Supreme Court Case No. S040653
Court of Appeal Case No. C007654

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

EVELYN SMITH,

Petitioner,

vs.

COMMISSION ON FAIR EMPLOYMENT AND HOUSING,

Respondent,

KENNETH C. PHILLIPS AND GAIL RANDALL,

Real Parties in Interest.

OPENING BRIEF ON THE MERITS
OF KENNETH C. PHILLIPS

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ISSUE PRESENTED FOR REVIEW

Although the parties characterized the issues presented for review in various ways in their petitions and answer, the primary issue in this case essentially comes down to one question:

> Did court ratification of a landlord's restrictive renting practices, granting the landlord a personal religious exemption from the Fair Employment and Housing Act and the Unruh Civil Rights Act, violate the Doctrine of Separation of Church and State and the Establishment Clauses, as well as constitute a misapplication of the Free Exercise Clauses, of both the state and federal constitutions, where:
>
> (a) the landlord's sole reason for refusing to rent to Real Parties in Interest was that their future conduct, the landlord surmised, would not coincide with the landlord's personal religious belief that sexual activity outside of marriage is a sin, and that by renting to them, she believed that she would facilitate such sinful conduct; and
>
> (b) the rental housing is not operated by a religious institution on a nonprofit basis but by an individual solely for business and commercial purposes; and
>
> (c) the landlord does not live on the premises?

SYNOPSIS

The California Legislature has enacted laws prohibiting discrimination in housing transactions. This case involves a landlord who, according to the undisputed facts, engaged in illegal practices in violation of these statutes. Rather than obey the law, the landlord went to court and sought an injunction to stop the government from enforcing the law against her.

The landlord's legal theory is remarkable. She claims that owners of commercial businesses have a religious right not to do business with persons they perceive to be sinners, even though such discriminatory conduct is against the law. The Court of Appeal granted the landlord's request for an injunction, thereby commanding the Fair Employment and Housing Commission to grant exemptions to business owners who, for religious reasons, choose not to comply with the state's civil rights laws.

The decision of the Court of Appeal is unprecedented. No reported appellate decision outside of California has ever held that a business owner may hide behind his or her religious beliefs as an excuse to engage in illegal discrimination.

There are many reasons why the opinion of the Court of Appeal is flawed and should be reversed. First, it blurs the distinction between religion and commercialism. In other words, the renting of apartments for profit is nothing more than the "exercise of capitalism" and not the "exercise of religion" protected from government regulation. Furthermore, there are many compelling reasons why the state has passed laws protecting consumers from arbitrary discrimination. But most importantly, the Doctrine of Separation of Church and State precludes a court from giving permission to a business owner to discriminate against consumers that he or she perceives as sinners. By issuing such an injunction, the court itself would become a party to such discrimination and would unconstitutionally give preference to persons with orthodox or conservative religious beliefs over those with liberal or moderate beliefs, or who have no religious beliefs at all.

The Free Exercise Clauses of the state and federal Constitutions were never intended to authorize discrimination against persons who refuse to conform their conduct to the religious convictions of a business owner. The Establishment Clauses preclude such a result.

STATEMENT OF THE CASE

As the opinion of the Court of Appeal observes, the facts are not in dispute.[1] Evelyn Smith owns and leases two adjacent duplexes in Chico. They are operated exclusively for business and commercial purposes, with income generated from the rentals reported as business income. The business is not organized or classified as a religious, charitable or other nonprofit concern. Smith, who does not reside in any of these units, only visits them occasionally to maintain them. (Commission Decision, hereinafter"CD," p. 2.)

When she has a vacancy, Smith places an advertisement in local newspapers. (CD, p. 2.) Vacancies are available to the general public. (Ibid.) However, when prospective tenants inquire about a vacant unit, Smith always tells them that she prefers married couples. (AR, Vol. II, p. 86.) Her preference is based on her religious beliefs. (CD, p. 2.)

Smith, a Christian, has attended the Bidwell Presbyterian Church in Chico for the past 25 years. (CD, p. 3.) Not only does she believe that sex outside of marriage is a sin, she also believes that it would be a sin for her to rent her units to people who will engage in nonmarital sex on her property. (Ibid.) Smith has no religious need to inquire into the potential sexual activities of applicants or tenants. (AR, Vol. II, p. 87.) For example, she does not ask tenants about their sexual orientation, whether they have girlfriends or boyfriends, or whether they have overnight guests. (AR, Vol. II, p. 87.) However, her religious beliefs would cause her to evict an existing tenant if she found out that the tenant committed a single act of nonmarital sex, even if the sexual act occurred in a place other than her rental property, such as at a hotel. (AR, Vol. II, pp. 87-89.)

Smith does not have any secular reasons for not renting to unmarried couples. She does not believe that unmarried couples would be irresponsible or disruptive as tenants. (AR, Vol II, p. 80.) On the contrary, she believes that it is possible that an unmarried

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[1] See *Smith v. Fair Employment and Housing Commission* (1994) 25 Cal.App.4th 251, 257. However, that opinion omitted many material facts. (See Petition for Rehearing of Kenneth Phillips.) As a result, most facts in the statement of the case in this brief are taken directly from the "findings of fact" in the decision of the Fair Employment and Housing Commission (hereinafter "CD"), which may be found in the Administrative Record (hereinafter "AR") under tab 43 at pages 2-5. Other facts are taken from testimony presented at the administrative hearing.

couple could be a "model tenant" from a purely secular perspective. (AR, Vol. II, p. 82.)

Smith's religious objections to renting apartments to persons she suspects to be engaging in sexual sins is a result of her own interpretation of the Bible. (AR, Vol II, p. 55.) In fact, however, there is nothing in the official written doctrines of the Presbyterian Church (USA), the denomination with which Smith's church is affiliated, that prohibits a landlord from renting an apartment to an unmarried couple.[2] Smith herself is unaware of any mandate of her church that tells her she can't rent to unmarried couples. (AR, Vol. I, p. 91.) No one in her church has ever told her that she would be subject to reprimand or discipline if she rented to an unmarried couple. (Id., at p. 93.)

In March and April of 1987, Smith ran a newspaper advertisement for a vacant rental unit in one of her duplexes. (CD, p. 3.) Gail Randall and Kenneth Phillips saw the ad, drove by the apartment, and decided that the unit met their specific needs. (Ibid.) The next morning they called Smith, who told them on the phone that she preferred to rent to married couples. (Ibid.) Randall and Phillips responded "that's us." (AR, Vol. II, p. 61.) The next day Smith showed the apartment to them. (Ibid.) When she noticed that they did not have rings on, Smith asked them how long they had been married. (AR, Vol. II, pp. 62-63.) Phillips said they were married for about 18 months. (Ibid.)

A few days later, Smith accepted a deposit from Phillips and Randall. (CD, p. 4.) Later that same day, Phillips told Smith that he and Randall were not married. (Ibid.) Smith responded that since they were not married, she would not rent to them due to her religious beliefs. (AR, Vol. II, p. 68.) Randall told Smith that she was violating the law. (AR, Vol. II, p. 68.) Smith replied that even though there is a law against discrimination that she had religious rights under the First Amendment. (AR, Vol. II, p. 69.)

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[2] Rev. Walter Link testified to this fact at the administrative hearing. He has been the Stated Clerk of the Presbytery of Sacramento for the past 17 years and is familiar with official church doctrines. (Administrative Record, Vol. I, pp. 106-110.) Smith's church is a member of the Sacramento Presbytery. (Id., at p. 100.) It is interesting that Smith's attorney did not call a minister from the Presbyterian Church (USA) as an expert theological witness on her behalf but instead called a member of the Orthodox Presbyterian Church to back her up on her interpretation of the Bible. (See testimony of Dr. Gregory Bahnsen at pages 127-134 of Volume II of the Administrative Record.)

Smith did not know if Phillips and Randall had a sexual relationship or whether they would even share the same bedroom. (AR, Vol. II, pp. 67-68.) She merely suspected that they would engage in sexual activity in the apartment. (AR, Vol. II, p. 88.)

Phillips and Randall filed complaints against Smith with the Fair Employment and Housing Department. (CD, p. 2.) Subsequently, the Department filed accusations against Smith charging her with unlawful rental practices under the Fair Employment and Housing Act and the Unruh Civil Rights Act. (CD, pp. 5-6.) The accusation asserted that Smith discriminated against Phillips and Randall on the basis of their marital status in violation of Government Code section 12955, subdivisions (a) and (d), provisions of the Fair Employment and Housing Act. (CD, p. 6.) It also alleged that Smith was guilty of an unlawful practice under Government Code section 12948 which prohibits marital status discrimination by business owners who are subject to the requirements of Civil Code section 51, also known as the Unruh Civil Rights Act. (CD, p. 6.) After an administrative hearing was conducted, the Fair Employment and Housing Commission found Smith in violation of both statutes. (CD, pp. 7-9.) The Commission noted that it was without authority to grant Smith an exemption from these statutes based on her defense under the free exercise clauses of the state and federal constitutions because no appellate court had ruled on that defense. (CD, pp. 10-11.) The Commission ordered Smith to pay $454 in damages for out-of-pocket expenses incurred by Mr. Phillips and Ms. Randall in finding another apartment. (CD, pp. 13-14.) The damage award will be split by the victims. The Commission also ordered Smith to post and distribute certain notices (CD, p. 13.)

Smith took her free exercise defense directly to the Court of Appeal in a petition for writ of mandate. Although it opposed the petition, the Commission agreed to lift the requirement that Smith post and distribute various notices.[3] The Court of Appeal issued a writ commanding the Commission to dismiss the case. This Court then granted review.

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[3] The Commission agreed to remove altogether the requirement that Smith post a notice that she had been found in violation of the fair housing laws. It further agreed to lift the requirement that she state in writing that she practices equal housing opportunity. It did insist, however, that she post a general notice on her properties explaining the type of conduct that constitutes an unlawful housing practice. (See Return to Alternative Writ of Mandate, p. 39.)

ARGUMENT

I

COURTS OUTSIDE OF CALIFORNIA HAVE NOT GRANTED FREE EXERCISE EXEMPTIONS AUTHORIZING BUSINESS OWNERS TO DISCRIMINATE IN VIOLATION OF STATE OR LOCAL CIVIL RIGHTS LAWS

Many states have passed laws prohibiting discrimination in employment, housing, and public accommodations. Many of these civil rights laws prohibit marital status discrimination as well as discrimination based on other arbitrary criteria such as race, color, religion, national origin, or sex. Over the years, many legislatures have also added age, disability, and sexual orientation to the list of protected classifications. Such statutes have always been vigorously enforced by the judiciary. However, the Court of Appeal in this case broke with that tradition by granting an exemption to Mrs. Smith based on her personal beliefs. In contrast, courts outside of California have universally declined to accept the principle that business owners may refuse to do business with persons they consider to be sinners.

The Minnesota Supreme Court was the first appellate court to grapple with these issues. (*State by McClure v. Sports and Health Club* (Minn. 1985) 370 N.W.2d 844, appeal dismissed, 487 U.S. 1015 (1986).) In that case, the owners of a health club said they were "born again" Christians whose fundamentalist religious convictions caused them not to hire any unmarried individual who was living with a person of the opposite sex. On two occasions, a woman filed a complaint against the club on this basis. An administrative law judge found each complaint to be true. (*State by McClure, supra*, 370 N.W.2d, at p. 871, fns. 37 and 38.) Minnesota law prohibits discrimination in employment on the basis of criteria such as religion and marital status. (Minn.Stat. § 363.03, subd. 1(2).)

In a decision that rejected the owners' claim to a free exercise exemption, the court quoted passages from several leading decisions of the United States Supreme Court. For example, the court referred to *Hishon v. King and Spalding* (1984) 467 U.S. 69, 70, wherein

the Supreme Court stated:

> "[A]s we have stated in another context, '[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been afforded affirmative constitutional protections.'" (*State by McClure, supra*, 370 N.W.2d, at p. 852.)

After concluding that the "government has an overriding compelling interest in prohibiting discrimination in employment and public accommodation," the court added:

> "In a pluralistic and democratic society, government has a responsibility to insure that all its citizens have equal opportunity for employment, promotion, and job retention without having to overcome the artificial and largely irrelevant barriers occurring from gender, status, or beliefs to the main decision of competence to perform the work. Likewise, the government has a responsibility to afford citizens equal access to all accommodations open to the public." (*State by McClure, supra*, 370 N.W.2d, at p. 851.)

Rejecting the owners' suggestion that granting individualized exemptions was a less restrictive means of achieving these governmental objectives, and noting that a legislative exemption existed for religious corporations, the court stated:

> "Sports and Health, however, is not a religious corporation -- it is a Minnesota business corporation engaged in business for profit. By engaging in this secular endeavor, appellants have passed over the line that affords them absolute freedom to exercise religious beliefs. The state's overriding compelling interest of eliminating discrimination based upon sex, race, marital status, or religion could be substantially frustrated if employers, professing as deep and sincere religious beliefs as those held by appellants, could discriminate against protected classes. . . . [W]hen appellants entered into the economic arena and began trafficking in the market place, they have subjected themselves to the standards the legislature has prescribed not only for the benefit of the prospective and existing employees, but also for the benefit of the state as a whole in an effort to eliminate pernicious discrimination." (*State by McClure, supra*, 370 N.W.2d, at p. 853.)

The court indicated that it could not permit business owners, even in the name of religious freedom, "to discriminate contrary to the state's public policy of affording equality

of opportunity and equal access to public accommodations to all its citizens," adding:

> "To permit such an exception would substantially emasculate the state's public policy of ensuring civil rights for the citizens. Were we to accept Sports and Health's position, we might justly be accused of significantly encouraging private discrimination. Cf., *Reitman v. Mulkey*, 387 U.S. 369, 376." (*State by McClure, supra*, 370 N.W.2d, at p. 853, fn. 16.)

In *State by Johnson v. Porter Farms* (Minn. App. 1986) 382 N.W.2d 543, when a farm owner discovered that his farm hand was living with a woman to whom he was not married, he gave the worker an ultimatum -- either marry the woman within two months or move out of the trailer in which the worker lived. When the couple did not marry by the deadline, the worker was fired. The Court of Appeal affirmed an award of damages and held that the Human Rights Act did not violate the employer's free exercise of religion.

Similar claims to a free exercise exemption from civil rights laws prohibiting marital status and sexual orientation discrimination have consistently been rejected by the Minnesota Court of Appeals and the Minnesota Supreme Court. (*State by Johnson v. Sports and Health Club* (Minn. App. 1986) 392 N.W.2d 329; *Blanding v. Sports and Health Club* (Minn. App. 1985) 373 N.W.2d 784, affirmed, 389 N.W.2d 205 (1986).) However, when a free exercise claim later arose in the context of housing discrimination against an unmarried couple, the court ruled for the landlord on statutory rather than constitutional grounds. (*State by Cooper v. French* (Minn. 1990) 460 N.W.2d 2.) While the court was evenly split on the need to grant the free exercise exemption, a seventh justice cast the deciding vote for the landlord solely as a matter of statutory construction. Concurring only with the plurality's decision that the existence of a fornication law precluded a finding that the Legislature intended to protect the right of unmarried couples to live together, Justice Simonett found it unnecessary to reach the constitutional questions. Thus, on the basis of the previous appellate decisions cited above, precedents in Minnesota continue to reject a free exercise exemption from civil rights statutes. Similarly, Minnesota courts have rejected such exemptions from laws prohibiting business owners from engaging in sexual orientation discrimination. (*Blanding, supra*.)

Alaska was the next state to deal with these issues. (*Swanner v. Anchorage Equal*

Rights Commission (Alaska 1994) 874 P.2d 274.) Tom Swanner appealed the superior court's decision which affirmed the Anchorage Equal Rights Commission's (AERC) order that Swanner's policy against renting to unmarried couples constituted unlawful discrimination based on marital status. The Supreme Court affirmed, holding that Swanner discriminated against the potential tenants based on their marital status and that enforcement of the fair housing laws did not deprive him of his right to free exercise of his religion under the state and federal constitutions.

Swanner's refusal to rent or show property to unmarried couples was based on his religious beliefs that even a non-sexual living arrangement by roommates of the opposite sex is immoral and sinful because such an arrangement suggests the appearance of immorality. (*Swanner, supra*, at p. 277.) It was undisputed that Swanner rejected each complainant as a tenant because of this policy and for no other reason. (Ibid.)

The Alaska court examined only two interests advanced by the state in support of the marital status law: a "derivative" interest in ensuring access to housing for everyone, and a "transactional" interest in preventing individual acts of discrimination based on irrelevant characteristics. (Id., at p. 282.) Referring to the "transactional interest," the court stated:

> "[I]n the instant case, the legislature and municipal assembly determined that housing discrimination based on irrelevant characteristics should be eliminated . . . . The existence of this transactional interest distinguishes this case from . . . most other free exercise cases where courts have granted exemptions. The government's transactional interest in preventing discrimination based on irrelevant characteristics directly conflicts with Swanner's refusal to rent to unmarried couples. The government views acts of discrimination as independent social evils even if the prospective tenants ultimately find housing. Allowing housing discrimination that degrades individuals, affronts human dignity, and limits one's opportunities results in harming the government's transactional interest in preventing such discrimination. Under Frank [*Frank v. State*, 604 P.2d 1068 (Alaska 1979)], this interest will clearly 'suffer if an exemption is granted to accommodate the religious practice at issue.'
>
> "The dissent attempts to prove that the state does not view marital status discrimination in housing as a pressing problem by pointing to other areas in which the state itself discriminates

> based on marital status. However, those areas are easily distinguished. The government's interest here is in specifically eliminating marital status discrimination in housing, rather than eliminating marital status discrimination in general. Therefore, the other policies which allow marital status discrimination are irrelevant in determining whether the government's interest in eliminating marital status discrimination in housing is compelling." (*Swanner, supra*, at pp. 282-283.)

The Alaska court cited two additional reasons for rejecting Swanner's claim to a free exercise exemption from the fair housing laws. First, it noted that the statutes restricted his conduct and not his beliefs, adding:

> "Here, the burden on his conduct affects his commercial activities. In *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982), the United States Supreme Court stated the distinction between commercial activity and religious observance: 'When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith, are not to be superimposed on the statutory schemes which are binding on others in that activity.' Id. at 261, 102 S.Ct. at 1057." (*Swanner, supra*, at p. 283.)

In response to Swanner's complaint that applying the anti-discrimination laws to his business activities presented him with a "Hobson's choice" -- to give up his economic livelihood or act in contradiction to his religious beliefs, the court said:

> "Swanner has made no showing of a religious belief which requires that he engage in the property-rental business. Additionally, the economic burden, or 'Hobson's choice,' of which he complains, is caused by his choice to enter into a commercial activity that is regulated by anti-discrimination laws. Swanner is voluntarily engaging in property management. The law and ordinance regulate unlawful practices in the rental of real property and provide that those who engage in those activities shall not discriminate on the basis of marital status. See AS 18.80.240; AMC 5.20.020. Voluntary commercial activity does not receive the same status accorded to directly religious activity. . . ."

Citing James Madison for the principle that "free exercise should prevail in every case where it does not trespass on private rights or the public peace," the court concluded

that "[b]ecause Swanner's religiously impelled actions trespass on the private right of unmarried couples not to be unfairly discriminated against in housing, he cannot be granted an exemption from the housing anti-discrimination laws." (*Swanner, supra*, at p. 284.) Therefore, the court concluded that enforcement of the fair housing laws against Swanner did not violate his right to free exercise of religion under the Alaska Constitution.

Rejecting his claim under the federal Free Exercise Clause, the Supreme Court held that, assuming the Freedom of Religion Restoration Act was constitutional and applied to the case, it did not affect the outcome because the court had already concluded that compelling state interests supported the prohibitions against marital status discrimination. (*Swanner, supra*, at p. 280, fn. 9.)

The Supreme Court of Massachusetts also has declined to exempt a landlord from a state statute prohibiting housing discrimination against unmarried couples. (*Attorney General v. Desilets* (Mass. 1994) 636 N.E.2d 233.) In *Desilets*, the defendants had a policy of not leasing an apartment to any person who intended to engage in conduct that violated their religious principles. The defendants' sole reason for declining even to consider the complainants as tenants was based on that religion-based policy. The defendants, who are Roman Catholics, believed that they should not facilitate sinful conduct, including fornication. Since developing the policy at least a decade earlier, the defendants had applied it ten or more times to deny tenancies to unmarried couples. The Supreme Court concluded that the defendants violated a statute prohibiting marital status discrimination. It therefore considered the defendants' argument that enforcement of the statute against them violated their rights under the state and federal constitutions.

The Massachusetts Supreme Court observed that the fact that the defendants' free exercise of religion claim arose in a commercial context would be "relevant when engaging in a balancing of interests." (*Desilets, supra*, at p. 238.) However, the court held that such a balancing process was premature since the case had reached the court on an appeal from a summary judgment by the superior court. The parties had not been given an opportunity to present testimony at either an administrative hearing or a trial. While the court found the record insufficient to determine whether one or more compelling interests existed, it

hypothesized that such interests might exist, such as: that accommodating religious objections might significantly impede the availability of rental housing to unmarried couples in the state or even in some local communities, or that it might be impractical to administer a law that allows for free exercise exemptions.

Remanding the case to the Superior Court for a trial to resolve disputed facts on the existence and nature of the state interests, the court stated:

> "Uniformity of enforcement of the statute may be shown to be the least restrictive means for the practical and efficient operation of the antidiscrimination law. It should be remembered that the task is to balance the State's interests against the nature of the burden on the defendants and that we are concerned here with the business of leasing apartments, not with participation in a formal religious activity." (*Desilets, supra*, at p. 241.)

Therefore, no officially reported appellate decision outside of California has granted a free exercise exemption from a civil rights statute to a business owner on the theory that the owner is constitutionally entitled to discriminate against an employee or consumer whose conduct or lifestyle offends the owner's religious beliefs.

II

THE COURT OF APPEAL INCORRECTLY CONCLUDED THAT THE FREE EXERCISE CLAUSE OF THE FEDERAL CONSTITUTION GRANTS LANDLORDS THE RIGHT TO VIOLATE CIVIL RIGHTS STATUTES

Despite its acknowledgement that Mrs. Smith violated the state's fair housing statutes (*Smith, supra,* 25 Cal.App.4th, at p. 267), in Section IV of its opinion the Court of Appeal ruled that Free Exercise Clause of the United States Constitution required the Commission to exempt Mrs. Smith from the nondiscrimination mandate of these laws. (Id., at pp. 260-267.) As argued below, this conclusion is based on several faulty premises.

First, the majority opinion unnecessarily and improperly relied on a "hybrid rights" analysis to reach its conclusion under the Free Exercise Clause. According to the majority opinion, the order of the Commission requiring Mrs. Smith to post notices on her rental

property infringed on her right to freedom of speech. The majority held that this infringement, when coupled with her free exercise claim, created a "hybrid situation" calling for strict scrutiny. In order to reach this result, the majority refused to accept the Commission's concession that it would lift the objectionable aspects of the notice-posting requirement. (*Smith, supra*, 25 Cal.App.4th, at p. 266, fn. 8.) Once the Commission made this concession, there was no longer a real case or controversy on this issue. Therefore, the concession should have been accepted by the Court of Appeal. In any event, as the concurring opinion aptly pointed out, the notice-posting requirement "is clearly severable from the purported free exercise claim" and the court, therefore, "could simply strike that portion of the order." (Id, at p. 280 (Raye, J., concurring).)

In addition to unnecessarily engaging in a "hybrid rights" test -- a situation that was removed by the Commission's concessions -- the majority's analysis of federal constitutional law is otherwise flawed. The opinion not only distorted the intent and purpose of the Free Exercise Clause, but it failed to acknowledge that the Establishment Clause does not permit a judicially-mandated exemption from civil rights laws when granting such an exemption would cause harm to third parties.

II(a)

Federal Civil Rights Cases Uniformly Hold That Accommodation of Religion is Unwarranted if Doing So Will Discriminate Against or Harm Another Person

Title VII of the United States Code is the richest source of case law involving multiple-party disputes over religious accommodation in a commercial setting. The cases invariably involve an employee who demands that his or her religious practices be accommodated by an employer. Courts are asked to resolve these disputes when the employer and employee cannot agree on what type of accommodation, if any, would be reasonable. Third parties, such as coworkers and unions, who would be affected by the outcome either watch from the sidelines or intervene in the cases.

In most of these disputes, courts have been able to avoid making constitutional

adjudications as to what the Free Exercise Clause commands or what the Establishment Clause forbids. Instead, they are able to refrain from entering this constitutional debate by interpreting the "reasonable accommodation" requirement of Title VII in a manner that treads the fine line between these two components of the First Amendment.

By analogy, courts that are faced with making an unavoidable constitutional decision can be guided by this abundant treasure-trove of precedent. The cases uniformly hold that accommodation of the religious beliefs or practices of one employee is unwarranted and inappropriate if it would cause an undue hardship to the employer. According to these cases, an undue hardship exists if the accommodation would cause more than a de minimis cost to the employer, if it would disrupt the business operations, or if it would cause harm to, or otherwise discriminate against, other employees. The principle that emerges from these cases is that a reasonable accommodation of religion does not contemplate any action that would harm a third party.

In the past, this Court has looked to reasonable accommodation cases under Title VII to interpret the requirements of a religious freedom clause of the California Constitution. (*Commission on Professional Competence v. Byars* (1979) 24 Cal.3d 167.) It should do so again. In *Byars, supra*, this Court acknowledged that the California Constitution required a reasonable accommodation of religion by the state. It also agreed that accommodation was not reasonable if it would cause harm to third parties. However, in that case, the Court determined that there was no substantial evidence in the record that third parties would be harmed if the school district accommodated the religious needs of a teacher. In contrast, the record in the instant case shows that both the statutory rights of Mr. Phillips and Ms. Randall under the Fair Employment and Housing Act and the Unruh Act, and their constitutional rights of privacy and non-establishment of religion will be harmed if Mrs. Smith is granted an exemption that allows her to discriminate against tenants whose supposed conduct violates her religious beliefs.[4]

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[4] Many recent law review articles and comments also refer to the doctrine of accommodation when analyzing the religious clauses of the Constitution. (Arlin Adams, "The Doctrine of Accommodation in the Jurisprudence of the Religion Clauses," 37 *DePaul L. Rev.* 317 (Spring 1988) (continued...)

Trans World Airlines v. Hardison (1977) 432 U.S. 63 is instructive on what reasonable accommodation does not require. Hardison worked at an airplane maintenance and overhaul base operated by Trans World Airlines. He belonged to a union. Hardison's religious beliefs prohibited him from working on Saturdays. Because he had low seniority, Hardison was not always able to get Saturdays off. The union was unwilling to violate the seniority system. TWA was unwilling to allow Hardison to work only four days a week because it would impair critical functions of the airline operations. When no accommodation could be reached, Hardison was discharged after he refused to report to work on Saturdays. Hardison filed suit in federal district court, alleging that TWA violated the statutory mandate of reasonable accommodation of religion. The district court ruled in favor of the defendants but the Court of Appeals reversed.

In separate petitions for certiorari, TWA and the union contended that adequate steps had been taken to accommodate Hardison's religious observances and that to construe the statute to require further accommodation would create an establishment of religion contrary to the First Amendment. Both petitions for certiorari were granted. However, because the court agreed that no further accommodation was required by Title VII, it did not reach the constitutional questions presented.

The court found that TWA had three alternatives to firing Hardison but that each of them posed an undue hardship. Permitting Hardison to work only four days a week would have required pulling another employee from another job which would have caused shop functions to suffer. Having someone work overtime would have required the payment of premium overtime pay. Finally, requiring another employee to shift days would have

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'(...continued)
[free exercise jurisprudence calls for "mandatory accommodation" unless there is a compelling and narrowly tailored state interest, while "forbidden accommodation" is used to describe the requirements of the Establishment Clause]; Michael W. McConnell, "Accommodation of Religion: An Update and a Response to Critics," 60 *Geo. Wash. L. Rev.* 685, 686 (March 1992) [central questions under the religion clauses have come to be framed in terms of "accommodation" of religion, which critics now call the "central motif of religion clause thought"]; Brian Bertonneau, "Estate of Thornton v. Caldor, Inc.: Defining Sabbath Rights in the Workplace," 15 *Hastings Const. L. Q.* 513, 514 (Spring 1988) ["This Comment suggests that the Supreme Court might employ the 'reasonable accommodation' test currently used in the federal antidiscrimination law to resolve establishment/free exercise conflicts in the area of employee rights."

breached the seniority system which the union was unwilling to do.

The court gave several reasons why requiring TWA to accommodate Hardison's religious practices would have been unreasonable. It noted that a "strong congressional policy against discrimination in employment argues against interpreting the statute to require the abrogation of the seniority rights of some employees in order to accommodate the religious needs of others." (*Hardison, supra*, 432 U.S., at p. 80.) The court added:

> "Had TWA nevertheless circumvented the seniority system by relieving Hardison of Saturday work and ordering a senior employee to replace him, it would have denied the latter his shift preference so that Hardison could be given his. The senior employee would also have been deprived of his contractual rights under the collective-bargaining agreement.
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> * * *
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> "There were no volunteers to relieve Hardison on Saturdays, and to give Hardison Saturdays off, TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath. Title VII does not contemplate such treatment.
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> * * *
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> "It would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far." (*Hardison, supra*, 432 U.S., at pp. 80-81.)

In conclusion, the Supreme Court stated, "we will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath." (Id., at p. 84.) The decision in *Hardison* was reaffirmed in *Ansonia Board of Education v. Philbrook* (1986) 479 U.S. 60.[5]

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[5] Following the decision in *Hardison*, state and federal cases have uniformly rejected the need for religious accommodation if a third party would be harmed in the process. In *Olin v. Fair Employment Practices Commission* (Ill. 1977) 367 N.E.2d 1267, 1273, the court found undue hardship (continued...)

While the decision in Hardison was based on statutory interpretation and avoided the necessity of a direct constitutional adjudication, it answered the concerns expressed by Justice Celebrezze when he dissented in an earlier case involving religious accommodation in the workplace:

> "The Free Exercise Clause provides a shield against government interference with religion, but it does not offer a sword to cut through the strictures of the Establishment Clause." (*Cummins v. Parker Seal Co.* (6th Cir. 1975) 516 F.2d 544, 557 (Celebrezze, J., dissenting.))

II(b)

The Free Exercise Clause Does Not Require Accommodation of a Business Owner's Religious Beliefs if Doing So Harms an Identifiable Third Party

It has been clear since *Sherbert v. Verner* (1963) 374 U.S. 398 that, in certain cases, the Free Exercise Clause requires government to accommodate religious practices by creating exemptions from general laws.[6] This is not such a case.

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[5](...continued)
because accommodation could be said "to discriminate against Olin's other employees." In *Brener v. Diagnostic Center Hospital* (5th Cir. 1982) 671 F.2d 141, 146-147, the court applied the *Hardison* principle even though no collective bargaining agreement was involved. The court rejected the employee's suggestion that the employer order other employees to trade shifts with him, noting "the actual imposition on other employees in depriving them of their shift preference at least partly because they do not adhere to the same religion as Brener." In *Murphy v. Edge Memorial Hospital* (M.D. Ala. 1982) 550 F.Supp. 1185, 1191, the district court found accommodation unnecessary because, even though there was no union seniority system or collective bargaining agreement, "it was impossible to schedule Murphy to be off every Friday night without depriving the other LPN's of their 'expected' one free weekend in three." In *Ka Nam Kuan v. City of Chicago* (N.D. Ill. 1983) 563 F.Supp. 255, 258-259, the court found "reverse discrimination" because giving additional days off for religious holidays to some employees caused "workers such as plaintiff to work overtime on a regular basis; that is exactly the sort of burden that was held to be undue in *Hardison*." These cases stand as surrogates for many others that are in accord.

[6] State governments must sometimes accommodate religious practices by granting an exemption since the Free Exercise Clause is wholly applicable to the states by the Fourteenth Amendment. (*Cantwell v. Connecticut* (1940) 310 U.S. 296, 303.)

Sherbert involved an unemployed worker who was unable to find a job because her religious beliefs prevented her from working on Saturday. She was denied unemployment compensation from the Employment Security Commission in South Carolina because the commission found her refusal to work on Saturdays was "without good cause" within the meaning of the statute governing such benefits. In granting her relief under the Free Exercise Clause, the Supreme Court noted that a judicially-mandated exemption from the statute did not "serve to abridge any other person's religious liberties." (*Sherbert, supra*, at p. 409.) The court also noted that exemptions are properly denied when the regulated conduct poses a threat to public safety, peace, or order. (*Id.*, at p. 403.)

Similarly, in other unemployment benefits decisions by the United States Supreme Court there was no evidence in the record that any third party would be harmed by granting an exemption to accommodate the religious practices of an unemployed worker. (*Thomas v. Review Board* (1981) 450 U.S. 707; *Hobbie v. Unemployment Appeals Commission of Florida* (1987) 480 U.S. 136.) State and federal cases granting free exercise exemptions in other contexts also have not caused any actual harm to an identifiable third party.[7]

This principle was probably best articulated in *Otten v. Baltimore & O.R. Co.* (2nd Cir. 1953) 205 F.2d 58. In that case, the defendant railroad ran a union shop as authorized by Congress in the Railway Labor Act. Otten was employed by the railroad before the union shop agreement went into effect. The employer and the union then entered an agreement requiring all employees to belong to the union. Otten refused to join because his religious scruples forbad him from becoming a member of any organization composed in any part of "unbelievers." The union offered to dispense with Otten becoming an official member as long as he paid dues like everyone else. Otten's religion prohibited this arrangement. After no other accommodation could be reached, Otten was discharged. He then sued for reinstatement, arguing that the Railway Labor Act violated his rights under

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[7] The principle that the Free Exercise Clause does not mandate exemptions from statutory requirements if a third party would be harmed thereby is consistent with the ancient maxim "sic utere tuo ut alienum non ladeas" -- one must so use his rights as not to infringe on the rights of others. This maxim arose in cases involving land use control and has been cited on occasion by this Court and by the United States Supreme Court. (*Peabody v. City of Vallejo* (1935) 2 Cal.2d 370-371; *Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365, 387.)

the Free Exercise Clause. When his request for an injunction was denied, Otten appealed.

The Court of Appeals denied Otten the relief he requested. Writing a short, but poignant opinion for the court, Judge Learned Hand noted that conflicts that require an employee to obey the law or yield on a point of conscience are inevitable. Drawing a firm constitutional line denying free exercise claims that would cause harm to third parties, Judge Hand wrote:

> "The First Amendment protects one against action by the government, though even then not in all circumstances; but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities." (*Otten, supra*, 205 F.2d, at p. 61.)

This quote took an added importance when it was cited with approval by the United States Supreme Court in *Estate of Thornton v. Caldor* (1985) 472 U.S. 703, 710. No doubt the Supreme Court agreed with Judge Hand based on the premise that "[t]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." (*Lee v. Weisman* (1992) __ U.S. __, 112 S.Ct. 2649, 2654-2655.)

The precept of not harming third parties also emerged in two cases involving the Amish. In the first case, *Wisconsin v. Yoder* (1972) 406 U.S. 205, the court granted an exemption to members of the Amish community who, for religious reasons, refused to send their teenage children to high school. Recognizing that compulsory high school education for Amish teenagers would have a devastating affect on the religiously-secluded Amish community, the court granted their free exercise claim. In doing so, however, the court noted several times in its opinion that no third parties would be harmed by the exemption.[8]

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[8] "A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different." (*Yoder, supra*, 406 U.S. at p. 224.) "This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may properly be inferred. The record is to the contrary, and any reliance on that theory would find no support in the evidence." (Id., at p. 230.) "The State at no point tried this case on the theory that respondents were preventing their children from attending school against their expressed desires, and indeed the record is to the contrary." (Id., at p. 231.) "Our holding in no way determines the proper resolution of possible

(continued...)

In the second case, *United States v. Lee* (1982) 455 U.S. 252, an exemption was denied because third party rights would have been harmed thereby. When it denied an exemption to an Amish employer who had a religious problem with paying social security taxes, the Court observed:

> "Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees. Congress drew the line in § 1402(g), exempting the self-employed Amish but not all persons working for an Amish employer." (*Lee, supra*, 455 U.S., at p. 261.) [9]

A wide variety of other federal cases illustrate the principle under discussion. For example, in *South Ridge Baptist Church v. Industrial Commission of Ohio* (6th Cir. 1990) 911 F.2d 1203, the court held that requiring a religious employer to participate in the workers' compensation system did not violate the Free Exercise Clause. That conclusion was buttressed by the fact that third parties -- the employees -- had a statutory right to receive workers' compensation benefits if they were injured on the job. In *Dawson v. Mizell* (E.D. Vir. 1971) 325 F.Supp. 511, the court held that the Free Exercise Clause did not require the post office to give a worker Saturdays off because doing so would have violated the rights of other employees under a collective bargaining agreement. In *Brown v. Polk County, Iowa* (S.D. Iowa, 1993) 832 F.Supp. 1305, the court upheld a municipality's decision to prohibit an employee from quoting scripture to other employees during working hours. The court held that the free exercise claim of the employee needed to be balanced against the right

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[9](...continued)
competing interests of parents, children, and the State in an appropriate state court proceeding in which the power of the State is asserted on the theory that Amish parents are preventing their minor children from attending high school despite their expressed desires to the contrary." (Ibid.)

[9] The only exception to the rule of not granting exemptions if an identifiable third party harmed thereby has arisen in cases involving employment disputes within an organized religious entity. (*Corporation of Presiding Bishop v. Amos* (1987) 483 U.S. 327.) In *Amos*, however, it was Congress, not the court, that created an exemption for religious organizations from the prohibition against religious discrimination in Title VII. The Supreme Court upheld this limited exemption as a reasonable means of avoiding the Establishment Clause violation that might occur if the government micro-managed the internal religious affairs of an established religious organization. The court later acknowledged the overriding purpose of this limited exemption. (*Texas Monthly, Inc. v. Bullock* (1989) 489 U.S. 1, 18.)

of other employees to freedom from religion.

In *Kallas v. Department of Motor Vehicles* (Wash. 1977) 560 P.2d 709, the Supreme Court of Washington upheld a three-day suspension of an employee who violated a work rule restricting religious discussion during working hours. Noting the tension between the Free Exercise Clause and the Establishment Clause, the court held that the imposition of discipline was not unconstitutional, stating:

> "The only restriction the State has placed on appellant's conduct is a prohibition against imposing his religious views upon other State workers in his department. His supervisory and evaluative duties over those other employees are particularly relevant to the State's obligation of insistence upon neutrality on State property during working hours. The tension between appellant's rights and the State's absolute obligation of neutrality must be resolved in favor of the State. . . . Appellant's fellow employees, too, have constitutional rights. The State cannot be a party to violating their rights of privacy and nonassociation. . . . The State's limited restriction upon appellant's conduct was pursuant to the State's constitutional duty and in recognition of the constitutional rights of appellant's fellow employees." (*Kallas, supra*, at pp. 358-359.)

The Supreme Court of Oklahoma put the matter succinctly when it stated: "No real freedom to choose religion would exist in this land if under the shield of the First Amendment religious institutions could impose their will on the unwilling and claim immunity from secular judicature for their tortious acts." (*Guinn v. Church of Christ of Collinsville* (Okla. 1989) 775 P.2d 766, 779.)

In a similar vein, this Court should deny an exemption to Mrs. Smith because discrimination that is expressly prohibited by statute is "an invidious practice that causes grave harm to its victims." (*United States v. Burke* (1992) __ U.S. __, 112 S.Ct. 1867, 1872.)

II(c)

The Establishment Clause Precludes Judicial Accommodation of Religion That Harms a Third Party

The Commission urged the Court of Appeal that granting Mrs. Smith an exemption from the nondiscrimination mandate of the fair housing laws would violate the

Establishment Clause.[10] The Commission argued that there was no secular justification for such an exemption and therefore it would violate the primary effects test of *Lemon v. Kurtzman* (1971) 403 U.S. 602, 612-613.) It also pointed out that by granting such an exemption, the court would be creating two classes of political "insiders" and "outsiders" -- an impermissible effect under the Establishment Clause. (*Wallace v. Jaffrey* (1985) 472 U.S. 38, 69 (conc. opn. by O'Connor, J.).)[11] Furthermore, the Commission argued:

> "'the [Free Exercise Clause] gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities.' (*Estate of Thornton v. Caldor, Inc., supra*, 475 U.S. 703, 710, quoting from *Otten v. Baltimore & O. R. Co.* (2nd Cir. 1953) 205 F.2d 58, 61.)" (Return to Petition for Writ of Mandate, p. 29.)

The opinion of the Court of Appeal dismissed the Establishment Clause argument as "patently without merit." (*Smith, supra*, 25 Cal.App.4th, at p. 270, fn. 13.) In circular logic, the opinion concluded that "plaintiff's asserted religious exemption does not involve an imposition of beliefs upon others, but rather her own attempt to refrain from, as she sees it, a sinful facilitation of immoral behavior." (Ibid.) This clearly contradicts the decision in *Caldor, supra*, in which the United States Supreme Court specifically disapproved of religious accommodation that harms a third party.

Courts "must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause." (*Yoder, supra*, 406 U.S., at p. 221.) In this case, the "tight rope" between the Free Exercise and Establishment Clauses cannot be successfully traversed by sacrificing the rights Mr. Phillips and Ms. Randall in order to accommodate Mrs. Smith's religious beliefs.

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[10] See Return to Alternative Writ of Mandate, at pp. 27-29.

[11] On the one hand, landlords who impose a religious test on prospective tenants, and applicants who pass that test, would become "insiders" who would be protected by the law. On the other hand, landlords who want to discriminate based on personal preferences not grounded in religion, and tenants who refuse to conform to religious qualifications imposed by a landlord, would become political "outsiders." (See Return, at p. 28.) In *Sands v. Morongo* (1991) 53 Cal.3d 863, 878-879, this Court concluded that government action that creates such a result "fails the 'effect' test of *Lemon, supra*."

The First Amendment "was designed to provide a bulwark against those who wish to impose their religious beliefs upon others through governmental action." (*De Spain v. DeKalb County Community School District* (7th Cir. 1967) 384 F.2d 836, cert. den. 88 S.Ct. 815.) That protection has been severely damaged by the decision below.

The Court of Appeal has given Mrs. Smith a personal veto over enforcement of state laws prohibiting marital status discrimination in housing. Granting such a religious veto violates the Establishment Clause. (*Larkin v. Grendel's Den Inc.* (1982) 459 U.S. 116.) The delegation of such veto power, for purely subjective religious reasons is especially troubling since neither the state nor the victims may effectively question or deeply probe into the theological justification for a sincerely held religious belief. A searching examination and meaningful inquiry into such matters is itself prohibited by the constitution. (*Thomas v. Review Board* (1981) 450 U.S. 707, 714.)

In *Estate of Thornton v. Caldor, supra*, the Supreme Court invalidated a state law that, in effect, "decreed that those who observe a Sabbath any day of the week as a matter of religious conviction must be relieved of the duty to work on that day, no matter what burden or inconvenience this imposes on the employer or fellow workers." (472 U.S., at pp. 708-709.) The court found the law in violation of the Establishment Clause because it "arms Sabbath observers with an absolute and unqualified right not to work on whatever day they designate as their Sabbath." (Id., at p. 709.) The opinion of the Court of Appeal below suffers from the same infirmity. It has given Mrs. Smith an absolute and unqualified right not to rent to unmarried tenants who may commit so-called sexual sins, even though such discrimination violates fair housing laws and causes harm to the victims of such discrimination. In granting Mrs. Smith an exemption, the Court of Appeal has imposed on tenants an absolute duty to conform their behavior to a landlord's religious beliefs in order to gain protection under the fair housing laws. Tenants and applicants now "must adjust their affairs to the command of the State" whenever the Free Exercise Clause is invoked by a landlord. (*Caldor, supra*, at p. 709.) Granting landlords an exemption from fair housing laws in this manner "impermissibly advances a particular religious practice." (Id., at p. 710.)

Mr. Justice Douglas once observed that "the State cannot compel one so to conduct

himself as not to offend the religious scruples of another." (*McGowan v. Maryland* (1961) 366 U.S. 420, 563 (Douglas, J. concurring.) Justice Douglas further explained that "[t]he establishment clause protects citizens also against any law which selects any religious custom, practice, or ritual, puts the force of government behind it, and fines, imprisons, or otherwise penalizes a person for not observing it." (Ibid.) The order of the Court of Appeal does just that. By stripping them of statutory protections against discrimination, the court has penalized tenants who do not conform their conduct to the religious beliefs of a landlord.

Speaking for the court in *Engel v. Vitale* (1962) 370 U.S. 421, Mr. Justice Black illuminated the restrictions placed on state action by the Establishment Clause, stating:

> "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support for government to spread its faith. The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate." (Id., at pp. 431-432.)

Restrictions placed by the Constitution on "state action" are not limited to actions of the Legislature. "[A]ction of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment." (*Shelley v. Kraemer* (1948) 334 U.S. 1, 14.) The power of the state's judicial system may not be enlisted to enable a landlord to engage in invidious discrimination. (*Barrows v. Jackson* (1952) 112 Cal.App.2d 534, 552.) Once a court enters an order that compels such discrimination against an unwilling victim, what might otherwise be considered an act of

private discrimination is transformed into state action. (Ibid.)

Even though the order of the Court of Appeal does not require Mrs. Smith to discriminate against tenants, it nonetheless violates the Establishment Clause. The fact that the court is permitting Mrs. Smith to discriminate on the basis of her religious beliefs, rather than requiring such action, is irrelevant; what is significant is that a burden is being placed on the tenants in the name of religion. (*Lemon v. Kurtzman, supra,* 403 U.S. 602, 612; *Corporation of the Presiding Bishop v. Amos* (1987) 483 U.S. 327, 341, fn. 1 (Brennan, J., concurring.); Id., at p. 347 (O'Connor, J., concurring.).) Just as granting an exemption from social security taxes to an employer "operates to impose the employer's religious faith on the employees" (*United States v. Lee, supra*, 455 U.S., at p. 261) so does the court-ordered exemption in this case operate to impose Mrs. Smith's religious beliefs on the prospective tenants. "A law need not require discrimination to be invalid; it is forbidden for the state to encourage it." (*Mulkey v. Reitman* (1936) 64 Cal.2d 529, 540; *Citizens for Responsible Behavior v. Superior Court* (1992) 1 Cal.App.4th 1013, 1030.)

By entering an order that mandates the Commission to allow Mrs. Smith to discriminate against tenants on the basis of her religious beliefs, the opinion below has given affirmative constitutional protection to invidious discrimination.[12] Such judicial action violates numerous admonitions of the Supreme Court. For example, the court has repeatedly stated that "invidious private discrimination . . . has never been accorded affirmative constitutional protection." (*Norwood v. Harrison* (1973) 413 U.S. 455, 470; *Hishon v. Spalding, supra*, 467 U.S. 69, 80.) In *Roberts v. Jaycees* (1984) 468 U.S. 609, 628, the court cautioned that "acts of invidious discrimination in the distribution of publicly available goods, [and] services . . . like violence or other types of potentially expressive activities that produce special harms from

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[12] Blacks Law Dictionary defines the term "invidious" as "arbitrary, irrational, and not reasonably related to a legitimate purpose." By her own testimony, Mrs. Smith admitted that, from a secular perspective, unmarried couples might be perfect tenants. Her objections were not based on any rational or objective criteria. Rather they were grounded in purely subjective beliefs. In this sense, her absolute decision not to rent to unmarried couples constituted invidious discrimination. "A discriminatory classification that is based on prejudice or bias is not rational as a matter of law." (*Cammermeyer v. Aspin* (W.D. Wash. 1994) 850 F.Supp. 910, 914.) "[P]olicies based on or motivated by the prejudice of one group toward another do not further any conceivable legitimate government interest and must be deemed irrational as a matter of law." (*Dahl v. Secretary of the United States Army* (E.D. Cal., 1993) 830 F.Supp. 1319.)

their communicative impact, . . . are entitled to no constitutional protection." In *Palmore v. Sidoti* (1984) 466 U.S. 429, the court declared:

> "Private biases may be outside of the reach of the law, but the law cannot, directly or indirectly, give them effect." (Id., at p. 433.)[13]

The California Legislature has carved out only one exception from the fair housing laws specifically to accommodate religion. The exemption is properly limited to religious organizations that sell, lease, or rent property "for other than a commercial purpose."[14] By granting such an exemption to the nonprofit activities of religious organizations, the Legislature did not violate the Establishment Clause. (*Corporation of Presiding Bishop v.*

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[13] This principle was applied by the Court in *City of Cleburne v. Cleburne Living Center* (1985) 473 U.S. 432, 448. Because the denial of zoning permits for a group home for mentally disabled persons was based, in large measure, on the subjective fears of neighbors, the court found the zoning decision to be irrational. The decision in *Cleburne* made it clear that the principle enunciated in *Palmore v. Sidoti* would not be limited to racial discrimination or other suspect classifications. (*Pruitt v. Cheney* (9th Cir. 1991) 943 F.2d 989, 994.) Later cases demonstrate that point. For example, in *Marks v. City of Chesapeake* (4th Cir. 1989) 883 F.2d 308, 311, the principle was cited by the court in an appeal from the denial of a conditional use permit to operate a palmistry because the denial was based on negative attitudes and fears of elderly residents of the area. More recently, it was cited when the court invalidated an initiative that would have authorized sexual orientation discrimination by preventing state and local governments from passing laws against such discrimination. (*Equality Foundation of Greater Cincinnati v. City of Cincinnati* (S.D. Ohio, 1994) __ F.Supp. __, 1994 WL 442746.) In granting a preliminary injunction against a similar initiative in Colorado, the trial court also relied on this principle. The injunction was affirmed on appeal. (*Evans v. Romer* (1993) 854 P.2d 1270, 1274, fn. 5.) (Accord: *Doe v. District of Columbia* (D.C. 1992) 796 F.Supp. 559, 570-571 [overturning decision to deny position as fire fighter because of negative attitudes of members of the public toward persons with HIV-positive status]; *Church of Jesus Christ of Latter-Day Saints v. Jefferson County* (N.D.Ala., 1989) 721 F.Supp. 1212, 1218 [city cannot deny permit solely to placate members of the public who expressed "religious" objections]; *In re B & F Associates* (Bankruptcy Ct., D.C., 1985) 55 B.R. 19, 21 [landlord cannot evict a tenant on account of perceived biases of others in the neighborhood against tenant].)

[14] Government Code section 12955.4 provides: "Nothing in this part shall prohibit a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental, or occupancy of dwellings that it owns or operates for other than a commercial purpose to persons of the same religion or from giving preference to those persons, unless membership in that religion is restricted on account of race, color, or national origin."

Amos, supra, 483 U.S. 327.)[15] Under the *Lemon* analysis, it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions. (Id., at p. 335.) Applying a law that prohibits religious discrimination to a religious organization "impermissibly entangles church and state." (Id., at p. 339.) By granting an exemption to such organizations from prohibitions against religious discrimination, the Legislature "effectuates a more complete separation of the two." (Ibid.) Some members of the Supreme Court have questioned the constitutionality of legislation that would exempt religious organizations from civil rights laws for their profit-making activities. (*Amos, supra*, 483 U.S., at p. 346 (Blackmun, J., concurring); Id., at p. 348 (O'Connor, J., concurring.) However, the full court has authorized exemptions for nonprofit endeavors of an organized religious entity. Even though such an exemption "says that a person may be put to the choice of either conforming to certain religious tenets or losing a job opportunity," which creates "serious tension with our commitment to individual freedom of conscience in matters of religious belief," allowing such discrimination by a religious organization engaged in nonprofit activities furthers a paramount constitutional purpose of keeping the government out of the internal affairs of organized religion. (*Amos, supra*, 483 U.S., at pp. 340-341 (Brennan, J. with whom Justice Marshall joined, concurring.)

In the instant case, however, Mrs. Smith is neither an organized religious entity, nor does she rent apartments on a nonprofit basis. Thus, she is not entitled to the exemption granted by the Legislature. In essence, Mrs. Smith has asked the courts to enlarge this exception, presumably on the grounds that it is unconstitutionally underinclusive. There is no constitutional basis for granting her request. To construe the fair housing laws to permit unlawful discrimination against tenants in order to accommodate Mrs. Smith's religious

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[15] *Amos* and cases like it are the only exception to the principle that the government need not grant an exemption from a law to accommodate religious beliefs if doing so would harm a third party. This can be explained in only one of two ways. Either the constitution requires such an exemption for nonprofit activities of organized religion in order to avoid excessive government entanglement with internal religious operations, or such an exemption is permitted because it advances a compelling state interest of avoiding such excessive entanglement. In any event, the issue is academic as to Mrs. Smith since she is an individual engaged in a business for profit.

beliefs "would excessively involve government in the implementation of a particular belief by interfering with the individual choices of third persons, in order to achieve the accommodation." (*Pennsylvania State University v. Pennsylvania Human Relations Commission* (Pa. App. 1986) 505 A.2d 1053, 1058.) It also would totally blur the constitutional distinction between secular and religious activities.[16]

The distinction between religious nonprofit activities and those that may be classified as commercial enterprises was ably summarized in *Kings Garden, Inc. v. Federal Communications Commission* (D.C. Cir. 1974) 498 F.2d 51, where the court said:

> "It is conceivable that there are 'many areas in which the pervasive activities of the State justify some special provision for religion to prevent it from being usurped by an all-embracing secularism.' [citation] But it hardly follows that the state may favor religious groups when they themselves chose to be submerged, for profit or power, in the 'all-embracing secularism' of the corporate economy." (Id., at p. 56.)

Mrs. Smith's decision to rent apartments for profit -- an industry regulated by the State

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[16] Many cases have drawn the line at government regulation of secular versus religious activities of businesses. When the business owner is engaging in a secular activity, especially when it is for profit, there is no constitutional requirement that the owner be exempted from a law he or she finds religiously offensive. On the other hand, when the primary function of the activity in question is religious in nature, an exemption may be permissible. For example, in *Tressler Lutheran Home for Children v. N.L.R.B.* (3rd Cir. 1982) 677 F.2d 302, the court denied the business owner's request for an exemption from collective bargaining requirements imposed by law. The court found that the primary function of the nursing home was secular. The court also refused to grant an exemption from the law because it would have undercut the right given by the law to employees to the benefits of collective bargaining. (Accord: *N.L.R.B. v. World Evangelism, Inc.* (9th Cir. 1981) 656 F.2d 1349, 1354 ["WEI's operations were commercial, and its employees spent a substantial portion of time engaged in commercial activities."]; *Volunteers of America v. N.L.R.B.* (9th Cir. 1985) 777 F.2d 1386, 1390 ["alcohol treatment centers in this case are essentially secular."]; *St. Elizabeth Hospital v. N.L.R.B.* (7th Cir. 1983) 715 F.2d 1193, 1196 ["Where the institution's primary activity is secular, assertion of NLRB jurisdiction does not violate the institution's first amendment rights."]; *N.L.R.B. v. St. Louis Christian Home* (8th Cir. 1981) 663 F.2d 60, 64 ["Home operates in the same way as a secular childcare institution."].) On the other hand, in *Dignity v. Newman Center* (Minn.App. 1991) 472 N.W.2d 355, the court exempted the Catholic Church from a law prohibiting sexual orientation discrimination in housing because the nature of the landlord-tenant relationship in question was religious and not secular. Dignity's sole reason for renting a portion of the facility in question was for worship and because of the religious identity of the center. The court held that "[a] city or municipality is without jurisdiction to enforce civil rights protections against a religious organization enforcing conformity of its members to certain standards of conduct and morals." (Id., at p. 357.)

of California -- precludes her claim that she is free to discriminate against consumers whose conduct she finds offensive to her religious sensibilities.

III

THE STATE CONSTITUTION'S FREE EXERCISE CLAUSE DID NOT REQUIRE THE COURT OF APPEAL TO EXEMPT MRS. SMITH FROM THE STATE'S FAIR HOUSING LAWS

The California Constitution does not provide absolute protection to the free exercise of religion. To qualify for protection under the state charter, the free exercise of religion must be "without discrimination or preference." (Cal.Const., Art. I, § 4.)[17] Furthermore, the state constitution's Free Exercise Clause "does not excuse acts that are . . . inconsistent with the peace or safety of the state." (Ibid.) Finally, state action is prohibited that would constitute an "establishment of religion." (Ibid.)[18]

The opinion below erroneously ignored these limitations on the free exercise of religion when it relied on the state Constitution as a basis for exempting Mrs. Smith from the fair housing laws. (*Smith, supra*, 25 Cal.4th, at pp. 273-276 [Section VI of opinion].)

Enjoyment of Religion Without Discrimination

It is hard to imagine that, after expressly stating that the enjoyment of religion shall be "without discrimination," the framers of this provision intended to authorize a business owner to use religion as an excuse to violate statutes prohibiting discrimination. Since the law is based on principles of reciprocity, it seems hypocritical, even absurd, to conclude that

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[17] Article I, § 4 provides: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the state. The Legislature shall make no law respecting the establishment of religion."

[18] Actions of administrative agencies or judicial officers constitute "state action." (*Moose Lodge No. 107 v. Irvis* (1972) 407 U.S. 163, 92 S.Ct. 1965, 1974.) State action occurs when a state court takes action pursuant to state law that violates the constitutional rights of an individual. (*Adoption of Kay C.* (1991) 228 Cal.App.3d 741, 748-749.)

the state Constitution makes it illegal when others discriminate against Mrs. Smith for religious reasons, but authorizes her to discriminate against others in the name of religion.

A landlord who advertises a vacant apartment to the public, and then imposes a religious test on applicants who respond, should not be heard to complain that her religious freedom is violated when the state cites her for illegal discrimination. Furthermore, Mrs. Smith is invoking the state Free Exercise Clause in her quest for an injunction to prevent the Commission from enforcing state nondiscrimination laws against her. The injunction should be denied since the provision she invokes contemplates the exercise of religion "without discrimination." She who seeks equity must do equity. (*Ephraim v. Metropolitan Trust Co.* (1946) 28 Cal.2d 824, 837.)

Enjoyment of Religion Without Preference

The "no preference" restriction also precludes judicial action barring enforcement of fair housing laws against a landlord who discriminates strictly for religious reasons. The public is deeply split on the morality of unmarried couples living together.[19] About 40 percent of the public believe that such living arrangements are "wrong" or otherwise disapprove of them, with 56 percent either approving or stating that it does not matter to them.[20]

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[19] This Court has sometimes noted public opinion surveys conducted by reputable pollsters about religious beliefs (*Sands v. Morongo* (1991) 53 Cal.3d 863, 892, fn. 5 (Lucas, C.J., concurring) or other issues relevant to an appeal. (*Hovey v. Superior Court* (1980) 28 Cal.3d 1, 36, fn. 74.) Federal courts have also cited public opinion surveys when illustrating a point. (*Gregg v. Georgia* (1976) 428 U.S. 153, 181; *American Dental Assn. v. Martin* (7th Cir. 1993) 984 F.2d 823, 842, fn. 21.)

[20] Averaging the results of 12 national surveys conducted between 1977 and 1989 (as reported on the Dialog database of Westlaw), about 40 percent of adults stated that they felt it was wrong for unmarried couples of the opposite sex to live together. About 4 percent had no opinion, and the remaining 56 percent either said it was not a moral issue or said it didn't matter. These data are not cited to show who is right or wrong on this issue but merely to illustrate the deep divisions in the public on this issue. (Time/CNN national survey of 1,000 adults in June 1991 [27% always wrong; 68% sometimes ok]; Time national survey of 1,044 adults in July 1977 [44% morally wrong; 52% not a moral issue/not morally wrong]; Roper national survey in November 1986 [34% not acceptable; 37% acceptable; 27% acceptable for others but not for me]; CBS News/New York Times national survey of 1,603 adults in October 1977 [48% wrong; 26% ok; 23% doesn't matter]; similar

(continued...)

These sharp divisions along religious lines were cited to the Court of Appeal:

> "In a 1987 national survey conducted by the Los Angeles Times, 2,040 adults were asked: "Do you think it is a sin, or not, for unmarried people to have sexual relations?" Some 39% of respondents said that it was always a sin while another 10% said it was often a sin. In a national survey of 1,014 adults conducted the same year by Yankelovich Clancy Shulman for Time magazine, 54% of respondents stated that "living with someone when you're not married" was "morally wrong." A third national poll of 857 adults conducted the same year by ABC News and the Washington Post reported that 41% of respondents agreed with the statement that "Sex between unmarried couples is wrong."[21]
>
> "How religion has shaped these opinions is illustrated by a "Family in America" survey conducted in 1992 by the Barna Research Group, Ltd.[22] Respondents were asked "How much have your religious beliefs influenced your view of sexual behavior?" Some 40% said 'a lot' and another 28% said 'some.'[23] This data suggests that thousands of landlords may take advantage of any religious freedom exemption that might allow them to discriminate against tenants who may commit sins

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[20](...continued)
CBS national survey of 1,439 adults in April 1981 [43% wrong; 27% ok; 27% doesn't matter]; similar CBS national survey of 1,581 adults in January 1986 [43% always wrong; 22% ok; 31% doesn't matter]; similar CBS national survey of 594 adults in January 1989 [37% always wrong; 31% ok; 29% doesn't matter much]; Merit national survey of 1,200 adults in October 1983 [33% disapprove; 13% approve; 53% it's strictly their business]; similar Merit survey in October 1982 [49% disapprove; 39% approve]; ABC News/Washington Post national survey of 1,506 adults in May 1986 [37% disapprove; 49% approve]; similar ABC national survey of 1,505 adults in April 1986 [37% disapprove; 48% approve]; similar ABC national survey of 1,148 adults in March 1986 [40% disapprove; 43% approve]; similar ABC national survey of 1,672 adults in March 1982 [37% disapprove; 44% approve].)

[21] These three surveys were reported on the *Dialog* data base of Westlaw, a computerized research service of West Publishing Company.

[22] Begun in 1984, Barna Research Group, Ltd. is "the nation's largest full-service marketing research company dedicated to the needs of the Christian community." (Unmarried America, aBarnaReport (sic), published by the Barna Research Group, Ltd., 647 W. Broadway, Glendale, CA 91204, p. 110.)

[23] Source: George Barna, *The Future of the American Family* (Moody Press: Chicago, 1993), p. 193.

> on the rented premises. Furthermore, the rights of millions of unmarried tenants to equal housing opportunities could be swept away by such religious freedom exemptions." ("Supplemental (Post Oral Argument) Brief" filed by Kenneth Phillips in the Court of Appeal, at pp. 4-6.)

The administrative record in the instant case itself illustrates the existence of theological disagreements over the "sin" of renting to unmarried couples. While the head of the Presbyterian Church (USA) in the Sacramento Presbytery -- the denomination to which Mrs. Smith's church is affiliated -- testified that a landlord would suffer no discipline for renting to unmarried couples, an Orthodox Presbyterian minister found support for Mrs. Smith's position in the Bible.[24] Turmoil within established religious denominations over issues such as unmarried couples or homosexual relations is common knowledge.[25]

Plainly, much more is at stake here than the individual rights of Mrs. Smith, Mr. Phillips and Ms. Randall. This case is part of a larger ongoing political struggle involving persons with fundamentalist or orthodox religious beliefs, on the one side, and persons with moderate or liberal religious beliefs, or no religious beliefs, on the other. The Legislature

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[24] Contrast the testimony of Rev. Walter Link (AR, Vol. I, pp. 106-110) with that of Dr. Gregory Bahnsen (AR, Vol. I., pp. 127-134.)

[25] Article on these subjects appears regularly in newspapers of general circulation. (See "N.J. Episcopal Group Approves Unwed Couples, Gay Life Styles," *Los Angeles Times*, January 31, 1988; "Rabbis Draft Guidelines for Sex Outside of Marriage," *Los Angeles Times*, April 30, 1994, p. B4 [sex between unmarried partners may be ethical if religious moral standards are followed]; "Episcopal Bishops' Panel Completes Study on Gay Issues," *Los Angeles Times*, August 6, 1994, p. B4; "Pope to Fight Resolution to Allow Gays to Marry," *Los Angeles Times*, February 12, 1994, p. B4; "Support Grows Among Clergy for 'Weddings' of Gay Couples," *Los Angeles Times*, December 7, 1987, p. A3; "Vatican Warning Seen Against Liberal Views on Sexuality," *Los Angeles Times*, October 31, 1986, p. A10; "Poll: Catholics Agree to Disagree with Pope's Views," *Los Angeles Herald Examiner*, September 10, 1987, p. A1.) A Los Angeles Times Poll of 2,040 respondents nationwide, 957 of them Catholics, found that a majority of Protestants believes that sex between unmarried people was sinful, while Catholics were nearly evenly divided on the issue. However, nearly two-thirds of the younger Catholics said that such activity was not a sin. ("Americans Like Pope But Challenge Doctrine," *Los Angeles Times*, August 23, 1987, p. A1.) In another national survey of 1,515 adults done by the Los Angeles Times, while 61% of all adults said homosexual relations were always wrong, the percentage condemning such relations rose to 77% among white born-again Christians and to 87% among white Protestant fundamentalists. ("Morals, Religion and Politics," *Los Angeles Times*, July 28, 1994, p. A19.)

passed the state's fair housing laws for neutral and objective secular reasons. The courts would violate the constitution's "no preference" clause by giving business owners who hold conservative and punitive religious beliefs a veto over this legislation.

This Court has held that the limits created by the state Constitution's "no preference" clause is broader than the corresponding federal limitation under the Establishment Clause because in the state Constitution preference is forbidden even when there is no discrimination. (*Fox v. City of Los Angeles* (1978) 22 Cal.3d 792, 796.)[26]

In *Feminist Women's Heath Center v. Philibosian* (1984) 157 Cal.App.3d 1076, 1088, the Court of Appeal observed that the strict scrutiny test is applied when government activity shows a preference for one religion over another. The court upheld an injunction prohibiting the District Attorney of Los Angeles from delivering fetuses to a private cemetery for a burial at which the Catholic League would have conducted religious services. The Court said that the district attorney's proposed action would express an unconstitutional preference for the views of the Catholic League. Similarly, the judgment of the Court of Appeal should be reversed because compelling the dismissal of the tenants' complaints against Mrs. Smith will have the effect of giving preference to Mrs. Smith's religious beliefs over the religious or secular views of those who refuse to conform to them.

In *Sands v. Morongo* (1991) 53 Cal.3d 863, this Court upheld an injunction prohibiting religious benedictions and invocations at public high school graduation ceremonies. Writing for a plurality, Justice Kennard observed that the challenged practice violated the "no preference" clause of the state Constitution, stating:

> "Section 4 of article I guarantees the '[f]ree exercise and enjoyment of religion without discrimination or preference ....' The Attorney General of this state has observed that '[i]t would

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[26] In *Fox*, the Court held that a preference was unconstitutionally shown to one religion by the illumination of a huge cross on the Los Angeles City Hall at Christmas and Easter. Even though the manifestation of the government's preference was purely symbolic in that case, the preference was nonetheless declared to be in violation of the "no preference" clause of the state Constitution. Here, the preference being shown for the religious beliefs of Mrs. Smith is much more than symbolic. By granting Mrs. Smith an exemption from the fair housing laws, over the objection of Mr. Phillips and Ms. Randall, the government is stripping the victims of housing discrimination of basic civil rights.

> be difficult to imagine a more sweeping statement of the principle of government impartiality in the field of religion.' (25 *Ops.Cal.Atty.Gen.* 316, 319 (1955)), and California courts have interpreted the clause as being more protective of the principle of separation than the federal guarantee (*Fox v. City of Los Angeles, supra* [citation].) As we noted earlier, when government sponsors prayers at public school ceremonies it appears to take positions on religious questions. The practice at issue independently violates the 'no preference' clause of the California Constitution." (Id., at pp. 883.)

If the symbolic preference that occurred in *Sands* is unconstitutional, then surely the granting of a preference to Mrs. Smith is also invalid since it causes actual harm to applicants because they have not conformed to Mrs. Smith's brand of religion.

Inconsistency of Discrimination with the Peace of the State

By its express terms, the Free Exercise Clause of the state Constitution does not excuse acts that are inconsistent with the peace or safety of the state. (Cal.Const., Art. I, § 4.) The Legislature has expressly declared that housing discrimination on the basis of religion and marital status is against public policy because it violates the "welfare, health and peace of the people of this state." (Gov. Code, § 12920.) Granting an exemption to Mrs. Smith to authorize her to discriminate against unmarried couples on the basis of her religious beliefs would all but ignore this express legislative finding that practically mirrors the limitation imposed by Article I, section 4.[27]

In *Pines v. Thomson* (1984) 160 Cal.App.3d 370, the Court of Appeal rejected the plea of a business owner who, under the shroud of the state Free Exercise Clause, claimed a right to refuse to do business with consumers unless their conduct conformed to the business owner's religious beliefs. Anyone who would not affirm that they were born-again Christians and had accepted Jesus as their personal savior could not place an advertisement in the "Christian Yellow Pages." The appeals court denied the owner's request for an exemption from the Unruh Civil Rights Act. Writing for the court, Justice Arabian said

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[27] A detailed discussion of how such discrimination violates the health, welfare, and peace of tenants and would be tenants may be found below, at pp. 40-46.

that the state's interest in eradicating all forms of invidious discrimination was paramount to the owner's free exercise claim. Plainly, the same state interest is served by the ban on housing discrimination in the Fair Employment and Housing Act and the Unruh Civil Rights Act. These interests would be defeated by granting an exemption that authorizes discrimination against consumers who do not conform to the religious beliefs and practices of a business owner. The denial of the exemption sought in *Pines* is an implicit recognition that invidious discrimination is inconsistent with the peace or safety of the state.

"Anti-Establishment" Clauses of the State Constitution

Article I, Section 4 of the California Constitution prohibits the establishment of religion by the state. Article XVI, Section 5 also prohibits the government from granting anything to or in aid of any religious creed. Section 5 has been interpreted broadly so that it not only forbids any material aid to religion, but any official involvement that promotes religion. By granting an exemption to Mrs. Smith on the basis of her religious beliefs, the Court of Appeal violated both anti-establishment clauses of the state Constitution.

In her plurality opinion in *Sands v. Morongo, supra*, Justice Kennard found that the practice of government endorsement of graduation prayers violated both anti-establishment clauses because such action promote religion. (*Sands, supra*, 53 Cal.3d 883.) Justice Mosk agreed. (*Id,* at 910-914.) He observed that the use of Christian prayers at public school graduation ceremonies unconstitutionally "discriminates against those who prefer other religions or no religion." (*Id,* at 913.) He concluded that the practice in question violated the anti-establishment clauses of the state Constitution because prayers in public school ceremonies operated as state endorsement of the religious views of some people and as a tacit rejection of inconsistent views of others. (*Id,* at 913-914.)

Granting an exemption from fair housing laws to landlords who justify their discrimination in the name of religion, and denying the protection of those laws to victims who refuse to conform their conduct to the landlord's religious beliefs, offends both anti-establishment clauses of the state Constitution. Such an exemption offends the same principles that prohibit government sponsorship of prayers in public schools. As Justice

Kennard aptly explained: (*Sands, supra*, at 883-884)

> "Ours is a religiously diverse nation. Within the vast array of Christian denominations and sects, there is a wide variety of belief and practice. Moreover, substantial segments of our population adhere to non-Christian religions or to no religion. Respect for the differing religious choices of the people of this country requires that the government neither place its stamp of approval on any particular religious practice, nor appear to take a stand on any religious question. In a world frequently torn by religious factionalism and the violence tragically associated with political division along religious lines, our nation's position of government neutrality on religious matters stands as an illuminating example of the true meaning of freedom and tolerance."

The requirement of government neutrality on religious matters should have cautioned the court below against giving a legal preference to the religious beliefs of Mrs. Smith over the secular concerns of the Legislature as manifested in the fair housing laws.

IV

STATE COURTS LACK AUTHORITY TO GRANT EXEMPTIONS UNDER THE STATE CONSTITUTION WHEN DOING SO VIOLATES FEDERAL LAW

An action of state government that violates federal law is invalid under the Supremacy Clause of the United States Constitution. (U.S. Const., Art. VI, cl. 2) A federal right, whether created by Congress or by the federal constitution, cannot be trumped by state law. (*Garnett v. City of Renton* (9th Cir. 1993) 987 F.2d 642, 646. Therefore, the Court of Appeal lacked authority under the state Free Exercise Clause to authorize violations of federal law. By effectively granting Mrs. Smith permission to discriminate against tenants whose conduct offended her religious beliefs, the court below violated the federal Establishment Clause.[23] It also violated the federal Fair Housing Act.

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[23] See Section II(c), at pages 19-27, above, for a discussion of this issue. For brevity's sake, it will not be repeated here even though it is equally relevant to the issues of supremacy and preemption.

The federal Fair Housing Act prohibits discrimination on the basis of religion in the sale or rental of a dwelling. (42 U.S.C.A. § 3604.) Although religious discrimination in housing has not produced much federal case law, cases in the area of employment make it clear that unlawful discrimination on the basis of religion occurs when a business owner takes adverse action against someone whose conduct offends the religious beliefs of the owner.[29] Putting it another way, laws prohibiting discrimination on the basis of religion make it illegal for business owners to impose "forced religious conformity" on others.[30] (*Young v. Southwestern Savings and Loan* (5th Cir. 1975) 509 F.2d 140, 141, 145.) There is no reason why housing discrimination law should yield a different conclusion.[31]

Congress has declared the eradication of discrimination in housing as having the "highest national priority." (*United States v. Hughes Memorial Home* (W.D. Vir. 1975) 396 F.Supp. 544.) State laws that interfere with, or are contrary to, the laws of Congress are invalid under the Supremacy Clause. (*Wisconsin Public Intervenor v. Mortier* (1994) 501 U.S. __, 115 L.Ed.2d 532, 542-543.)

The federal Fair Housing Act controls to the extent that state law is used to

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[29] In *Meltebeke v. Bureau of Labor and Industries* (Ore. App. 1993) 852 P.2d 859, the appeals court ruled that an employer who discriminated against a worker "because his lifestyle did not conform to [petitioner's] religious beliefs" violated a statutory ban on discrimination on the basis of religion. (Id., at p. 862.) In *Turic v. Holland Hospitality, Inc.* (W.D. Mich. 1994) 849 F.Supp. 544, a woman was discharged because her decision to have an abortion offended the religious beliefs of her employer. Since her decision to have an abortion was not compelled by her own religious beliefs, the court observed that her claim under Title VII was not religious discrimination in the classic sense. However, the court found that when an employer imposes a religious test as a condition of employment, the ban on religious discrimination is violated. In other words, the court found that the religious beliefs of a business owner may not be forced on others. The fact that Turic's disagreement with her employer was not premised on a faith of her own did not alter the conclusion that the employer engaged in discrimination on the basis of religion. (Id., at pp. 551-552.)

[30] The only exception to this principle arises when a religious organization that has been afforded a statutory exemption to employ or rent to persons of a particular religion (presumably to promote separation of church and state) discriminates against persons whose conduct is inconsistent with the organization's religious purposes. (*Little v. Wuerl* (3rd Cir. 1991) 929 F.2d 944.)

[31] The Fair Housing Act is to be construed liberally (*Hughes Memorial Home, infra*) and exemptions must be read narrowly. (*City of Edmonds v. Washington State Building Code Council* (9th Cir. 1994) 18 F.3d 802.)

authorize discrimination. ("*K*" *Care, Inc. v. Town of Lac Du Flambeau* (Wisc. 1993) 510 N.W.2d 697, 699.) The federal Fair Housing Act emphatically states that:

> "[A]ny law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid." (42 U.S.C.A. § 3615)

The first time in this case that any entity of the State of California purported to permit religious discrimination in housing was when the Court of Appeal issued its opinion and judgment. Before then, agencies of state government actively resisted Mrs. Smith's claim that she had a right to discriminate against Mr. Phillips and Ms. Randall. The California Legislature has outlawed such discrimination. Agencies of the executive branch have sought to enforce the law. Surprisingly, it is an act of the state judiciary that has authorized Mrs. Smith to discriminate against tenants who offend her religious beliefs.

The fact that the Court of Appeal was acting pursuant to its interpretation of the state Constitution rather than a state statute makes no difference for purposes of a Supremacy Clause analysis. State constitutional provisions are also subservient to federal law. (*United States v. Lot 5* (11th Cir. 1994) 23 F.3d 359 [invalidating provision of Florida Constitution that conflicted with federal bankruptcy law]; *Beerbower v. United States* (E.D. Mich. 1984) 592 F.Supp. 67 [federal Internal Revenue Act preempted Michigan Constitution].)

Because the exemption granted by the Court of Appeal "chills the exercise of the right to equal housing opportunity, [that action] must be viewed as an obstacle to the accomplishment of the principle objective of Congress in passing the Fair Housing Act, that is, to provide fair housing throughout the United States." (*United States v. State of Wisconsin* (W.D. Wisc. 1975) 395 F.Supp. 732, 734.)

Furthermore, an injunction may not issue under state law that permits a violation of the federal Fair Housing Act. (*Deep East Texas Regional Mental Health and Mental Retardation Services v. Kinnear* (Tex.App. 1994) 877 S.W.2d 550, 557.) For this reason alone, the decision of the Court of Appeal should be reversed.

V

THE STATE HAS COMPELLING REASONS NOT TO GRANT MRS. SMITH AN EXEMPTION FROM THE FAIR HOUSING LAWS

Over and above the compelling state interests served by the legislative ban on marital status discrimination,[32] other paramount and overriding governmental interests are served by denying Mrs. Smith an exemption from the fair housing laws.

Avoiding Violations of Federal Law

Administrative agencies and judicial officers of the state are bound to uphold the federal Constitution. Pursuant to the Supremacy Clause of the federal Constitution (U.S. Const., Art. VI, cl. 2), state officials may not authorize violations of federal law. As argued above, the state would violate both the federal Establishment Clause as well as the federal Fair Housing Act if Mrs. Smith is given a court-ordered exemption authorizing her to discriminate against consumers whose conducts offends her religious beliefs.[33] For these reasons alone, the state has a compelling interest to reject her claim for an exemption.[34]

Avoiding Complicity in Religious Discrimination

Furthermore, the state has a compelling interest to avoid complicity in either promoting or permitting a landlord to establish a religious test that consumers must pass before they are allowed to rent an apartment. By demanding a court-ordered exemption from the state's fair housing statutes, Mrs. Smith has, in effect, asked the state judiciary to participate in religious discrimination. In addition to the constraints placed on the courts

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[32] Section VI, at pages 40-46, below, contains a discussion of the state interests advanced by the statutory prohibition against marital status discrimination.

[33] See Section II(c), at pages 19-27, above, for a discussion of the federal Establishment Clause, and Section IV, at pages 34-36, above, for a discussion of the federal Fair Housing Act.

[34] This point was presented to the Court of Appeal. (See "Respondent Fair Employment and Housing Commission's Post Hearing Brief," at pp. 35-36.)

by the state and federal Establishment Clauses, the Fair Employment and Housing Act and the Unruh Civil Rights Act also prohibit courts from authorizing discrimination on the basis of religion.[35] Protecting a person's right to be free from forced observance of the religion of a business owner is at the heart of statutes prohibiting religious discrimination. (*EEOC v. Townley Engineering & Manuf. Co.* (9th Cir. 1988) 859 F.2d 610, 620.) A statutory purpose to end discrimination "is equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions." (Ibid.) In other words, the state has a compelling interest in prohibiting religious discrimination in obtaining accommodations advertised to the public. (*Jews for Jesus Inc. v. Jewish Community Relations Council* (2nd Cir. 1992) 968 F.2d 286, 295.) For a court to issue an injunction authorizing such discrimination certainly frustrates this paramount state interest. By doing so, the Court of Appeal has improperly given effect to private religious biases. (Cf. *City of Cleburne, supra*, 473 U.S., at p. 448.)

Providing Efficient Administrative Relief

As this Court observed in *Walnut Creek Manor v. Fair Employment and Housing Commission* (1991) 54 Cal.3d 245, 264, the purpose of the Fair Employment and Housing Act "was to provide a streamlined and economic procedure for preventing and redressing discrimination in housing as an alternative to the more cumbersome and costly procedure of civil suit." This important purpose will be frustrated in two ways if a free exercise defense may be raised by a landlord in administrative proceedings before the Commission.

First, the administrative law judge will be required to deal with a wide variety of issues of a high order of complexity. Instead of being efficient and streamlined procedures, these hearings could be lengthy and complicated.[36]

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[35] As argued in Section IV, above, discrimination on the basis of religion occurs when a business owner takes adverse action against an employee or a consumer whose conduct or lifestyle offends the owner's religious beliefs. (See fn. 29, at p. 35.)

[36] Any number of important legal and evidentiary questions may arise in such a hearing. What is the landlord's religious belief? Is it sincerely and deeply held? Does the landlord uniformly or (continued...)

Second, and equally important, whenever a landlord believes that the Commission's decision offends his or her religious beliefs, the case will wind up in court since the Commission lacks authority to make constitutional adjudications.[37] This will not only delay a final resolution, but it will prove costly to the parties and to the state.[38]

In *United States v. Lee, supra*, the Supreme Court found that the "broad public interest in maintaining a sound tax system" free of "myriad exceptions from a wide variety of religious beliefs" provided a compelling reason to deny an exemption in that legal context. (455 U.S., at p. 260.) The court noted that "[t]he tax system could not function if denominations were allowed to challenge the tax system" on the ground that it operated "in a manner that violates their religious beliefs." (Ibid.) The same rationale applies with equal force to maintaining the effective enforcement of California's civil rights laws.

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[36](...continued)
selectively enforce this belief? How far may the state or a victim of discrimination probe into the nature, sincerity, and uniform application of this belief in discovery or in cross-examination? How many experts may be called by each party to prove or disprove the sincerity and conviction of the landlord? What if the consumer objects to this belief for religious or nonreligious reasons of his or her own? May the consumer produce evidence, both personal and expert, to support his or her theological or secular opposition? What may the administrative law judge do if the landlord and the consumer have opposing religious beliefs? What standards must the Commission use in reviewing a decision of an administrative law judge on these religious questions?

[37] Although the Commission may receive testimony about religious beliefs and practices, it may not grant any constitutionally-based exemption from the fair housing law absent a specific order from an appellate court. (Cal.Const., Art. III, § 3.5(a).) Although a published appellate opinion in any given case may provide general guidelines to the Commission, since each case will be factually different in some significant way, each new case also will require appellate review.

[38] If religious exemptions are permitted, there will be no limit to the types of objections that businesses may raise. In addition to more traditional religious beliefs, landlords would also be able to raise any deeply held moral or ethical belief, even if the landlord does not believe in God or belong to an organized religion. (*Welsch v. United States* (1970) 398 U.S. 333.) Corporations may raise the religious objections of shareholders. (*EEOC v. Townley Eng. & Manuf. Corp., supra*, 859 F.2d, at pp. 619-620.) Denying exemptions based on the subjective beliefs of landlords promotes stability and predictability in the enforcement of civil rights laws. To paraphrase this court's recent decision in *Nahrstedt v. Lakeside Village Condominium Association Inc.* (1994) __ Cal.4th __, 94 Daily Journal D.A.R. 12534, "Fewer lawsuits challenging [Commission decisions] will be brought, and those that are filed may be disposed of more expeditiously, if the rules courts use in evaluating [fair housing laws] are clear, simple, and not based on the peculiar circumstances or hardships of individual [business owners]." (Id., 94 Daily Journal D.A.R. 12534, 12541.)

VI

THE FAIR HOUSING LAWS PROMOTE COMPELLING INTERESTS RELATED TO THE WELFARE, HEALTH, AND PEACE OF RENTERS

The fair housing statutes were enacted by the Legislature pursuant to the police power of the state to protect the "welfare, health, and peace of the people of this state." (Gov. Code. § 12920) The ban on marital status discrimination clearly serves this purpose.

Prohibiting invidious discrimination promotes equal opportunity to all consumers, discourages business owners from making decisions based on stereotypes, and protects the personal dignity of each individual who seeks housing accommodations. The specific ban on marital status discrimination protects important privacy interests of renters. It also removes an arbitrary barrier to the decision of a renter to live with another person as a means of protecting his or her personal safety and economic security.

Equal Opportunity and Personal Dignity

In *Roberts v. United States Jaycees, supra*, the Supreme Court stated that the government's goal of "eliminating discrimination and assuring its citizens equal access to publicly available goods and services . . . plainly serves compelling state interests of the highest order." (468 U.S. 609, 624.) The court stressed this point again in *Board of Directors of Rotary International v. Rotary Club of Duarte* (1987) 481 U.S. 537, 547. More recently, the court stated that a law that "helps to ensure the basic human rights of members of groups that have historically been subject to discrimination, including the right of such group members to live in peace where they wish" promotes compelling state interests. (*R.A.V. v. City of St. Paul* (1992) __ U.S. __, 112 S.Ct. 2538, 2549.)[39]

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[39] There is no doubt that unmarried couples have historically been subject to discrimination. Up until 1975 when the Legislature added "marital status" to the ban on discrimination in employment and housing, discrimination against this class was permitted in virtually all aspects of life. Just 20 years ago, even the children of unmarried couples were targets of discrimination because of the marital status of their parents. (Civ. Code, § 7002.) As the opinion of the Court of Appeal itself

(continued...)

The "essential dignity and worth of every human being" is a "concept at the root of any decent system or ordered liberty." (*Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 22.) No doubt this is why the Supreme Court has recognized that a civil rights statute prohibiting arbitrary discrimination "vindicates an interest in dignity as a human being entitled to be judged on individual merit." (*United States v. Burke* (1992) __ U.S. __, 112 S.Ct. 1867, 1877 (Souter, J. concurring); *Roberts v. United States Jaycees, supra*, 468 U.S., at p. 625; *Heart of Atlanta Motel Inc. v. United States* (1964) 379 U.S. 241, 250.)

Marital status discrimination in housing against unmarried couples "degrades individuals, affronts human dignity, and limits ones opportunities." (*Swanner v. Anchorage Equal Rights Commission, supra*, 874 P.2d, at p. 282.)

In this respect, marital status discrimination is just like discrimination on the basis of sexual orientation[42] or age discrimination,[43] or sex discrimination,[44] or disability

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[39](...continued)
demonstrates, discrimination against unmarried couples is still pervasive in many areas of the law. That the Legislature limited its initial protections to the necessities of life, i.e., equal opportunity in employment and housing, does not signal a weakness or defect in the Fair Employment and Housing Act for it has been said that "a statute is not invalid under the Constitution because it might have gone farther than it did" and that "a legislature need not strike at all evils at the same time" and that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." (*Katzenbach v. Morgan* (1966) 384 U.S. 641, 644.)

[42] *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University* (D.C. Cir. 1987) 526 A.2d 1, 37 [compelling interests that any state has "in eradicating discrimination against the homosexually or bisexually oriented include the fostering of individual dignity"].

[43] *EEOC v. Recruit U.S.A. Inc.* (9th Cir. 1991) 939 F.2d 746, 753 [compelling interest to eradicate age discrimination in employment]; *EEOC v. County of Los Angeles* (C.D. Cal. 1982) 531 F.Supp. 122, 125 [irreparable injury presumed from loss of human dignity which age discrimination causes]; *Gately v. Commonwealth of Massachusetts* (D. Mass. 1992) 811 F.Supp. 26, 27-28 [compelling interest in eradicating age discrimination in employment]; *Hodge v. Roy H. Park* (Tenn. App. 1984) 673 S.W.2d 157, 159 [statute prohibiting age discrimination preserves safety, health, and general welfare and protects victim's interest in personal dignity].

[44] *Perilli v. Board of Education* (W.Vir. 1989) 387 S.E.2d 315, 317 [sex discrimination "is an injury to the health, welfare and dignity of the victim"]; *Idaho Commission on Human Rights v. Campbell* (Idaho 1973) 506 P.2d 112, 113 [statute against sex discrimination protects "interest in personal dignity"].

discrimination,[45] or racial discrimination,[46] or religion.[47] That is why "the government has a compelling interest in eradicating discrimination in all forms." (*EEOC v. Mississippi College* (5th Cir. 1980) 626 F.2d 477, 488; *Daton Christian Schools v. Ohio Civil Rights Commission* (S.D. Ohio 1984) 578 F.Supp. 1004, 1034.)

It is "without question that the state has a legitimate and compelling state interest generally in the battle against discrimination on the basis of race, gender, age, national origin, or other invidious categories of discrimination." (*Pacific-Union Club v. Superior Court* (1991) 232 Cal.App.3d 60, 78.) Civil rights statutes properly prohibit business decisions based on stereotypes and subjective assumptions. (*Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 429-431; *Hardin v. Stynchomb* (11th Cir. 1982) 691 F.2d 1364, 1372; *Elliott v. City of Athens* (11th Cir. 1992) 960 F.2d 975, 978.)

The opinion of the Court of Appeal ignored arguments that providing equal access to housing, regardless of marital status, promotes compelling state interests.[48] It improperly used an equal protection approach in a compelling state interest analysis. In doing so, the court mixed apples with oranges. If a legislative body protects some classes but not others, it is appropriate to use a different standard for judicial analysis of that decision based on the nature of the omitted criteria. For this purpose, some criteria are considered suspect

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[45] *Maine Human Rights Commission v. City of South Portland* (Maine 1986) 508 A.2d 948, 954 [prohibiting handicap discrimination protects the "public health, safety, and welfare," and the "basic human right to a life with dignity"]; *Chevron Corp. v. Redmon* (Texas 1988) 745 S.W.2d 314, 316 [prohibiting disability discrimination preserves the "public safety, health, and general welfare" and protects the interest of people with disabilities in "personal dignity"].

[46] *Middlesboro Housing Authority v. Kentucky Commission on Human Rights* (Ky. App. 1977) 553 S.W.2d 57, 64 [civil rights statute protects interest in "personal dignity and freedom from humiliation" and preserves the "public safety, health and general welfare"]; *Meyer v. Bureau of Labor* (Ore. App. 1979) 592 P.2d 564, 569 [same].

[47] *Ranger Insurance Co. v. Bal Harbor Club Inc.* (Fla. 1989) 549 So.2d 1005, 1008 [statute prohibiting discrimination because of race, color, religion, national origin, age, handicap, or marital status protects an "interest in personal dignity" and preserves the "public safety, health and general welfare"].

[48] See "Supplemental (Post Oral Argument) Brief of Kenneth Phillips, pp. 17-20; "Supplemental Brief on Behalf of Gail Randall," at pp. 28-31; "Respondent Fair Employment and Housing Commission's Post Hearing Brief," at pp. 27-35.

and others are not. However, the decision of the Legislature to be inclusive must be given more deference by the judiciary. That is why, for purposes of a compelling state interest analysis, courts have held that eliminating all forms of discrimination is a paramount purpose without hinting that a legislative decision to prohibit marital status, age, disability, or sexual orientation discrimination would be less important that banning discrimination based on race, religion, or national origin. Such a proposition should be rejected.[49]

Personal Privacy Interests of Consumers

The Legislature has not only prohibited discrimination on the basis of arbitrary personal characteristics in housing transactions but it also has forbidden a landlord to express preferences or make inquiries into such criteria. (Govt. Code, § 12955.) This legislation promotes the personal privacy rights of applicants and renters.

Although the parties thoroughly briefed the compelling privacy interests protected by the fair housing statutes,[50] the Court of Appeal dismissed the privacy interests of Ms. Randall and Mr. Phillips in a summary manner. (*Smith, supra*, 25 Cal.App.4th, at pp. 277-278.) The opinion misconstrued their informational privacy claim, and all but ignored a breach of their decisional and associational privacy interests. It also failed to recognize a violation of their federal constitutional right to be free from governmental intrusions into their private sex lives. (Id., at p. 278, fn. 18.)

Protection of Informational Privacy Concerns

The Legislature's decision to prohibit inquiries by a landlord into a tenant's marital status (Govt. Code, § 12955) promotes a compelling state interest to protect the privacy of

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[49] Cases dealing with age discrimination illustrate this point. Although "age" is not a suspect classification -- indeed age discrimination in many, if not most, contexts is not unlawful -- legislative decisions to prohibit some types of age discrimination have been held to promote compelling state interests. (See cases listed in footnote 43, supra.)

[50] See "Supplemental (Post Oral Argument) Brief of Kenneth Phillips, pp. 26-39; "Supplemental Brief on Behalf of Gail Randall," at pp. 38-43; "Respondent Fair Employment and Housing Commission's Post Hearing Brief," at pp. 40-46; "Return to Alternative Writ of Mandate," at pp. 29-30.

renters. Even if privacy were not a constitutional right that stands on its own merit, the state interest in keeping rental transactions free of arbitrary discrimination is served well by prohibiting inquiries into irrelevant criteria, such as race, religion, or marital status.[51]

Protection of the Marital Decisionmaking Process

This Court has long recognized that the right to marry is a fundamental right protected by the Constitution. (*Perez v. Lippold* (1948) 32 Cal.2d 711; *People v. Belous* (1969) 71 Cal.2d 954, 963.) To be more precise, however, it is not the status of marriage, but rather the *decision* regarding marriage, that is constitutionally protected.[52] (*Turner v. Safley* (1987) 482 U.S. 78, 95; *Zablocki v. Redhail* (1978) 434 U.S. 374, 404)

Just as the right to procreate (*Skinner v. Oklahoma* (1942) 316 U.S. 535) and the right not to procreate (*Roe v. Wade* (1973) 410 U.S. 113) are flip sides of the same constitutional right protecting an individual's *decision* whether or not to procreate, so too must the right to marry imply a right not to marry, leaving to the individual the freedom of choice with respect to this intimate and personal matter.

The fair housing statute's requirement that a landlord not express preferences based on marital status, inquire into an applicant's marital status, or deny housing on that basis,

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[51] The balancing process used by this Court in *Hill v. N.C.A.A.* (1994) 7 Cal.4th 1 is not appropriate in this case. In *Hill*, the plaintiff sued the defendant in tort for a violation of the right of privacy contained in Article I, Section 1 of the state Constitution. In that case, the right of privacy was being used by the plaintiff in an affirmative legal attack on the defendant. In that type of a situation, the Court decided that the plaintiff's privacy interest must be balanced against competing interests of the defendant before the court could determine whether a cause of action existed for invasion of privacy. In this case, however, Mr. Phillips and Ms. Randall are enforcing a legislatively created cause of action for marital status discrimination. The Legislature already did the balancing when it created this cause of action. The only question is whether the statute is unconstitutional as applied to the conduct of Mrs. Smith. If any compelling interest exists, that question must be answered adversely to the landlord. In this context, once the court finds that the statute in question protects one or more privacy interests of housing consumers, the constitutionality of the fair housing statute should be upheld and no further balancing is necessary or even appropriate.

[52] In *Cleveland Board of Education v. LaFleur* (1974) 414 U.S. 632, 639-640, the Supreme Court recognized the constitutional importance of "that *freedom of choice* in matters of marriage and family life." (Emphasis added) As the United States Supreme Court observed in *Loving v. Virginia* (1967) 388 U.S. 1, 12, "the freedom to marry *or not marry*" rests with the individual. (Emphasis added)

protects consumers against adverse action based on the way in which they exercise their choice to marry or not. While a person's decision on this issue may affect their legal rights and responsibilities in other contexts, the Legislature has properly decided that the product of this decision -- one's marital status -- is irrelevant when renting an apartment.

The compelling nature of the state interest in prohibiting discrimination against those who live together before marriage is even more apparent when demographics are considered. Almost one in four Americans has cohabited at some point in his or her life, and nearly half of all people who have married recently have cohabited beforehand.[33] For millions of Americans, their choice to live together before marriage is part of the marital decisionmaking process. The Legislature's determination to prohibit marital status discrimination supports a compelling state interest of keeping marital decisions free from outside interference by business owners.

Protection of the Choice of a Living Companion

Refusing to allow two people to live together because they are not related by blood, marriage, or adoption is a violation of the state constitutional right of privacy. (*City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 134.) "The right to privacy was held to encompass the right to choose the people with whom one lives." (*Robbins v. Superior Court* (1985) 38 Cal.3d 199, 213.) Citing *Atkisson v. Kern County Housing Authority* (1976) 59 Cal.App.3d 89, this Court listed the right of unmarried persons to cohabit in its discussion of the diverse range of personal freedoms protected by the right of privacy. (Ibid.)

In *Roberts v. United States Jaycees, supra*, the Supreme Court acknowledged that the right of privacy protects the freedom of intimate association. (468 U.S., at pp. 618-619.) If this means anything at all, it must encompass the decision of two unmarried adults to live together in an apartment. By exempting Mrs. Smith from the fair housing laws, the Court of Appeal has undermined this important privacy interest.

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[33] Larry Bumpass and James Sweet, "Young Adults Views of Marriage, Cohabitation, and Family," *National Survey of Families and Households Working Paper No. 33* (Madison, Wisconsin: Center for Demography and Ecology, University of Wisconsin, January 1991), p. 5.

Personal Safety and Economic Security

The legislature's decision to ban marital status discrimination in housing promotes another compelling state interest. It removes arbitrary barriers to shared housing. The decision of an unmarried tenant to share an apartment with another compatible person may be based on the tenant's concern for his or her personal safety or economic security. With the cost of living so high, and crime rates what they are, many renters want to share an apartment rather than live alone.[54] Although expansive arguments on this important state interest were presented to the Court of Appeal, the opinion below failed to address them.[55]

VII

DENYING RELIGIOUS EXEMPTIONS FROM THE FAIR HOUSING LAWS IS THE LEAST RESTRICTIVE MANNER OF PROTECTING THE STATE'S COMPELLING INTERESTS

In *Roberts v. United States Jaycees, supra*, the court held that even if ensuring equal access to public accommodations causes some incidental abridgement of First Amendment rights, "that effect is not greater than necessary to accomplish the State's legitimate purposes" which the court acknowledged were "compelling." (468 U.S. 609, 610.)

Permitting a religious exemption to civil rights statutes "would substantially emasculate the state's public policy of ensuring civil rights for the citizens." (*State v. Mc Clure, supra*, 370 N.W.2d, at p. 853, fn. 16.) In the struggle to ensure equal opportunity to all, including the unmarried, there is no less restrictive alternative than to prohibit

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[54] Nearly one million Californians checked the "unmarried partner" box on the 1990 census form. (1990 Decennial Census -- Summary Tape File 4, PB12.) Another 538,391 persons checked the "roommate" or "housemate" box. (1990 Decennial Census -- Summary Tape File 4, PB18.) "People are doubling up not only for financial reasons, but also for security, companionship, sharing household chores . . . or even reducing dependence on day care." (Peter Bennett, "Housemate Trend Growing," *Los Angeles Times*, March 6, 1994, pp. K1, K8.) This phenomenon is not limited to California. More than four million people in the United States reported themselves as "roommates" or "housemates" or "unmarried partners" in the 1990 census. (Rebecca Howard, "Crowd Control," *Los Angeles Times*, June 27, 1994, p. E3.)

[55] See "Supplemental (Post Oral Argument) Brief" of Kenneth Phillips, at pp. 21-26.

discrimination.[56] (*Swanner, supra*, 874 P.2d, at p. 280, fn. 9.)

VIII

THE RELIGIOUS FREEDOM RESTORATION ACT DOES NOT AFFECT THIS CASE

Last year, Congress passed the Religious Freedom Restoration Act. (42 U.S.C.A. 2000bb et seq.) Its stated purpose is to provide a claim or defense to persons whose religious exercise is "substantially burdened" by government and to require the government to respond by demonstrating a "compelling interest" for imposing such a burden. (42 U.S.C.A. 2000bb, subd. (b).)

RFRA does not alter existing decisional law as to whether a given practice constitutes the "exercise of religion" under the First Amendment. (42 U.S.C.A. 2000bb-2.) Nor does it in any way alter "that portion of the First Amendment prohibiting laws respecting the establishment of religion." (42 U.S.C.A. 2000bb-4.)

RFRA does not affect the outcome of this case for several reasons. First, renting apartments is not the "exercise of religion" within the meaning of the First Amendment.[57] Second, the federal Establishment Clause prohibits a judicially-mandated exemption in this case. (See pages 19-27, supra.) Furthermore, compelling state interests support both the enforcement of the ban on marital status discrimination, and the refusal to grant an exemption authorizing religious discrimination in housing. (See pages 37-46, supra.)

Finally, being required to rent to unmarried couples, especially in the absence of any evidence that they would engage in sexual relations inside the rental property, does not "substantially burden" the exercise of Mrs. Smith's religion.[58] Mrs. Smith had the burden

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[56] In the specific context of this case, the assessment against Mrs. Smith of $454 in damages for out-of-pocket losses suffered by Mr. Phillips and Ms. Randall is certainly about the least restrictive method of enforcing the fair housing statutes. No fines or punitive damages have been awarded.

[57] See "Opening Brief on the Merits" of Gail Randall, at pp. 4-26.

[58] For further argument on this point, see pages 26-33 of "Opening Brief on the Merits of Gail Randall."

of proof to demonstrate that her religious beliefs were substantially burdened in this case. (*Northwest Indian Cemetery v. Peterson* (9th Cir. 1984) 764 F.2d 581, 585.) An *actual* burden must be proven. (*Tony and Susan Alamo Foundation* (1985) 471 U.S. 290, 304.)

Mrs. Smith did not meet her burden of proof. Her decision not to rent to Mr. Phillips and Ms. Randall was based on her assumption that they would engage in sexual conduct inside the rental apartment. (AR, Vol. II, pp. 67-68, 88.) In the Court of Appeal, Mrs. Smith relied on a so-called presumption that an unmarried man and woman who live together are engaging in sexual intercourse. (Petitioner's Response Memorandum, p. 3.) She further argued that: "[t]he complainants and the State have a burden to rebut the legal presumption of sexual activity." (Ibid.)

Although the Court of Appeal did not expressly address this issue, it nonetheless implicitly accepted the presumption when it found that Mrs. Smith's religious beliefs were substantially burdened by the Commission's decision to assess damages against her based on her refusal to rent. It is sexual relations outside of wedlock, and not merely living together, that offends Mrs. Smith's religious beliefs. Therefore, because there is no evidence in the record that Mr. Phillips and Ms. Randall had an ongoing sexual relationship, the court below must have relied on a presumption when it found that their future conduct would have offended Mrs. Smith's religious beliefs.

Mrs. Smith cited *Sharon v. Sharon* (1888) 75 Cal. 1 as the legal basis for the so-called presumption of sexual activity of unmarried adults who live together. However, not only does *Sharon* not stand for this principle, but judicial decisions and statutes are to the contrary.[59] Furthermore, a law that creates such a presumption and that shifts the burden of proof to tenants to produce evidence that they do not have a sexual relationship would

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[59] Evidence Code section 520 puts the burden of proof on she who alleges that another is guilty of wrongdoing. In *Brill v. Brill* (1940) 38 Cal.App.2d 741, 745, the court observed that a presumption of innocence applies in civil cases. In *Rodetsky v. Nerny* (1925) 77 Cal.App. 525, 526, the court spoke of a presumption of moral conduct. In *Lertora v. Globe* (1936) 18 Cal.App.2d 142, 144-145, the court applied a presumption that occupancy of a dwelling is not for immoral purposes. In *Marvin v. Marvin* (1976) 18 Cal.3d 660, 684, this Court rejected a presumption that sexual activity is an integral part of a nonmarital relationship.

violate the right of privacy protected by the state and federal constitutions.[60] Furthermore, if such a presumption were limited only to persons of the opposite sex, it would be highly suspect as gender-based discrimination.[61] (*Sail'er Inn v. Kirby* (1971) 53 Cal.3d 1, 17-18.)

CONCLUSION

Even though enforcement of a civil rights statute may justifiably cause the commercial demise of a discriminatory enterprise (*Easebe Enterprises Inc. v. Rice* (1983) 141 Cal.App.3d 981, 987), this need not be the case. Mrs. Smith can take reasonable measures to eliminate the conflict she experiences with her religious beliefs. (Cf. *Hudson v. Western Airlines* (9th Cir. 1988) 851 F.2d 261, 266-267.)

Since Mrs. Smith's conflict seems to arise solely when prospective tenants are screened to fill a vacancy, she could hire a real estate broker or agent for this limited purpose. The broker could make all decisions in accord with civil law, without bothering Mrs. Smith with any information that may trouble her religious sensibilities.

Since she does not have a religious need to inquire into the sexual practices of prospective tenants, this type of a limited "blind trust" would eliminate any perceived infringement on her religious beliefs and, at the same time, would enable her to obey the

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[60] *Fults v. Superior Court* (1979) 88 Cal.App.3d 899, 904, holds that personal sexual information is protected by the right of privacy. *Vinson v. Superior Court* (1987) 43 Cal.3d 833, 841, observes that the constitutional privacy protection embraces sexual relations. In *Whalen v. Roe* (1977) 429 U.S. 589, 599, the Supreme Court held that personal information is protected by the federal constitutional right of privacy. *Thorne v. City of El Segundo* (9th Cir. 1983) 726 F.2d 459, 468-469, held that applying an adverse inference from the refusal to disclose personal information violated the right of privacy. In *Boler v. Superior Court* (1987) 201 Cal.App.3d 467, 473, the court, on privacy grounds, refused to entertain an adverse presumption about the sexual conduct of a litigant.

[61] Applying this presumption only in opposite-sex cases would create the strange effect of protecting the privacy rights of two same-sex roommates who have a homosexual relationship, while intruding into the privacy of opposite-sex roommates who may have a purely platonic relationship, thereby creating a prima facie case of reverse sexual orientation discrimination. (Cf. *People v. Municipal Court (Street)* (1979) 89 Cal.App.3d 739, 748-749.)

fair housing statutes.[62] While self-accommodation would involve some cost to Mrs. Smith, an adherent sometimes must endure financial sacrifice in order to comply with the demands of her religion.[63] (*Ansonia Board of Education v. Philbrook, supra,* 479 U.S. 60.)

Essentially, Mrs. Smith has engaged in an act of civil disobedience. She was warned by the victims, the Department, and the Commission, but she has insisted that she has sound moral reasons for violating the law. In substance, Mrs. Smith:

> "wants to rely on the privilege or the moral honor of civil disobedience without paying the price or penalty such disobedience necessarily incurs. But she cannot seek immunization from the penalty -- as Thoreau recognized -- regardless as to what she may perceive the morality of her position. In exercising her right to civil disobedience, she may indeed by joining a legion of persons from Thoreau to Mohandas (Mahatma) Ghandi to Martin Luther King, Jr. who were committed to nonviolent civil disobedience. Nevertheless, she, like them, can be subjected to the rule of law for its infraction even though she may perceive the laws to be 'unjust.'" (*Kahn v. United States* (3rd Cir. 1985) 753 F.2d 1208, 1215-1216.)

The law does not require Mrs. Smith, or any other businessperson, to rent apartments. Entrepreneurs with tender religious sensibilities are free to invest in other financial endeavors that will not challenge, or call on them to compromise, their spiritual convictions.

Dated: October 8, 1994

Respectfully submitted:

Thomas F. Coleman

THOMAS F. COLEMAN
Attorney for Kenneth Phillips
Real Party in Interest

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[62] It is not uncommon to resolve conflicts of interest through the use of a "blind trust." (*In re General Development Corporation* (S.D. Fla. 1991) 135 B.R. 1002; *United States v. Sapp* (S.D. Fla. 1974) 371 F.Supp. 532; *Caragol v. Oregon Government Ethics Commission* (Ore. App. 1989) 780 P.2d 751; *United States v. Kearns* (D.C. Cir. 1978) 595 F.2d 729.)

[63] In *Braunfeld v. Brown* (1961) 366 U.S. 599, 606, the Supreme Court upheld a Sunday closing law because it regulated secular activity, noting that persons who obey valid laws may well experience "some financial sacrifice in order to observe their religious beliefs."

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, County of Los Angeles:

I am a resident of the county aforesaid; I am over the age of 18 years and am not a party to the within action; my business address is: P.O. Box 65756, Los Angeles, CA 90065.

On October 10, 1994, I served the within OPENING BRIEF ON THE MERITS OF KENNETH PHILLIPS on the following persons and/or agencies by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, in the U.S. mail, at Los Angeles, addressed as follows:

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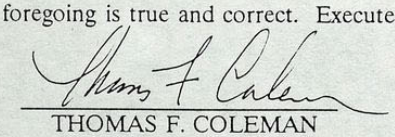
I declare under penalty of perjury that the foregoing is true and correct. Executed at Los Angeles, CA, on October 10, 1994.



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