work, some would quibble with the clergy-laity distinction or the secular-sacred divide and teach that all believers are called to work and to glorify the Creator in their work and spiritual witness. Many would say God calls and equips some to be clergy (as in 1 Samuel 3) and others to be craftsmen (as in Exodus 31).

For example, Christian reformer Martin Luther affirmed that “even the most mundane stations are places in which Christians ought to live out their faith.” Marc Kolden, *Luther on Vocation, 3 Word & World* 382 (Oct. 1, 2001).

Similarly, John Calvin “regarded vocation as a calling into the everyday world. The idea of a calling or vocation is first and foremost about being called by God, to serve Him within his world.” Alister McGrath, *Calvin and the Christian Calling, 1999 First Things* 94 (July 1999).

Business author Hugh Whelchel quotes modern Evangelical theologian Carl F. Henry: “According to the Scriptural perspective, work becomes a waystation of spiritual witness and service, a daily traveled bridge between theology and social ethics. In other words, work for the believer is a sacred stewardship, and in fulfilling his job he will either accredit or violate the Christian witness.” Hugh Whelchel, *How Then Should We Work? Rediscovering the Biblical Doctrine of Work*, 4 (2012).

Further it is a central tenet of Judaism that, throughout one’s daily life, one should accept and act upon the great multitude of opportunities to improve one’s thoughts and behavior. Talmud, Makkos 23b; see also Rabbi Moshe Chaim Luzzato, *Derech Ha-Shem* §§ 1:2:1–5. These opportunities are “mitzvot,” or commandments, which constitute civil and criminal rules that govern virtually all aspects of the believer’s life, personal and commercial. For example:

- A Jewish store owner cannot sell a cheeseburger to any customer, Jewish or Gentile, because of a mitzvah against deriving any profit from a cooked mixture of dairy and meat. *Why Not Milk and Meat*, *Aish.com* (last accessed: 11/12/18); Exodus 23:19, 34:26, Deuteronomy 14:21, and Babylonian Talmud: Hullin 113b, 115b.
- A Jewish baker cannot provide services to a formal wedding on the Sabbath or select holy days. Menachem Posner, *What is Shabbat?*, *Chabad.org* (last accessed: 11/12/18); Exodus 16:26-30, 20:8-11, 23:12, 31:12-17, 34:21, 35:3, Leviticus 23:3, Deuteronomy 5:12-15, Isaiah 58:13-14, Amos 8:5, Haggai 1:8.

- A Jewish baker might not create a wedding cake for a ceremony in which a Jew was converting to another religion, though a wedding between two Christians or two Muslims, or a Muslim and a Christian, would be permissible. Leviticus 20:26; Exodus 20:2. Deuteronomy 7:3; Babylonian Talmud: Yevamoth 23a
- A Jewish tailor may find it religiously objectionable to create garment with a wool-linen blend for a Jewish customer, though not for Gentiles. *Shatnez-Free Clothing, Chabad.org* (last accessed: 11/12/18); Leviticus 19:19; Deuteronomy 22:9-11.

In sum, for millions of believers, “freedom to embrace religion as a way of life . . . is a key substantive good.” Miroslav Volf, *Flourishing: Why We Need Religion in a Globalized World* 113 (2015). The above decisions and distinctions by proprietors living out their faith in the marketplace are not unfair or invidious discrimination. The terms simply do not fit the conduct. Similarly, the term “unfair discrimination” in HRS § 489 should not be applied to Petitioner’s acts of conscience in housing guests under her roof.

B. Mrs. Young’s home-based business is protected by this Court’s precedents.

This Court has recently protected the statutory free exercise rights of the Green family, (who are Southern Baptists) and the Hahn family (who are Mennonites), owners of successful closely held for-profit corporations, Hobby Lobby Stores, Inc. and Conestoga Wood Specialties. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). The Court’s opinion reviewed the history of free exercise claims by merchants in for-profit trades, incorporated or not, in which religious

adherents sought protection of the free exercise of their religion. The government disputed that for-profit corporations could “exercise religion” apart from the human beings who operated it, to which the Court retorted that corporations could do nothing apart from those human beings. *Id.*, at 2768.

Likewise, this Court protected the Free Exercise of Jack Phillips and his closely-held family corporation. *Masterpiece, supra*, 1724.

That Mrs. Young operates a home-based business should not diminish the religious liberty protections accorded to her by the First Amendment. The Court should grant the petition to review Hawai`i’s application of an anti-discrimination law to religiously motivated decisions made in Mrs. Young’s home.

C. The State, by labeling an act of conscience as invidious discrimination and a horrible evil, exposes its *animus*.

The Court of Appeals held that HRS § 489 prohibits “unfair discriminatory practices” and “invidious discrimination.” App. 15a. The court said the remedial statute should be “liberally construed to suppress the perceived evil and advance the enacted remedy.” 18a. It said public accommodation laws eradicate the “evil of unequal treatment.” The Court proceeded to cherry-pick from the record statements by Petitioner’s counsel, supposedly admitting that discrimination based on sexual orientation was a “horrible evil.”

The State, in effect, labels Mrs. Young’s religiously motivated conduct as invidious discrimination, and a horrible evil. Mrs. Young and her counsel did not

admit to these characterizations, and do not now accept these disparaging labels for her religious faith.

Mrs. Young did not discriminate against anyone under HRS § 489. The Court of Appeals says that the term means unequal treatment that is unfair and invidious, and hence, unlawful. Not every difference of opinion or discretionary judgment is invidious or unfair. Invidious implies malice or an intent to harm. Many of your *amici* see sexual immorality as harmful to the participants, and seek the ultimate good for all involved.

The Constitution respects individuals in their homes and close associations, and in this case it should protect individuals in their own homes as they draw lines motivated by sincere religious conscience. Hawai`i cannot deride Mrs. Young's decisions as a "horrible evil." Hawai`i should have found that HRS § 489 did not apply to Mrs. Young. Or the State should have reasonably interpreted HRS § 515-4(a)(2) to provide a Mrs. Murphy exemption. The interpretive verbal gymnastics engaged in by the State to avoid applying the Mrs. Murphy exemption to Petitioner exposes its anti-religious *animus*.

D. The State is dismissive, if not hostile, toward Mrs. Young's religious rationale.

Both the Commission and the Court of Appeals are dismissive, if not hostile, toward Mrs. Young's religious defenses. Decent, honorable religious beliefs motivate her in-home conduct, not "invidious discrimination" or anti-gay *animus*. The appeals opinion makes a half-hearted reference to Mrs. Young's Catholic faith, but

then, astonishingly, never mentions it again in its discussion. Cf. Pet. 4-6 to Pet. App. 15a-17a.

Thus, the Commission and the Court of Appeals frame the issue in a way that misses the point of Mrs. Young's conscience claims. "Aloha B&B admitted that the sole reason it refused to provide lodging to Plaintiffs was because of their sexual orientation. Young testified in her deposition that there was no other reason for Aloha B&B's refusal." App. 15a.

However, such statements ignore Mrs. Young's defenses that she referred this couple to another guesthouse because of her "house rule," as a matter of conscience, that she could not host under her roof unmarried cohabitating couples. Like many people of faith, she believes that extra-marital sexual relations do moral harm to the couple, and she cannot knowingly accommodate them under her roof, lest she share in the divine disapproval of these harms.

Thus, it is unfair to characterize the facts as Hawai'i did: "It is undisputed that Aloha B&B refused to provide Plaintiffs with lodging on the basis of their sexual orientation." Pet. App. 17a. Mrs. Young defends that she did not refuse, but referred; she did not discriminate, but she declined the business; she did not demean the individuals based on sexual orientation, but she asked them, and the State, to honor her religious conscience as she exercised the Mrs. Murphy exemption under HRS § 515.

This Court has promised that religious convictions about sexual morality, "long . . . held . . . in good faith by reasonable and sincere people here and throughout the world," will be treated as decent and honorable by

government officials. *Oberbefeell, supra*, 1792. By granting this Petition the Court may insure that these promises are being kept by state governments.

III. Petitioner's sincere religious views, shared by many, deserve the protection promised in *Obergefell* and *Masterpiece*.

A. Many faiths teach that extra-marital sexual relations, same sex or otherwise, are sinful and harmful.

Jesus Christ taught a marriage rooted in creation; it is a sacred, lifelong bond between one man and one woman. Matthew 19:4–6. Extra-marital sexual relations are sinful and harmful, including same-sex relationships. Exodus 20:14; Matthew 5:27; 1 Corinthians 6:9-18; Romans 1:24-32. This has been the traditional orthodox view of the Christian church from the beginning.

Like other Protestant denominations, the Southern Baptist Convention's doctrinal statement, *Baptist Faith and Message*, 2000, ("BFM") Article 18, addresses the Family. It says: "Marriage is the uniting of one man and one woman in covenant commitment for a lifetime. It is God's unique gift to reveal the union between Christ and His church and to provide for the man and the woman in marriage the framework for intimate companionship, the channel of sexual expression according to biblical standards, and the means for procreation of the human race. www.sbc.net/bfm2000/bfm2000.asp (last accessed: 11/12/18)

The objection is not limited to Christians. Judaism historically does not condone homosexual relationships, including same sex marriage. Rabbi Tzvi

HershWeinreb, Orthodox response to Same-Sex Marriage (June 5, 2006) <https://goo.gl/u4zjbd>. (last accessed: 11/12/18)

And Islamic officials have recently affirmed that the Qur'an prohibits same-sex marriage. *Islamic Perspective on Same-Sex Marriage*, (July 7, 2015) <https://goo.gl/UZjCTT>. (last accessed: 11/12/18)

Obergefell and *Masterpiece* addressed religious beliefs about same-sex marriage and weddings. This case deals with biblical sexual morality more generally, including extra-marital relations, same sex or otherwise. The Respondents were a same-sex couple, but the Mrs. Young's "house rule" applied to any unmarried couple cohabiting a single bedroom. Mrs. Young's views, like Jack Phillips' views, should receive respect and tolerance by the State; but if not, then by this Court.

B. Many faiths teach the principle of moral complicity.

Another conviction that is common to many faiths is moral complicity. For example, Romans 1:32 refers to the separate sin of giving approval to those who practice sin. Understanding the principle of complicity may also be the key to understanding Mrs. Young's case, and a key to why your *amici* support her petition.

In a concurring opinion in *Hobby Lobby Stores, Inc. v. Sebelius*, Case No. 12-6294 (10th Cir. 2013), Justice (then Judge) Gorsuch wrote: "All of us face the problem of complicity. All of us must answer for ourselves whether and to what degree we are willing to be involved in the wrongdoing of others. For some,

religion provides an essential source of guidance both about what constitutes wrongful conduct and the degree to which those who assist others in committing wrongful conduct themselves bear moral culpability. . . . Understanding that is the key to understanding this case.”

This Court later agreed with the Tenth Circuit, and declined to tell plaintiffs their moral thinking was flawed. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 at 2778 (2014)

In *Masterpiece*, this Court noted:

A principled rationale . . . cannot be based on the government’s own assessment of offensiveness. Just as “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,” *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642, 63 S. Ct. 1178, 87 S. Ct. 1628 (1943), it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive. (citations omitted) . . . [To] elevate one view of what is offensive over another . . . itself sends a signal of official disapproval of Phillips’ religious beliefs.

Supra, 1731.

Hawai`i cannot take up the offense of the potential guests while ignoring the offense to Mrs. Young’s dignity; or worse, compounding the offense to her by calling her acts of conscience a “horrible evil.” This Court should grant the petition and give due protection to Mrs. Young’s conscience, relieving her of the indignities she is suffering at the hand of the State,

while encouraging consumers to accept the other readily available resources for housing as they show mutual respect and toleration for differing moral views in this pluralistic society.

CONCLUSION

A home-based proprietor who declines to accommodate customer conduct for reasons of religious conscience does not engage in “invidious discrimination.” Compelling a religious proprietor to use her home to advance the government’s policy agenda on sexuality is itself invidious discrimination that threatens to exclude or expel her from her livelihood if not her home. This the First Amendment forbids.

This Court should grant the petition for writ of certiorari and ultimately reverse the judgment below.

Respectfully submitted,

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