Court to Rule on Refusal to Rent to Unwed Couple

■ **Bias:** Landlords said their beliefs did not allow them to give a lease. Case will be a pivotal test of religious rights versus fair-housing laws.

By PHILIP HAGER
TIMES LEGAL AFFAIRS WRITER

SAN FRANCISCO—In a pivotal test of religious rights versus fair-housing laws, the state Supreme Court agreed Thursday to decide whether landlords can cite their religious beliefs to refuse rentals to unmarried couples.

The high court, in a brief order signed by all seven justices, set aside a widely debated appellate court ruling that held that the constitutional right of a Downey couple to free exercise of religion would be violated by forcing them to rent to a woman and her boyfriend.

State statutes barring housing discrimination based on marital status must yield to the landlords' sincere belief that fornication is sin, the appellate court had said in a 2-1 decision last November.

The case, apparently the first of its kind in the nation, has attracted wide attention among civil rights and religious groups. The outcome before the high court could have broad effect on the state's increasing numbers of unmarried, cohabitating couples, including gay men and lesbians. No hearing date was set.

According to the 1990 census, about 8% of California households consist of unmarried adults living together. Another 33% contain only single adult.

Lawyers for the state and the unmarried woman in the case had warned that the appellate ruling, if left intact, could open the way for landlords to discriminate against an array of tenants—ranging from homosexuals to divorcees—whose status or practices conflict with the landlords' religious views.

Now, the high court ruling could set new legal guidelines beyond the rights of landlords and tenants, said Thomas F. Coleman of Los Angeles, the woman's attorney.

"The court really is going to look at freedom of religion versus civil rights in the entire spectrum of business relationships," said Coleman. "It's exciting—but also frightening in some respects. It's not going to be an easy time."

Thomas F. Donahue of Fresno, an attorney representing the landlords, who are his parents, said: "We're looking forward to the Supreme Court hearing the case and hoping it decides in our favor."

In a written brief, Donahue had asked the high court to leave the appellate decision intact, noting that the state sometimes denies to unmarried couples the rights granted to married couples. He said state and private colleges are allowed by law to limit student housing to married couples.

Donahue also denied that the appellate ruling would give business establishments broad freedom to discriminate on the pretext of religious views. The ruling had provided only a narrow exception based on the landlords' view that it is morally wrong to rent to unmarried couples, he said.

The case began in 1987 when Verna Terry sought to rent a one-bedroom, $450-a-month apartment from John and Agnes Donahue of Downey. According to testimony, Terry indicated that the apartment was for her and her boyfriend, Robert Wilder. The two were not married but were considering marriage, she said. Agnes Donahue, like her husband a devout Catholic, turned Terry down, saying she was "old-fashioned" and would not rent to an unmarried couple.

Terry and Wilder filed complaints with the state Department of Fair Employment and Housing, charging housing discrimination based on marital status. The Fair Employment and Housing Commission ordered the Donahues to pay Terry and Wilder $7,480 in damages—including $6,000 for emotional distress.

The Donahues filed suit, contending that their belief that sexual intercourse outside marriage is a sin entitled them to a constitutionally based religious exemption from state statutes that ban discrimination in housing.

On Nov. 27, a state Court of Appeal in Los Angeles upheld the Donahues' contention, finding that the state's concern with protecting unmarried cohabitating couples was "not such a paramount and compelling interest" to outweigh the landlords' religious freedoms.

Appellate Justice Roger W. Boren, joined by Appellate Justice Paul Turner, said that the state, in ruling against the Donahues, "has failed to explain exactly what is so invidious or unfairly offensive" about refusing rentals to unmarried couples.

In dissent, Justice Margaret M. Grignon said that renting to unmarried couples would be only a slight burden on the Donahues. They were still free to practice their religion and renting to the couple would not require them to "aid and abet 'sinners,' " Grignon wrote.

Attorneys for the Fair Employment and Housing Commission asked the state high court to review the appellate ruling, saying it would open the way for businesses to assert religious views to discriminate against consumers.

Terry also sought review, saying the appellate court ruling threatened the rights of countless tenants, violating their rights of privacy in "non-traditional" living arrangements.

Los Angeles Times

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LOS ANGELES
Daily Journal
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Justices to Hear Renter Rights Case

By Philip Carrizosa
Daily Journal Staff Writer

SAN FRANCISCO — The California Supreme Court agreed Thursday to decide whether a deeply religious landlord may legally refuse to rent to unmarried couples, setting aside a controversial appeal court ruling in favor of the landlord.

All seven justices voted to review the decision of the 2nd District Court of Appeal in *Donahue v. Fair Employment and Housing Commission,* 1 Cal.App.4th 387 (1991). Both the commission and attorneys for a couple denied an apartment in Downey asked the state high court to hear the case, saying the appellate decision had opened the door to all types of discrimination.

The court's decision to hear the case "delighted" Los Angeles attorney Thomas F. Coleman, who represents the unmarried couple in the case.

Clash of Two Rights

"I'm extremely encouraged that all seven justices voted to hear the case. That doesn't mean all seven want to overturn the Court of Appeal decision, but they recognize that this raises an important legal question. I hope the court will rule that religion can't be used as a sword of oppression," Coleman said.

The case pits two fundamental constitutional rights against each other. For landlords Agnes and John Donahue, it's a matter of their right to free exercise of their Roman Catholic faith, which considers sexual intercourse outside of marriage to be a mortal sin, including facilitating such behavior.

For would-be tenants Verna Terry and Robert Wilder, their rights to privacy and freedom of association are at stake along with the state's statutory interest in banning housing discrimination on the basis of marital status.

After Agnes Donahue discovered that Terry and Wilder were not married, she refused to rent them a $450-a-month apartment in her five-unit building in 1987. The couple later found a less attractive apartment for $575 monthly, but they complained to the Department of Fair Employment and Housing.

A hearing officer agreed that the Donahues had discriminated unlawfully and ordered them to pay $11,973 in damages. The Fair Employment and Housing Commission overruled the hearing officer and reduced the damages but agreed that the Donahues had discriminated on the basis of marital status.

The Donahues appealed and Los Angeles Superior Court Judge David P. Yagge ordered the commission to set aside its decision. Then last Nov. 27, in a precedent-setting decision, a panel of the 2nd District Court of Appeal said that while the Donahues had violated the statutory ban on marital status discrimination, they were entitled to an exemption because their religious rights overrode the statute.

In its petition for review, the FEHC concentrated on the privacy and free-association rights of tenants, saying the appeal court failed to recognize those rights at all.

Coleman, representing Terry and Wilder, took a different approach, emphasizing that the appeal court ignored many significant facts that made the case much broader, such as Donahue's testimony that she would not rent to divorced couples either.

Based on Unruh Act

Coleman said that because the appeal court also based its decision on the Unruh Civil Rights Act, its ruling would allow similar discrimination beyond the context of housing and into many other areas.

"If the Court of Appeal decision is not overturned, we're going to have holy wars in the consumer marketplace," Coleman said. He said Terry and Wilder never married and are no longer living together.

Fresno attorney Thomas F. Donahue, who represents his parents in the case, declined to comment beyond saying he was "looking forward to the court hearing the case and deciding in our favor."

In his response to the petitions for review, Donahue minimized the effect of the appeal court decision on other cases, noting that the lower court limited its ruling to marital discrimination and landlords who believe that renting to unmarried couples directly infringes on their religion.

The case provides the Supreme Court with an opportunity to resolve an important question of whether a longstanding state standard or a recent federal standard applies in cases involving the free exercise of religion.

Under the state standard laid down in *People v. Woody,* 61 Cal.2d 716 (1964), the courts balance the importance of the state's interests against the severity of the burden imposed on religion. The court has applied that test as recently as 1988.

But in 1990, the U.S. Supreme Court announced a new test, saying a statute that has only an "incidental effect" on religion does not violate the federal Constitution.

In *Donahue,* Justices Roger Boren and Paul Turner applied the traditional balancing test over the objection of dissenting Justice Margaret Grignon.

While the justices agreed to hear the *Donahue* case, it refused to grant review of a nearly identical case involving a Chico widow who also refuses to rent to unmarried couples. Attorneys for Evelyn Smith asked the justices to transfer her case from the 3rd District Court of Appeal, where Smith's appeal has lain fully briefed but unargued since January 1990.

But the justices refused to take over the case, *Smith v. FEHC,* S025049, meaning it will probably remain undecided by the Sacramento appeal court until the Supreme Court decides *Donahue.*

THE WASHINGTON POST

REAL ESTATE

SATURDAY, SEPTEMBER 12, 1992

A Case of Rent Bias and Religious Views

In California, Landlords Deny Apartment to Unmarried Couple

By Jayne Levin
Special to The Washington Post

Agnes and John Donahue own a five-unit apartment building in Downey, Calif., a suburb of Los Angeles. They also are devout Roman Catholics who believe that sex outside marriage is a mortal sin.

So when Verna Terry, and her companion, Robert Wilder, wanted to rent a one-bedroom unit from the Donahues in February 1987, the Donahues followed their deeply held religious beliefs and turned them away.

The Donahues believed that it would be sinful for them to facilitate fornication by renting to an unmarried couple. They didn't want to be put into a position of what they believed would be "eternal, divine retribution" by doing so.

Terry and Wilder believe that they were treated unfairly and charged the Donahues with discrimination under state fair housing and civil rights laws.

But the Donahues claimed that their state constitutional right to free exercise of religion excused them from the statutes.

Now, in a widely watched case, the California Supreme Court will decide whether the Donahues are entitled to assert their religious beliefs to keep out tenants they don't want. A state court of appeals says they can. The dispute has pulled religious and civil rights groups into the debate.

Larger issues are at play, however. The state supreme court will have to grapple with the clash of religious beliefs and privacy and free-association protections. No hearing date has been set.

The state supreme court's decision could stand as a benchmark and set an example for other courts nationwide to follow in similar cases. Other courts have spoken and they have ruled in favor of landlords, mostly because of laws that prohibit cohabitation. California has no such law.

If the Donahues win, it would open the door to discrimination suits in housing and the workplace against, say, women who have an abortion, gay and lesbian couples or individuals who use drugs or alcohol, according to some attorneys.

"Enforcement of the fair housing laws would be almost impossible," said Thomas F. Coleman, a Los Angeles attorney who is representing Terry. "The crazier the belief, the more protection people would get to either not rent or evict somebody," he said.

Thomas F. Donahue, the Donahues' son as well as their attorney, disagreed. "This is not a far-reaching case," he said. "It has very narrow applications."

Donahue said a favorable ruling would only apply to landlords who share his parents' religious belief that sex outside marriage is a sin.

He noted that discrimination on the basis of marital status already exists in the state of California, pointing to a legal loophole that allows colleges and universities to establish special housing for married students.

The emotionally charged case has drawn attention from an eclectic mix of religious and civil rights groups, from the American Civil Liberties Union to the Lambda Legal Defense and Education Fund to a coalition of 21 organizations representing Mormons, Baptists, Jews and Christians, among others.

For them, the problem is not so much whether sex out of wedlock is morally right or wrong, although clearly the religious right stressed the

See RENT, F6, Col. 1

RENT, From F1

Republican theme of family values in friend-of-the-court briefs filed on behalf of the Donahues.

The problem, as it turns out, is over the argument of California Attorney General Daniel E. Lungren to throw out the appeals court decision, handed down last November.

The appeals court granted the Donahues an exemption from both the state fair housing and civil rights laws, overturning a decision by the state Fair Employment and Housing Commission. The court found that the statutes infringed on the Donahues' religious practices, even though it held that the fair housing law protected unmarried couples from discrimination.

Lungren is asking the California Supreme Court to adopt the legal analysis in *Employment Division v. Smith*, a 1990 U.S. Supreme Court case that made it much easier for governmental bodies to override claims of religious freedom. The Smith decision was viewed by many as an immense step backward for religious liberty protections.

In that decision, the court found that First Amendment religious freedom claims do not justify breaking laws that apply generally to people and are neutral on religion. The decision prohibited Native Americans from using peyote in religious rituals.

Lungren's argument does not satisfy groups on the right or left, be they religious or public interest.

Fred M. Blum, president of the American Jewish Congress for the Northern Pacific Region, filed a brief in the case supporting the would-be tenants, but also said the group does not want the Donahues' religious freedom abridged.

Blum said, "Smith has been a disaster on a national level and we don't want to see that disaster brought into the state of California."

Jordan W. Lorence, who filed a friend-of-the-court brief in support of the Donahues, said, "Because [state officials] want the Donahues to lose, they're basically wiping out religious liberties for everybody else.

"I say, that is swatting a gnat with an atom bomb," said Lorence, who also represents a Christian widow who is a landlord charged with housing discrimination in Chico, Calif.

Kathleen W. Mikkleson, a state deputy attorney general, said that ending housing discrimination is the compelling legal reason to protect unmarried couples. Unfortunately, she said, the housing commission took a narrower view and defined the reason to support the would-be tenants as eliminating marital-status discrimination.

While the debate rages on over which way the California Supreme Court will rule, Terry said she has broken up with Wilder, partly the result of the stress brought on by the case.

She said she is renting from friends and that Wilder is in San Diego, where he bought a house. But Terry is not distraught. "We're still friends," she said.

THE WALL STREET JOURNAL TUESDAY, AUGUST 25, 1992

California Top Court to Wrestle With 'Sin' vs. Tenants' Rights

By R. GUSTAV NIEBUHR
Staff Reporter of THE WALL STREET JOURNAL

Claims to freedom of religion will be pitted against allegations of housing discrimination when the California Supreme Court hears a case that has drawn national attention from religious and civil-rights groups.

The case stems from the refusal of a Los Angeles area couple, John and Agnes Donahue, to rent an apartment to an unmarried couple for reasons of religious belief. The Donahues' attorney says they believe they would be committing a sin if they allowed sex outside marriage to take place on their property.

The California Supreme Court's decision could send a signal to other courts around the country on how to deal with the clash of religious beliefs and individuals' rights. If the court decides in favor of the Donahues, it could clear the way for similar lawsuits on religious grounds, some attorneys say.

Although a date hasn't been set, the state Supreme Court agreed to hear the case after an intermediate appeals court ruled in November for the Donahues, citing constitutional guarantees of religious freedom.

The intermediate appeals court overturned a state Fair Employment and Housing Commission decision in favor of Verna Terry, the woman who attempted to rent the Donahues' apartment. The commission, which ruled that the Donahues violated state fair-housing and civil-rights statutes, ordered the couple to pay Ms. Terry and her companion more than $7,000 in damages.

Attorneys representing the state commission couldn't be reached for comment. But Thomas F. Coleman, the Los Angeles attorney representing Ms. Terry, says the case has wide implications because it would open up discrimination against a diverse group of people. If landlords can claim religious exemptions to fair-housing laws, Mr. Coleman says, a large number of people would be exposed to discriminatory practices, including homosexuals, single parents or individuals who use tobacco or alcohol.

"This is not an isolated case," he contends. "Everybody is a 'sinner' in somebody's book."

Mr. Coleman is also concerned that tenants' right to privacy is at stake in the case. A victory for the Donahues would create a general situation in which "the landlord presumes the right to ask questions of the tenants' sexual lives," he says. "If you're out looking for an apartment, you'll never know if you're protected" by the laws, Mr. Coleman says. "This could be applied to conduct discovered while you're a tenant."

Further, a ruling for the Donahues might create a precedent that could also be used in the workplace, he says. "Some fundamentalist Christian employer could then use a litmus test on whether you're going to be hired or fired," he says.

Not so, replies Thomas F. Donahue, the Fresno attorney for the landlords, who are also his parents. "It's clear that this case has extremely limited applicability," he says.

Mr. Donahue says a decision for his parents would apply only to landlords who so oppose sex outside marriage that they believe they would be "putting themselves in the position of eternal, divine retribution" if they facilitated fornication by renting to an unmarried couple. "There aren't that many people who feel this way," he says.

Mr. Donahue says the state of California itself already allows housing discrimination based on marital status by permitting colleges and universities to reserve campus housing specifically for married students. "Once they allow themselves an exemption, it is very difficult for them to claim that no one else can violate a right," he says. Because such exemptions already exist, he says, a ruling in favor of the Donahues would "not affect any of the other discrimination statutes."

The case has drawn close attention from an ideologically diverse array of religious groups. Organizations representing liberal Protestants, conservative evangelicals and several other groups have signed a friend-of-the-court brief asking the court to apply a "compelling interest" standard – that is, to decide in favor of the tenant only if the court can find that the government has a compelling reason to restrict religious beliefs or practices.

The friend-of-the-court brief doesn't ask the court to necessarily rule in favor of the landlord. But lawyers for the groups say the brief is intended to persuade the court not to follow a broad decision two years ago by the U.S. Supreme Court that governmental bodies need not make special exemptions for religious groups when

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enforcing general laws.

"Our concern is that state courts not follow the lead of the U.S. Supreme Court and that they continue to provide strict scrutiny and strong protection" for free exercise of religion, says Richard T. Foltin, director of governmental affairs for the American Jewish Committee, which signed the brief.

But some other groups, while also supporting the compelling-interest standard, believe that state officials already met that standard when they originally found against the Donahues.

"Discrimination is discrimination, and if you discriminate against one group it has a negative effect on all groups," says Tzivia Schwartz, Western states counsel for the Anti-Defamation League of B'nai B'rith, which filed a friend-of-the-court brief on behalf of Ms. Terry and the housing commission.

In addition, Ms. Schwartz says one reason her organization is so concerned about the case is that it involves rental housing, in which a "long history of discrimination" against various minorities preceded the enactment of fair-housing and civil-rights laws.

"We think that when one chooses to participate in commercial activities [such as renting apartments] that one can't impose one's personal religion on . . . governmental restrictions," she says.

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