CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JOHN V. DONAHUE et al., Plaintiffs and Respondents, v. FAIR EMPLOYMENT AND HOUSING COMMISSION, Defendant and Appellant.	B052118 (Super. Ct. No. C754458)

APPEAL from a judgment of the Superior Court of Los Angeles County. David P. Yaffe, Judge. Affirmed, as modified.

John K. Van De Kamp and Daniel E. Lungren, Attorneys General, Andrea Sheridan Ordin, Chief Assistant Attorney General, Marian M. Johnston, Supervising Deputy Attorney General, and Manuel M. Medeiros and Kathleen W. Mikkelson, Deputy Attorneys General, for Defendant and Appellant.

Thomas F. Donahue for Plaintiffs and Respondents.

Respondents, Agnes and John Donahue, declined to accept a rental application from an unmarried cohabiting couple because renting to the couple would compromise the Donahues' sincerely held religious belief that fornication and its facilitation are sins. We agree with appellant, the Fair Employment and Housing Commission (FEHC), that the Donahues' refusal to rent violated Government Code section 12955, which prohibits "marital status" discrimination. However, we find that the Donahues are entitled to exemption from section 12955 because the state's statutory interest in protecting unmarried cohabiting couples from discrimination is not such a paramount and compelling state interest as to outweigh the Donahues' legitimate assertion of their right to the free exercise of religion under the California state constitution.

FACTS

In January of 1987, Verna Terry and Robert Wilder, an unmarried couple, shared with another person a two-bedroom apartment on Jib Circle in Downey. The apartment rent was $795 per month, approximately $400 of which was paid jointly by Terry and Wilder. At the end of January, Terry and Wilder gave notice to their landlord that they would leave by March 1, 1987. They gave notice before they secured another apartment because they wanted to avoid paying double rent and wanted their deposit money available from the Jib Circle apartment to use for a new rental.

During the first three weeks of February 1987, Terry and Wilder searched without success for a new rental which was suitable. They wanted a new rental in a good neighborhood in Downey. They needed an apartment with major appliances, laundry facilities and a garage in which Wilder could store his tools.

On February 22, 1987, with approximately one week left to find an apartment, Terry and Wilder saw in front of the Donahues' five-unit La Reina Avenue apartment building a sign advertising an apartment for rent. Terry and Wilder liked the appearance and location of the building, and Terry telephoned later in the day to inquire about the apartment. When Terry called about the apartment, she spoke on Wilder's behalf as well.

Terry spoke with Agnes Donahue, who told Terry that the available apartment had one bedroom, came with a stove and refrigerator, and rented for $450. Terry remarked that the apartment seemed suitable and inquired whether a garage was available. Donahue stated that a garage might become vacant soon and would rent for an additional $50 per month. Terry replied that her "boyfriend" needed an enclosed garage for his tools. Donahue responded, "Oh, your boyfriend." In response to Donahue's questions, Terry indicated that she and her boyfriend were not married and might possibly marry in the

future but had no specific plans or date to marry each other. Donahue stated, "Oh, I'm really old-fashioned, and I don't approve of that sort of thing. I don't rent apartments to unmarried couples." Donahue further related that she had previously rented to an unmarried couple but regretted doing so and refused to do so again.1/

Donahue did not provide Terry with a rental application. Terry never saw the inside of the La Reina Avenue apartment. Terry hung up the telephone and told Wilder what Donahue had said about not renting to an unmarried couple. Terry and Wilder were shocked, offended and upset by Donahue's rejection of them. The next day, Wilder continued their search for an apartment. Terry remained upset that they

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1/ As indicated subsequently by the testimony at the administrative hearing and as stated in the FEHC's decision, "[The Donahues] are devout Roman Catholics. Their religion teaches that sexual intercourse outside of marriage is a mortal sin, for which the sinner will go to hell unless the sin is forgiven before death. Agnes Donahue believes firmly in this rule, and has a similarly sincere belief, rooted in her religion, that it is sinful for her to aid another person in the commission of a sin. [¶] Because of these beliefs, Agnes Donahue believed strongly that it would be sinful for her to rent an apartment to an unmarried couple and, after regretting renting to one such couple years before, she had consistently refused to do so again. [The Donahues] regularly rent to married couples and to single tenants, and have no policy or practice of excluding one of these groups in favor of the other."

would be "quizzed about their personal life," and was confused about what to do and how to "present [themselves] to a prospective landlord."

As the end of the last week of the rental period in their existing apartment approached, Terry and Wilder disagreed, bickered and became nervous and frustrated. Terry and Wilder took time off from their jobs to search for an apartment. They also contacted the Department of Fair Employment and Housing (Department). By the end of the last week in February, they found an apartment in Downey for $575 per month. The apartment had no laundry facilities, was located on a noisier street, needed cleaning and had no stove or refrigerator, which they had to purchase for $800. The new apartment was small but had two bedrooms, and there was no additional charge for the use of half of a two-car garage. On the rental agreement for that apartment Terry falsely signed her name as "Verna Terry Wilder," but eventually told their landlord that she and Wilder were not married.

On March 10, 1987, Terry and Wilder each filed complaints with the Department alleging housing discrimination based on marital status. The Director of the Department thereafter charged the Donahues with arbitrary discrimination by a business establishment in violation of the Unruh Civil

Rights Act (Civ. Code, § 51; Gov. Code, § 12948)[2/] and unlawful housing discrimination based on marital status in violation of the Fair Employment and Housing Act

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2/ Civil Code section 51 provides, in pertinent part, as follows: "This section shall be known, and may be cited, as the Unruh Civil Rights Act. [¶] All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (Subsequently amended (Stats. 1987, ch. 159, § 1) to proscribe discrimination based on blindness or other physical disability.)

The types of discrimination listed in Civil Code section 51 are illustrative and not exhaustive. (Koire v. Metro Car Wash (1985) 40 Cal.3d 24, 28.) Civil Code section 51 prohibits every type of discrimination by a business establishment that is not related to legitimate business purposes or is not intended to further some compelling public policy. (Id. at pp. 30-33; Marina Point, Ltd. v. Wolfson (1982) 30 Cal.3d 721, 725, 737.)

Government Code section 12948 provides as follows: "It shall be an unlawful practice under this part for a person to deny or to aid, incite, or conspire in the denial of the rights created by Section 51 or 51.7 of the Civil Code."

(Gov. Code, § 12955, subds. (a), (b), (c) & (d)).[3/] After an administrative hearing in July of 1988, the hearing officer found that the Donahues had unlawfully discriminated, in violation of Government Code section 12955, and ordered, inter alia, that the Donahues pay actual damages of $2,493.34, punitive damages of $2,000, and damages for emotional distress of $7,480.

On December 29, 1988, the FEHC declined to adopt the hearing officer's proposed decision and provided the opportunity for further argument on whether the Donahues' discrimination was exempt from the purview of relevant statutes because of the constitutional guarantees of the free

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3/ Government Code section 12955 provides, in pertinent part, as follows: "It shall be unlawful: [¶] (a) For the owner of any housing accommodation to discriminate against any person because of the race, color, religion, sex, marital status, national origin, or ancestry of such person. [¶] (b) For the owner of any housing accommodation to make or to cause to be made any written or oral inquiry concerning the race, color, religion, sex, marital status, national origin, or ancestry of any person seeking to purchase, rent or lease any housing accommodation. [¶] (c) For any person to make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a housing accommodation that indicates any preference, limitation, or discrimination based on race, color, religion, sex, marital status, national origin, or ancestry or an intention to make any such preference, limitation, or discrimination. [¶] (d) For any person subject to the provisions of Section 51 of the Civil Code, as that section applies to housing accommodations, as defined in this part, to discriminate against any person because of race, color, religion, sex, marital status, national origin, or ancestry with reference thereto. . . ."

exercise of religion. On August 10, 1989, the FEHC rendered its decision and ordered as follows: (1) that the Donahues cease and desist from discriminating in their housing accommodations on the basis of marital status and post appropriate public notices; (2) that the Donahues offer the same or similar housing to Terry and Wilder; (3) that the Donahues pay to Terry and Wilder $1,023 for the lost income when they could not work because they had to search for another apartment after their rejection and because they attended the FEHC hearing; (4) that the Donahues pay to Terry and Wilder $75 per month (reflecting the higher monthly rental of their present apartment in comparison to that for rent by the Donahues) from the date of their rejection by the Donahues (February 22, 1987) until they are either offered comparable housing by the Donahues or advised that no such housing is available; (5) that the Donahues pay Terry $4,000 and Wilder $2,000 as compensation for their emotional injuries; and (6) that the Donahues pay all damages ordered plus compound interest at a rate of 10 percent per year.

On March 8, 1990, the Donahues filed in the superior court a petition for a writ of mandate. While the Donahues' petition was pending, on May 7, 1990, the FEHC stipulated for purposes of judicial economy that an opinion from the First District Court of Appeal, holding that the FEHC lacked

jurisdiction to award damages for emotional distress, was binding on the superior court while the petition for review was pending in the California Supreme Court. Subsequently, the Supreme Court reached a decision in the First District case and affirmed the impropriety of the FEHC award of damages for emotional distress. (See Walnut Creek Manor v. Fair Employment & Housing Com. (1991) 54 Cal.3d 245.) However, the superior court did not grant the Donahues' petition on the basis of the decision of the First District in Walnut Creek Manor. Rather, the superior court granted the petition, remanded the matter to the FEHC, and ordered that the FEHC set aside its decision and permit the parties to submit further briefing. The further briefing was to address the legislative history regarding the statutory prohibition against marital status discrimination in housing and to determine whether the statute was intended to cover single people, cohabiting as a couple, or only single people, living alone, and married couples.

The FEHC appeals.[4/]

4/ As was done in a similar case where the trial court avoided its obligation to decide the case before it (see Code Civ. Proc., § 170; 2 Witkin, Cal. Procedure (3d ed. 1985) Jurisdiction, § 288, pp. 694-695), "[r]ather than treating the case as unadjudicated and remanding the matter for consideration and determination by the trial court, in the interest of judicial economy, we elect to review the case and to decide the [statutory and] constitutional questions presented." (Atkisson v. Kern County Housing Authority (1976) 59 Cal.App.3d 89, 95.)

DISCUSSION

I. Statutory proscriptions against discrimination in housing on the basis of "marital status" protect unmarried cohabiting couples.

The Donahues contend that the FEHC's findings of unlawful discrimination are premised on an improper interpretation of the term "marital status." The Donahues acknowledge that two cases involved the protection of unmarried couples from marital status discrimination in housing. (Hess v. Fair Employment & Housing Com. (1982) 138 Cal.App.3d 232, and Atkisson v. Kern County Housing Authority, supra, 59 Cal.App.3d 89.) Atkisson held that a county housing authority's regulation prohibiting cohabitation in public housing violated federal agency rules and due process and equal protection principles. Hess found that an unmarried couple had been discriminated against in housing on the basis of their marital status in violation of Government Code section 12955 and that no legitimate business interest existed to justify the landlord's discrimination. The Donahues urge, however, that neither Atkisson nor Hess specifically addressed the meaning of the term "marital status" and are thus not authority for the proposition that the statutory proscription against marital status discrimination includes discrimination against an unmarried cohabiting couple. Indeed, an opinion is

not authority for an issue not addressed in the decision. (People v. Harris (1989) 47 Cal.3d 1047, 1071; Ginns v. Savage (1964) 61 Cal.2d 520, 524, fn. 2; People v. Parrish (1986) 185 Cal.App.3d 942, 947.)

According to the Donahues, the Atkisson and Hess opinions misinterpreted the term "marital status." The Donahues contend that the term "marital status" relates only to a circumstance or condition regarding marriage, such as unmarried (single), divorced, widowed or married, and not to a couple's activities or life style, such as the cohabitation of an unmarried couple. The Donahues also argue that the legislative history does not establish that the Legislature intended specifically to protect unmarried cohabiting couples.

To determine whether Government Code section 12955 protects unmarried cohabiting couples from discrimination in housing we must ascertain the intent of the Legislature, which is the fundamental premise and objective of statutory interpretation. (People v. Overstreet (1986) 42 Cal.3d 891, 895; California Teachers Assn. v. San Diego Community College Dist. (1981) 28 Cal.3d 692, 698.) "In determining such intent, the court 'turns first to the words themselves for the answers' [citations], giving to them 'their ordinary and generally accepted meaning' [citation]." (People v. Craft (1986) 41 Cal.3d 554, 559-560.) "When the language is clear

and unambiguous, there is no need for construction. [Citations.] When the language is susceptible of more than one reasonable interpretation, however, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. [Citations.]" (People v. Woodhead (1987) 43 Cal.3d 1002, 1007-1008.)

With respect to the words in the statute here, the operative phrase in Government Code section 12955, "marital status," is susceptible of more than one reasonable interpretation. The phrase may be narrowly interpreted, as the Donahues urge, to denote the classification of people as either a married couple or as a single, unmarried person. The phrase may also be more broadly construed, as the FEHC argues, to denote the classification or people as either a married couple or as unmarried, whether living alone or cohabiting with another person.

Because the words themselves provide no definitive answer, we must look to extrinsic sources to determine whether the phrase should be narrowly or broadly construed. To attempt to ascertain legislative intent, we have reviewed the history of the development of and opposition to the pertinent

legislation. (See, e.g., California Mfrs. Assn. v. Public Utilities Com. (1979) 24 Cal.3d 836, 844; Arvin Union School Dist. v. Ross (1985) 176 Cal.App.3d 189, 199.) The FEHC concedes, and we agree, that the development of and the opposition to legislative prohibitions against discrimination based on marital status "may have been more concerned about homosexual relationships and communal living situations, than with unmarried couples of different sex." It appears to this court that the legislative actions prior to the enactment of proscriptions against marital status discrimination are not particularly helpful in attempting to ascertain legislative intent.

However, the Legislature's intent in prohibiting marital status discrimination may be inferred from the chronology of relevant case law. The failure of the Legislature to change the law on a particular respect when the subject is generally before it and changes in other respects are made is indicative of an intent to leave the law as it stands in the aspects not amended. (Estate of McDill (1975) 14 Cal.3d 831, 837-839.) The Legislature is deemed to be aware of existing judicial decisions and to have amended statutes in light of such decisions which have a direct bearing on the statute. (People v. Overstreet, supra, 42 Cal.3d 891, 897.)

After the Legislature enacted the prohibition of marital status discrimination in housing (Stats. 1975, ch. 1189, § 3, p. 2943), one judicial opinion in 1976 held that a housing authority's inflexible regulation created an irrebuttable presumption of "immorality, irresponsibility and the demoralization of tenant relations from the fact of unmarried cohabitation" (Atkisson, supra, 59 Cal.App.3d at p. 97) which was arbitrary, irrational and violative of the federal constitutional rights to privacy, equal protection and due process. (Id. at pp. 96-100.) Although Atkisson apparently was not premised on a state statutory violation because the legislation prohibiting discrimination in housing was amended to add the classification of marital status after the case was litigated at the trial level, the court observed that the amendment was nonetheless applicable as a "general policy statement . . . by the State of California." (Id. at p. 99.) In 1980, the Legislature repealed the Fair Employment Practices Act (Lab. Code, §§ 1410 et seq.) and reenacted it as Government Code sections 12900 through 12996, as a part of the California Fair Employment and Housing Act. (Stats. 1980, ch. 992, § 4.) The Legislature made only minor technical changes consistent with an agency reorganization plan from the executive branch, but made no substantive changes. We must assume that the Legislature in 1980 was aware of Atkisson's

interpretation that the statutory proscription against marital status discrimination includes discrimination against an unmarried cohabiting couple, and that the statutory proscription reflects a "general policy statement" by the state. (See Harris v. Capital Growth Investors XIV (1991) 52 Cal.3d 1142, 1155-1156.). We must further assume that the failure to alter this judicial interpretation when the Legislature amended those statutes at issue constitutes acquiescence in this judicial interpretation. (Ibid.; Marina Point, Ltd. v. Wolfson, supra, 30 Cal.3d 721, 734.)

A related provision in the statutory scheme of which Government Code section 12955 is a part also supports the interpretation that marital status includes single people cohabiting as a couple. The Legislature prohibited marital status housing discrimination against any "person" (Gov. Code, § 12955, subd. (a)) and defined "person" to include "one or more individuals" (Gov. Code, § 12925, subd. (d)). The Alaska Supreme Court relied upon identical statutory language to support its conclusion that marital status discrimination includes discrimination against two individuals, and that discrimination against unmarried couples was prohibited. (Foreman v. Anchorage Equal Rights Com'n (Alaska 1989) 779 P.2d 1199, 1201-1202.) Similarly, the Massachusetts Supreme Judicial Court observed that their state's antidiscrimination

statute described the protected class of persons both in singular and plural terms, and thus protected an unmarried couple living together. (Housing Auth. v. Com'n Against Discrim. (1989) 406 Mass. 244, 246-247, 547 N.E.2d 43, 45.) Government Code section 12955 is similarly worded and compels the same conclusion as that reached in other jurisdictions with similarly worded statues. (See Webster v. State Bd. of Control (1987) 197 Cal.App.3d 29, 37, fn. 3.)

The Legislature's intent to include an unmarried cohabiting couple within the protections of Government Code section 12955 is consistent with the absence of any criminal penalties for cohabitation. California has never prohibited cohabitation by unmarried couples. State law only prohibited adulterous cohabitation, i.e., cohabitation between two persons where each person is married to another. (In re Cooper (1912) 162 Cal. 81; see Ex parte Isojoki (N.D. Cal. 1915) 222 F. 151, 153.) Even the proscription against adulterous cohabitation was repealed in 1975 (Stats. 1975, ch. 71, § 5), the same year in which the Legislature added the statutory proscription against marital status discrimination in housing. Accordingly, no state statute outlawing cohabitation or fornication exists to undermine a finding of the legislative intent to prohibit housing discrimination against unmarried cohabiting couples. (Cf. State by Cooper v.

French (Minn. 1990) 460 N.W.2d 2, 10; McFadden v. Elma Country Club (1980) 26 Wash.App. 195, 613 P.2d 146, 148.)

Our finding of a legislative intent to prohibit housing discrimination against unmarried cohabiting couples is also supported by the rule of statutory construction that when a statute contains an exception to a general rule, no other exceptions should be implied. (See, e.g., Strang v. Cabrol (1984) 37 Cal.3d 720, 725; Wildlife Alive v. Chickering (1976) 18 Cal.3d 190, 195-196.) Here, the Legislature specifically excepted college and university housing for "married students" (Gov. Code, § 12995, subd. (b)) from the proscription against marital status discrimination in housing. We therefore infer that since the Legislature specifically excepted married couples in only one narrow context, its general reference in Government Code section 12955 to "marital status" includes not only single people living alone, but any couple, whether married or not.

Finally, contrary to the Donahues' assertion, it is of no consequence that they do rent to single people other than unmarried cohabiting couples, such as single persons who live alone or divorced persons. Just because the Donahues do not discriminate against all single persons does not mean that they do not discriminate against some single persons. Even if the discrimination is based on the Donahues' objections to

what they characterize as a certain "lifestyle," that lifestyle is premised upon and defined by the absence of marriage and thus constitutes discrimination based on marital status. (Cf. Bob Jones University v. United States (1983) 461 U.S. 574, 605 (racial discrimination found in prohibiting enrollment of interracial couples, even though all races were allowed to enroll and policy was applied to all races).)[5/]

II. The Donahues are entitled to a constitutionally based religious exemption from laws which protect unmarried cohabiting couples from discrimination in housing.

On the record before us, the sincerity and depth of the Donahues' religious convictions are unquestioned. They are devout Roman Catholics who believe that sexual intercourse outside of marriage is a mortal sin and that to assist or facilitate such behavior also constitutes a sin. Because of their religious convictions, the Donahues declined to rent an apartment to an unmarried cohabiting couple.

The Donahues contend that both the state and federal constitutional guarantees of the free exercise of religion

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5/ Since the Donahues' conduct in discriminating against an unmarried cohabiting couple is proscribed by Government Code section 12955, we need not address whether the conduct is also proscribed by Civil Code section 51. (See Atkisson, supra, 59 Cal.App.3d at p. 99.) To the extent that Civil Code section 51 applies, the existence of a constitutionally based exemption to Government Code section 12955 (post, pp. 18-40) would apply, as well, to section 51.

(U.S. Const., 1st Amend.; Cal. Const., art. I, § 4)[6/] constitute a defense to their discrimination against an unmarried cohabiting couple. In analyzing a claim of the constitutional right to the free exercise of religion, the analysis is generally similar under both federal and state constitutional law. (See, e.g., Molko v. Holy Spirit Assn. (1988) 46 Cal.3d 1092, 1112, cert. den. (1989) 490 U.S. 1084.)[7/] In the present case, however, there is a difference between the state constitutional analysis and the federal constitutional analysis.

The United States Supreme Court in Employment Division v. Smith (1990) 494 U.S. 872 [108 L.Ed.2d 876, 110 S.Ct. 1595] recently addressed an asserted constitutionally

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6/ The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ." The First Amendment is applicable to the states, as well, by its incorporation into the Fourteenth Amendment. (Cantwell v. Connecticut (1940) 310 U.S. 296, 303.)

Article I, section 4 of the California Constitution provides, in pertinent part, that "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."

7/ California courts must, of course, independently determine the scope of a claim asserted under our state constitution. (See Sands v. Morongo Unified School Dist. (1991) 53 Cal.3d 863, 883; Bennett v. Livermore Unified School Dist. (1987) 193 Cal.App.3d 1012, 1017.)

based religious exemption from a statutory proscription, and its analysis "dramatically departs from well-settled First Amendment jurisprudence." (Id. at p. ___ [108 L.Ed.2d at p. 893] (conc. opn.).) In Smith, the court denied a constitutionally based religious exemption to two members of the Native American Church who were fired from their jobs and denied unemployment benefits because they violated a criminal narcotics statute by ingesting peyote for sacramental purposes at a religious ceremony. The court split five to four on the appropriate test for a constitutionally based religious exemption. Four justices urged the application of the traditional balancing test and compelling state interest analysis, but the majority focused on the criminal nature of the law and found that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' [Citation to a quoted concurring opn.]." (Id. at p. ___ [108 L.Ed.2d at p. 886].) The majority's opinion held that a "generally applicable and otherwise valid" statute which has the "incidental effect" of prohibiting the exercise of religion, does not offend the First Amendment of the United States Constitution. (Id. at p. ___ [108 L.Ed.2d at p. 885].)

The outcome in Smith is, of course, contrary to that in People v. Woody (1964) 61 Cal.2d 716, where the California Supreme Court held that practitioners of the Native American Church were entitled to a constitutionally based religious exemption from state laws prohibiting possession and use of peyote. Woody relied on federal constitutional authority and based its holding on the Free Exercise Clause of the First Amendment, though the exemption was claimed on both federal and state constitutional grounds. (Id. at p. 718, fn. 1.) Apart from the obvious effect of Smith on the holding in Woody, the balancing test and a compelling state interest analysis still applies under state constitutional law.

The California Supreme Court has recently reiterated its long-held approach that "Government action burdening religious conduct is subject to a balancing test, in which the importance of the state's interest is weighted against the severity of the burden imposed on religion." (Molko v. Holy Spirit Assn., supra, 46 Cal.3d at p. 1113 (liability of a religious organization for fraudulent misrepresentation in deceiving church members into subjecting themselves, with their knowledge or consent, to coercive persuasion).) Molko was based on independent state constitutional grounds, as well as on federal constitutional law as it existed prior to the United States Supreme Court's opinion in Smith. (Molko, supra, at pp. 1112, 1119.)

Contrary to the opinion of our dissenting colleague, we view our Supreme Court's specific reference twice in its analysis in Molko to the state constitution as an intention to decide the case not only on First Amendment grounds, but also on the basis of independent state constitutional grounds. As the dissenting opinion admits, the court in Molko stated that the cause of action at issue there "did not violate the state constitution." (Post, p. 7.) Such an observation should surely lead to the conclusion that the case was decided not only on federal but also on state constitutional grounds. Moreover, after Molko and prior to Smith, the California Supreme Court again reviewed a free exercise claim and again decided the case specifically on both federal and state constitutional grounds, using a balancing test and compelling state interest analysis. (People v. Walker (1988) 47 Cal.3d 112, 139-141 (neither First Amendment nor article I, section 4 of the California Constitution bars involuntary manslaughter and child endangerment prosecution of parents whose child died after receiving treatment by prayer in lieu of medical attention).) Therefore, the California Supreme Court has indeed specifically adopted and employed the pre-Smith federal

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balancing test and compelling state interest analysis as a matter of state constitutional law.[8/]

The California Supreme Court has not yet addressed the application of Smith. Unless the California Supreme Court adopts the approach in Smith, even if we found the approach in Smith preferable,[9/] we are bound to continue to follow the balancing test and compelling state interest analysis as a matter of state constitutional law. (Auto Equity Sales v. Superior Court (1962) 57 Cal.2d 450, 455.) Our pre-Smith approach therefore relies upon pre-Smith case law (both state and illustrative federal constitutional cases) for our conclusion that independent state constitutional grounds

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8/ The dissenting opinion also points out that "cogent reasons" must exist before a state court construing a state constitution should depart from a construction by the United States Supreme Court of a similar federal constitutional provision (Raven v. Deukmejian (1990) 52 Cal.3d 336, 353) and nothing in Molko suggests cogent reasons for a standard different than the federal. From this observation, the dissent surmises that there is nothing in Molko to conclude that our Supreme Court would adopt either Smith or the balancing test and compelling state interest analysis. (Post, pp. 7-8.) First, no "cogent reasons" would be stated in Molko because the opinion did not deviate from, but rather paralleled, the federal pre-Smith analysis. Second, it is not the task of this court to speculate regarding the California Supreme Court, but rather to follow the law as set forth in Molko and Walker.

9/ We do wonder why religious freedom, as opposed to the free speech component of the First Amendment, has been relegated to a status leaving it with the inferior protection of the incidental effect test in Smith.

provide the Donahues a constitutionally based religious exemption from the law prohibiting discrimination against an unmarried cohabiting couple.10/

As established by pre-Smith case law, "Although the prohibition against infringement of religious belief is absolute, the immunity afforded religious practices by the First Amendment is not so rigid. [Citations.] But the state may abridge religious practices only upon a demonstration that some compelling state interest outweighs the [person's] interests in religious freedom. [Citations.]" (People v.

10/ Because we hold that the Donahues have a constitutionally based religious exemption on state constitutional grounds under pre-Smith case law, we need not address the Donahues' federal constitutional claim under Smith (or a state constitutional claim using the Smith analysis). We note, however, that Smith's analysis upholding without any compelling governmental interest a generally applicable, religion-neutral law despite its burden upon the exercise of religion recognizes as an exception hybrid constitutional situations. The hybrid constitutional situations occur in contexts where "the First Amendment bars application of a neutral, generally applicable law to religiously motivated action [and] have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press [citations], or the right of parents . . . to direct the education of their children [citation]." (Employment Division v. Smith, supra, 494 U.S. at p. ___ [108 L.Ed.2d at p. 887].) Here, arguably, a hybrid state constitutional claim exists implicating the Donahues' "inalienable rights . . . [of] . . . enjoying . . . liberty, acquiring, possessing, and protecting property, and pursuing and obtaining . . . happiness . . . ." (Cal. Const., art. I, § 1.)

Woody, supra, 61 Cal.2d at p. 718.) Moreover, "no showing merely of a rational relationship to some colorable state interest [will] suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation.' [Citation.]" (Sherbert v. Verner (1963) 374 U.S. 398, 406.) "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance the legitimate claims to the free exercise of religion." (Wisconsin v. Yoder (1972) 406 U.S. 205, 215.) The burden on a person's exercise of religious freedom is permitted only when (1) the state's interest is overriding, (2) the burden is "essential" (United States v. Lee (1982) 455 U.S. 252, 257) and (3) the state's interest cannot be achieved by alternative, less "restrictive means." (Thomas v. Review Bd., Ind. Empl. Sec. Div. (1981) 450 U.S. 707, 718.)

The FEHC applies a constitutional balancing process to the present case, but its analysis is flawed. The FEHC balances, on the one hand, the absence of any religious belief required by or furthered by the Donahues' activities as landlords. On the other hand, it balances the general "compelling state interest in eradicating invidious discrimination" (Pines v. Tomson (1984) 160 Cal.App.3d 370,

392)[11/] and the state's general public policy requiring nondiscrimination in housing. (Gov. Code, § 12920.) However, the FEHC's analysis misses the mark as to both the factors it balances.

A. The Donahues' Interest in the Free Exercise of Religion

According to the FEHC, the Donahues are "free to believe that cohabitation is a sin" but when they function as landlords in the commerce of this state, the Donahues "are not free to act so as to impose their own religious beliefs on their tenants." The FEHC urges that granting the Donahues an exemption from the proscriptions of Government Code section 12955 would impermissibly shift the burden of the Donahues' religious convictions onto their tenants and violate the establishment clause of the First Amendment by lending de facto governmental support to the Donahues' religious purposes, effectively promoting religion. The FEHC's strained reasoning misconstrues the effect of an exemption in the present case.

11/ The Pines decision (holding defendants liable for discrimination based on the plaintiffs' religious beliefs) is obviously distinguishable from the case at bench because religious discrimination has a constitutional basis and is considered "invidious" when applying the "compelling state interest" test. (Pines v. Tomson, supra, 160 Cal.App.3d at p. 391.)

An exemption in the present case would not impose religious beliefs on others, who are entitled to the same religious freedom. The Donahues do not require their tenants to adhere to any religious beliefs. The Donahues simply do not rent to unmarried cohabiting couples because to do so would compromise their own religious beliefs. The Donahues' asserted religious exemption does not involve their imposition of beliefs upon others, but rather their own attempt to personally refrain from, as they see it, a sinful facilitation of impermissible behavior.

1. Sincerely Held Religious Belief

The initial requirement for an exemption from laws imposing sanctions for the claimed exercise of religion is that the claimant have a sincerely held religious belief with regard to the contested matter. (Thomas v. Review Bd., supra, 450 U.S. at pp. 714-716; Wisconsin v. Yoder, supra, 406 U.S. at pp. 215-216.) This is a subjective, personal test, and we are not to question the propriety or correctness of this belief or religious doctrine. (United States v. Lee, supra, 455 U.S. 252, 257; Thomas v. Review Bd., supra, 450 U.S. at pp. 714-716.) According to the religious convictions of the Donahues, sexual intercourse outside of marriage is a mortal sin, and assisting or facilitating in such behavior is also a sin. Appellant concedes the sincerity of the Donahues'

belief, and the Donahues have thus satisfied the initial prerequisite for their claimed constitutional exemption.12/

2. Burden on Religious Belief

A claimed constitutional exemption must also involve a governmental regulation which burdens the sincerely held religious belief. An analysis of the burden focuses on "the degree that the government's requirement will, directly or indirectly, make the believer's religious duties more difficult or more costly." (L. Tribe, American Constitutional Law (2d ed. 1988) § 14-12, p. 1247.) A conflict which threatens "the core values of a faith poses more serious free exercise problems than does a conflict that merely inconveniences the faithful." (Id. at p. 1246.) An affirmative obligation or prohibition combined with sanctions, as in the situation confronted by the Donahues, is an even greater burden on constitutional rights than a denial of benefits. (Bowen v. Roy (1986) 476. U.S. 693, 704; Wisconsin v. Yoder, supra, 406 U.S. at pp. 217-218.)

The burden imposed by Government Code section 12955 and the FEHC upon the Donahues' free exercise of religion does

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12/ We note that the FEHC raises the specter of landlords unlawfully discriminating and conveniently asserting bogus constitutionally based religious exemptions. We are confident, however, that the administrative agency's fact-finding process can, as it did here, weed out false claims from legitimate exemptions.

violate their sincere religious beliefs. The FEHC imposed monetary sanctions and other penalties, "thereby putting substantial pressure on [] adherent[s] to modify [their] behavior and to violate [their] beliefs . . . . While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." (Thomas v. Review Bd., supra, 450 U.S. at p. 718; see also Hobbie v. Unemployment Appeals Comm'n of Fla. (1987) 480 U.S. 136, 141.) The burden on the Donahues' religious beliefs is the choice they were required to make between adhering to their religious beliefs by refusing to rent to an unmarried cohabiting couple or modifying their behavior to comply with Government Code section 12955 and the FEHC's order. (See Thomas v. Review Bd., supra, 450 U.S. at pp. 717-718.)

The FEHC characterizes the Donahues' religious exemption as "wholly commercial" and therefore subordinate to the legitimate governmental regulation of commercial activities, reflected in Government Code section 12955, which only incidentally burdens religion and does not contravene the Donahues' free exercise of their religion. (See, e.g., Jimmy Swaggart Ministries v. Bd. of Equalization (1990) 493 U.S. 378 [107 L.Ed.2d 796, 110 S.Ct. 688] (holding state's tax on religious organization's retail sale of religious materials does not violate First Amendment).) The present case arises

in a commercial context and the Donahues obviously are not required to operate as landlords to maintain their religious beliefs. Nonetheless, the present case is distinguishable from a true commercial case such as a Jimmy Swaggart Ministries, where the mere collection and payment of a retail sales tax did not violate any sincere religious beliefs held by the ministries.

In another commercial case, United States v. Lee, supra, 455 U.S. 252, the court ruled that members of the Old Order Amish faith who operate businesses must pay Social Security and employment taxes despite their sincerely held religious belief that it is sinful not to provide for their own elderly and needy and therefore against their religious principles to financially support or to receive financial benefit from a national Social Security system. (Id. at pp. 255, 257.) The court in Lee acknowledged the conflict between the Amish faith and taxes but concluded that because "mandatory participation is indispensable to the fiscal vitality of the social security system" (id. at p. 258), the ensuing limitation on Amish religious freedom was outweighed by the "broad public interest in maintaining a sound tax system [which] is of such a high order . . ." (id. at p. 260).

The court in Lee also remarked, "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 p. 261.) However, neither Lee nor any other case holds, and the FEHC does not contend, that a person loses the constitutional right to the free exercise of religion just because the clash between religious duty and governmental regulation occurs in a commercial context. Rather, as the court in Lee acknowledged, even in a commercial context, the state must justify a governmental regulation or "limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest. [Citations.]" (Id. at pp. 257-258.)

Although the FEHC did not seek to impose a burden upon any specific religious object, ritual or ceremony, the intangible burden imposed was more onerous and fundamental. Religion may properly be viewed as not merely the performance of rituals or ceremonies, limited to one's home and place of worship, but as also a system of moral beliefs and ethical guideposts which regulate one's daily life. Religion thus does not necessarily end where society begins. We acknowledge that religious liberty embraces the freedom to believe, which is absolute, and the freedom to act, which in the nature of things cannot be absolute. (Cantwell v. Connecticut, supra,

310 U.S. at pp. 303-304; Pines v. Tomson, supra, 160 Cal.App.3d at p. 392.) As previously discussed, depending upon the governmental interest at stake, not all burdens on religion are unconstitutional. (See, e.g., United States v. Lee, supra, 455 U.S. 252; Prince v. Massachusetts (1944) 321 U.S. 158.)

However, people do not lose their freedom of religion and "liberty of conscience" (Cal. Const., art. I, § 4) when they engage in worldly activities. The burden imposed upon the freedom to act consistent with one's religious beliefs, even in a commercial or societal context, can constitute a burden on the free exercise of religion which is far from incidental. Here, the burden was personal and spiritual (i.e., inherent in the nature of governmentally enforced conduct which is perceived as sinful), as well as financial, as indicated by the substantial monetary sanctions and other penalties imposed by the FEHC.[13/]

13/ Our dissenting colleague relies upon Pines v. Tomson, supra, 160 Cal.App.3d 370, for the conclusion that the statutory prohibitions against marital status discrimination in housing do not materially abridge the Donahues' free exercise of religion. (Post, pp. 9-10.) Pines held that an injunction prohibiting the discriminatory practice of a Christian Yellow Pages requiring an oath or affirmation of a particular religious belief as a precondition to placing an ad in the directory did not materially abridge the free exercise of religion. In Pines, however, the basis of the discrimination was religion, which is, of course, entitled to constitutional protection. Here, the basis of the discrimination is marital status, which is not specifically protected in article I, the "Declaration of Rights" of the California Constitution, whereas "[f]ree exercise and enjoyment of religion" are. (Art. I, § 4.)

Finally, the FEHC argues that the free exercise of religion in the present commercial context implicates the constitutional guarantees of privacy of the prospective tenants when landlords screen tenants by inquiring as to marital status. (See Gov. Code, § 12955, subd. (b).) First, the facts in the present case reveal that the prospective tenant, Terry, was the party who first broached the subject by volunteering that her "boyfriend" would be living with her. Second, a neutral inquiry as to a tenant's marital status is commonly reflected in rental applications and is appropriate for valid commercial reasons related to who must sign a lease to ensure financial responsibility. (See Hess v. Fair Employment & Housing Com., supra, 138 Cal.App.3d 232, 236.) Third, to the extent that a person verbally expounds religious beliefs in the process of denying housing to an unmarried cohabiting couple, a hybrid constitutional claim is involved. Both state and federal constitutional protections thus may be successfully asserted because the conduct would be "in conjunction with other constitutional protections such as freedom of speech . . . ." (Employment Division v. Smith, supra, 494 U.S. at p. ___ [108 L.Ed.2d at p. 887].)

B. The Governmental Interest at Stake

As to the factor of the state's interest, to proclaim that the state has, of course, a compelling interest in

eradicating discrimination in general and has made marital status discrimination in housing illegal begs the question. According to the FEHC's reasoning, a compelling state interest will always prevail by virtue alone of the existence of the state law, the application of which is challenged. The state, however, must demonstrate more than the existence of the challenged law to defeat the guarantee of the free exercise of religion.

The state must also focus on more than just a compelling general interest in eradicating invidious discrimination. The state must focus on the particular nature of the discrimination at issue in the present case and where the state's interest lies in the hierarchy of its policies which must be protected and promoted, even against constitutional challenges. When viewed in such a hierarchy, marital status discrimination against an unmarried cohabiting couple simply does not rank very high.

On one end of the hierarchy, for example, "the Government has a fundamental, overriding interest in eradicating racial discrimination in education--discrimination that prevailed, with official approval, for the first 165 years of this Nation's constitutional history." (Bob Jones University v. United States, supra, 461 U.S. 574, 604.) Going down the hierarchy of the state's interests, while education

"ranks at the very apex of the function of a State" (Wisconsin v. Yoder, supra, 406 U.S. 205, 213), the state's interest in compulsory education is not compelling enough to restrict the Amish from their free exercise of religion. (Id. at pp. 219-229, 234-236.) Going further down the hierarchy of the state's interests, its interest in discouraging false unemployment compensation claims by requiring citizens to work on Saturdays is not sufficiently compelling to allow abridgement of the Sabbatarians' religious prohibition against working on Saturdays. (Sherbert v. Verner, supra, 374 U.S. 398; see also Hobbie v. Unemployment Appeals Comm'n of Fla., supra, 480 U.S. 136; Thomas v. Review Bd., supra, 450 U.S. 707, 717.)

Regarding this state's interest in prohibiting discrimination against an unmarried cohabiting couple, California has, in effect, sanctioned and judicially enforced discrimination against cohabiting couples in contexts other than housing. (See, e.g., Elden v. Sheldon (1988) 46 Cal.3d 267, 277-279 (without marital relationship at the time of the injury, no right to sue for loss of consortium); Norman v. Unemployment Ins. Appeals Bd. (1983) 34 Cal.3d 1 (no unemployment compensation for an unmarried partner); In re Cummings (1982) 30 Cal.3d 870 (no overnight prison visits for unmarried partners); Garcia v. Douglas Aircraft Co. (1982) 133

Cal.App.3d 890 (no standing of surviving partner of unmarried couple to bring wrongful death action); People v. Delph (1979) 94 Cal.App.3d 411 (no marital communication privilege between unmarried couples).) In the context of housing, the Legislature has excepted college and university housing for "married students" (Gov. Code, § 12995, subd. (b)) from the proscription against marital status discrimination, but has provided no similar exemption for unmarried cohabiting students. There are thus many examples of the disfavored legal status of cohabitation without marriage.

The law has, however, acknowledged a societal trend toward cohabitation without marriage. (Elden v. Sheldon, supra, 46 Cal.3d at p. 279; Marvin v. Marvin (1976) 18 Cal.3d 660, 663-665;[14/] see Civ. Code, § 51.3, subd. (c)(5) (recognizing that couples living in senior citizen housing might include not only spouses but "[c]ohabitant[s] . . . who live together as husband and wife").) Nonetheless, the law has also acknowledged that marriage is still the foundation of

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14/ Contrary to popular misconception, the Marvin case did not legitimize the cohabitation of unmarried persons. That case merely "permits unmarried cohabiting couples to enforce express or implied contracts relating to a division of property or support, and holds that a court may employ equitable doctrines such as quantum meruit to compensate a homemaking partner for services rendered." (Elden v. Sheldon, supra, 46 Cal.3d at p. 279; see Norman v. Unemployment Ins. Appeals Bd., supra, 34 Cal.3d 1, 6.)

family life in this country (see Marvin v. Marvin, supra, 18 Cal.3d at p. 684) and that the state has an "interest in promoting the responsibilities of marriage" (Elden v. Sheldon, supra, 46 Cal.3d at p. 279; see also Civ. Code, § 4213 (unmarried cohabiting couples may marry without complying with all the restrictions placed on couples who have not lived together prior to marriage)). Indeed, the "structure of society itself largely depends upon the institution of marriage . . . ." (Marvin v. Marvin, supra, 18 Cal.3d at p. 684.) As the Supreme Court emphasized in Norman v. Unemployment Ins. Appeals Bd., supra, 34 Cal.3d 1, 9, "We reaffirm our recognition of a strong public policy favoring marriage. [Citation.] No similar policy favors the maintenance of nonmarital relationships." (See also Nieto v. City of Los Angeles (1982) 138 Cal.App.3d 464, 470-471.)

It is thus apparent that although the law recognizes cohabitation as a modern reality, it has not affirmatively promoted it as a matter of government policy. Our Supreme Court has specifically eschewed even making a "value judgment" (Elden v. Sheldon, supra, 46 Cal.3d at p. 279) regarding the cohabitation of unmarried couples. It is thus difficult to discern any compelling state interest regarding the cohabitation of unmarried couples.

The FEHC also urges that there is a compelling state

interest in providing housing. Indeed, the Legislature has proclaimed, "To provide a decent home and suitable living environment for every California family is the basic housing goal of state government." (Health. & Saf. Code, § 50003, subd. (b).) Apart from whether an unmarried cohabiting couple constitutes a family, as envisioned by the Legislature, the Donahues' discrimination does not compel the unavailability of all suitable housing, but simply denies an unmarried cohabiting couple "access to a limited number of housing units." (Schmidt v. Superior Court (1989) 48 Cal.3d 370, 390.) There is no state housing interest in providing prospective tenants with one rental unit as opposed to any other unit when both units are, in the language used by the Legislature, decent and not unsanitary, unsafe, overcrowded or congested. (Health & Saf. Code, § 50001, subds. (a) & (b).) Moreover, the state's legitimate interest in providing housing is otherwise served by a plethora of other housing legislation. (See, e.g., Health & Saf. Code, § 50000 et seq.) Government Code section 12955 is thus not "essential" (United States v. Lee, supra, 455 U.S. at p. 257), "indispensable" (id. at p. 258) or the "least restrictive means" (Thomas v. Review Bd., supra, 450 U.S. at p. 718) of promoting the state's interest in housing, an interest "otherwise served." (Wisconsin v. Yoder, supra, 406 U.S. at p. 215.)

C. Conclusion

On the facts in the present case, and on independent state constitutional grounds, the Donahues are entitled to a religious exemption from laws which impose sanctions upon them to protect unmarried cohabiting couples from housing discrimination. The burden on the Donahues' sincere and legitimate free exercise of their constitutionally protected religious freedom is more than merely incidental. The application of Government Code section 12955 to them imposes a substantial burden on the exercise of their religious belief. On the other hand, the state's statutory interest in protecting unmarried cohabiting couples from discrimination ranks relatively low in the hierarchy of the state's governmental interests.

The FEHC has not only failed to establish a compelling governmental interest, but has also failed to explain what exactly is so invidious or unfairly offensive in not treating unmarried cohabiting couples as if they were married. Indeed, as previously noted, in the context of university housing the state itself has discriminated between married and unmarried couples. (Gov. Code, § 12955, subd. (b).) Accordingly, no paramount and compelling state interest overbalances the Donahues' legitimate claim of the free

exercise of religion which constitutes a valid exemption from Government Code section 12955.15/

DISPOSITION

The judgment of the superior court remanding the matter to the FEHC is affirmed, but modified in that the FEHC is directed to dismiss the complaint against the Donahues. The Donahues are entitled to recover costs on appeal.

CERTIFIED FOR PUBLICATION.

BOREN, J.

I concur:

TURNER, P.J.

15/ Since our holding as to the Donahues' constitutionally based exemption disposes of the entire case, we need not address other issues raised, such as the impropriety of the FEHC's $6,000 award for emotional distress. (See Walnut Creek Manor v. Fair Employment & Housing Com., supra, 54 Cal.3d 245, 255-265.) We note, however, that the FEHC's decision was not such as to warrant an award of attorney's fees. (Code Civ. Proc., § 1028.5; Gov. Code, § 800.)

GRIGNON, J., Dissenting:

I concur in the majority's conclusion that the Donahues' refusal to rent to Verna Terry and Robert Wilder, an unmarried couple, violated Government Code section 12955, which prohibits "marital status" discrimination. I dissent from the majority's conclusion that the California Supreme Court has adopted the "compelling interest test" on independent state constitutional grounds. That test would require that we engage in a balancing of interests, an approach recently rejected by the United States Supreme Court in Employment Division v. Smith (1990) 494 U.S. 872 [108 L.Ed.2d 876, 110 S.Ct. 1595], which adopted an "incidental effect test." Under the "incidental effect test," the Donahues are clearly not entitled to a religious exemption from Government Code section 12955 for their conduct. I dissent further from the majority's conclusion that the Donahues are entitled to a religious exemption from compliance with that statute, even under the more rigorous "compelling interest test."1/

In People v. Woody (1964) 61 Cal.2d 716, the California Supreme Court was asked to decide whether the state could proscribe the use of peyote for religious purposes by Native Americans as part of the state's general criminal laws

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1/ To the extent that the Unruh Civil Rights Act, Civil Code section 51, also applies, I would also conclude that no constitutionally based exemption to that statute exists.

prohibiting the possession and use of controlled substances. The court stated: "Only if the application of the proscription improperly infringes upon the immunity of the First Amendment can defendants prevail; their case rests upon that amendment, which is operative upon the states by means of the Fourteenth Amendment. [Citation.] The First Amendment reads 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .'" (Id. at p. 718.)

The Woody court noted that the defendants also relied on article I, section 4 of the California Constitution, which provides in pertinent part: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be guaranteed in this state . . . but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of this state." However, the court did not purport to decide the case on the basis of the state Constitution.

The Woody court concluded that, applying federal constitutional standards as interpreted by the United States Supreme Court, "the state may abridge religious practices only upon a demonstration that some compelling state interest outweighs the defendants' interests in religious freedom." (People v. Woody, supra, 61 Cal.2d at p. 718.) It held: "We have weighed the competing values represented in this case on

the symbolic scale of constitutionality. On the one side we have placed the weight of freedom of religion as protected by the First Amendment; on the other, the weight of the state's 'compelling interest.' Since the use of peyote incorporates the essence of the religious expression, the first weight is heavy. Yet the use of peyote presents only slight danger to the state and to the enforcement of its laws; the second weight is relatively light. The scale tips in favor of the constitutional protection." (Id. at p. 727.)

Woody was impliedly overruled by the United States Supreme Court in Employment Division v. Smith, supra, 494 U.S. 872 [108 L.Ed.2d 876]. In Smith, the United States Supreme Court concluded that Oregon could deny unemployment benefits to two drug rehabilitation counselors who had been fired from their jobs for using peyote for sacramental purposes as members of the Native American Church. The court stated: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. [¶] We have never invalidated any governmental action on the basis of the Sherbert [balancing] test except the denial of unemployment compensation. Although we have sometimes purported to apply the Sherbert test in contexts other than that, we have always found the test satisfied [citations]. In recent years we have abstained from applying the Sherbert test (outside the unemployment compensation field) at all." (Id. at p. ___ [108 L.Ed.2d at pp. 885, 888].)

The Smith court concluded: "[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (Employment Division v. Smith, supra, 494 U.S. at p. ___ [108 L.Ed.2d at p. 886].) Where "prohibiting the exercise of religion . . . is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." (Id. at p. ___ [108 L.Ed.2d at p. 885].) Thus, the United States Supreme Court held that Oregon could constitutionally deny unemployment benefits for misconduct when Native Americans are fired for the sacramental use of peyote.

In arriving at its conclusion, the Smith court expressly rejected the balancing/compelling state interest analysis. It found that the creation of a "private right to ignore generally applicable laws" would create a "constitutional anomaly." "To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the state's interest is 'compelling' -- permitting him, by virtue of his beliefs, 'to become a law unto himself' [citation] -- contradicts both constitutional tradition and common sense." (Employment Division v. Smith, supra, 494 U.S. at p. ___ [108 L.Ed.2d at p. 890].)

The United States Supreme Court also noted in Smith,

however, that the First Amendment may bar "application of a neutral, generally applicable law to religiously motivated action [in certain] . . . 'hybrid situations.'" (Employment Division v. Smith, supra, 494 U.S. at p. ___ [108 L.Ed.2d at pp. 887-888].) Thus, such laws may be invalidated where other, additional constitutional protections have been implicated, such as freedom of speech, freedom of the press, the right of parents to direct the education of their children, and freedom of association.

In the case at bar, there is no contention that Government Code section 12955, which prohibits discrimination in housing on the basis of marital status, "represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs . . . ." (Employment Division v. Smith, supra, 494 U.S. at p. ___ [108 L.Ed.2d at p. 888].) This case does not present a "hybrid situation" described in Smith but, rather, a "free exercise claim unconnected with any communicative activity or parental right." (Ibid.) Government Code section 12955 is a neutral, generally applicable statute which proscribes certain conduct, is not religiously motivated, and has only an incidental effect on the Donahues' free exercise of their religion. Under the authority of Smith, I conclude that the Donahues are not entitled to a religious exemption from laws which impose civil sanctions on them in order to protect unmarried couples from housing discrimination.

The question remains whether the California Constitution requires a different result. As noted previously, the California Supreme Court found that the prohibition of peyote use in religious ceremonies by Native Americans violated the free exercise clause of the United States Constitution. The Woody decision was based on a determination that, under federal constitutional standards, the balancing/compelling state interest analysis of Sherbert v. Verner (1963) 374 U.S. 398, was applicable to a free exercise clause challenge to a neutral, non-religiously motivated, generally applicable statute. In Smith, the United States Supreme Court explained that such a determination is erroneous on federal constitutional grounds. Plainly, Woody did not purport to base its decision on independent state constitutional grounds.

After Woody, but prior to Smith, the California Supreme Court issued its opinion in Molko v. Holy Spirit Assn. (1988) 46 Cal.3d 1092. In Molko, the court was asked to decide whether a cause of action for fraud could be stated against a religious organization based on alleged misrepresentations by church members during the initial recruitment of plaintiffs. In its introduction, the Molko opinion characterized the issue presented as whether such a cause of action was consistent with our federal and state Constitutions. At the beginning of the discussion, the opinion noted cryptically: "California guarantees free exercise and disestablishment in the state Constitution." (Id. at p. 1112.)

In its discussion, the Molko court concluded that "[g]overnment action burdening religious conduct is subject to a balancing test, in which the importance of the state's interest is weighed against the severity of the burden imposed on religion." (Molko v. Holy Spirit Assn., supra, 46 Cal.3d at p. 1113.) In arriving at this conclusion, the California Supreme Court relied on Woody and the United States Supreme Court decisions interpreting the free exercise clause of the federal Constitution. In its conclusion, the court stated: "We conclude that neither the federal nor state Constitution bars [plaintiffs] from bringing traditional fraud actions against the Church . . . ." (Molko v. Holy Spirit Assn., supra, at p. 1119.)

It is clear from a careful reading of Molko that the court did not intend to decide the case on the basis of independent state grounds. The court simply stated that permitting the case to go forward against the church also did not violate the state constitution. The court decided the case, as it did Woody, on the basis of federal constitutional standards set forth by the United States Supreme Court. The subsequent United States Supreme Court interpretation of its own precedents in Smith, has made it clear that the California Supreme Court analysis of the applicable federal constitutional test is no longer correct.

I cannot conclude from Molko that our state's Supreme Court has established a balancing/compelling state interest

test on independent state grounds. There is nothing in Molko to indicate that the California Supreme Court would, post Smith, adopt the balancing test of Sherbert as opposed to the incidental effect test of Smith. Just last year, the California Supreme Court stated that "'cogent reasons must exist before a state court in construing a provision of the state Constitution will depart from the construction placed by the Supreme Court of the United States on a similar provision in the federal Constitution.'" (Raven v. Deukmejian (1990) 52 Cal.3d 336, 353, quoting Gabrielli v. Knickerbocker (1938) 12 Cal.2d 85, 89.) Nothing in Molko suggests that such "cogent reasons" exist for application of a different state standard in cases involving the free exercise clause.

In any event, I also conclude that the Donahues are not entitled to a religious exemption from compliance with Government Code section 12955, even under the balancing/ compelling state interest test of Woody and Molko. It is undisputed that the state has a compelling state interest in providing its citizens access to housing and employment free from unwarranted discrimination. It is inappropriate for courts to determine on a case by case basis that the state has a compelling state interest to prevent certain types of employment and housing discrimination, but not others. It is inappropriate for courts to determine that the state has no compelling state interest in preventing marital status discrimination in housing. That is the wrong focus. The correct focus is the state's

interest in providing discrimination-free access to housing. "As a general proposition, 'government has a compelling interest in eradicating discrimination in all forms.'" (Pines v. Tomson (1984) 160 Cal.App.3d 370, 391.)

Thus, the state's compelling state interest in providing housing in a nondiscriminatory manner must be balanced against the burden imposed on religious conduct. Here, the burden on religious conduct is slight. The Donahues do not contend that refusing to rent to unmarried cohabitants is a central tenet of their religious belief. (People v. Woody, supra, 61 Cal.2d 716; Sherbert v. Verner, supra, 374 U.S. 398; Wisconsin v. Yoder (1972) 406 U.S. 205.) Nor do the Donahues contend that the burden imposed by the statute prohibits them from practicing their religion. (People v. Woody, supra.) The Donahues do contend, however, that if they are compelled to rent to unmarried cohabitants, they would be -- in effect -- aiders and abettors in the commission of sin by others in violation of their own religious beliefs.

The Donahues are the owners of a five-unit apartment building which they rent to members of the general public. They are engaged in secular commercial conduct performed for profit. There are no religious motivations for their conduct. The conduct is merely secular, not religiously motivated, commercial, and for profit. The statute does not require the Donahues to aid and abet "sinners," it merely requires them "to act in a nondiscriminatory manner toward all prospective

original.) "A legal compulsion . . . to refrain from discriminating against [prospective tenants] on the basis of [marital status] can hardly be characterized as an endorsement" (ibid.) or the aiding or abetting of sin.

In Pines, Division Three of this District held that a court's injunction prohibiting the practice of requiring an oath or affirmation of a particular religious belief as a precondition to placing an advertisement in a Christian yellow pages directory, did not "materially abridge their rights to free exercise of religion." The court concluded that it need not even undertake a free exercise analysis under these circumstances. Similarly, this court could find that the statutory prohibitions against marital status discrimination in housing do not materially abridge the Donahues' free exercise of their religion. At the very least, I am compelled to conclude that whatever slight burden is placed on the Donahues' free exercise of their religion is amply outweighed by our state's interest in providing nondiscriminatory access to housing and employment.

"Ours is a nation composed of people of many different races and faiths. Some are Native Americans, many of whom adhere to beliefs formed here over many centuries; others are immigrants, or the descendants of immigrants, many of whom came here to escape religious persecution. The historical fact of our diverse origins and beliefs is a vital part of our national heritage and central to the meaning of the establishment and

free exercise clauses of the First Amendment to the United States Constitution." (Sands v. Morongo Unified School District (1991) 53 Cal.3d 863, 867-868.)

"The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all 'governmental regulation of religious beliefs as such.'" (Employment Division v. Smith, supra, 494 U.S. at p. ___ [108 L.Ed.2d at p. 884].) "However, while religious belief is absolutely protected, religiously motivated conduct is not." (Molko v. Holy Spirit Assn., supra, 46 Cal.3d at p. 1112; emphasis in original.) The state can regulate religiously motivated conduct if it has a compelling interest in so doing, and if that interest outweighs any burden placed on religion by such regulation. (People v. Woody, supra, 61 Cal.2d 716; Molko v. Holy Spirit Assn., supra.)

In addition, the state may require an individual to comply with a valid and neutral law of general applicability which is not religiously motivated, even if the law has an incidental effect on the individual's free exercise of his or her religion. (Employment Division v. Smith, supra, 494 U.S. 872 [108 L.Ed.2d 876].) To conclude otherwise would allow each individual the right to ignore generally applicable laws. (Id. at p. ___ [108 L.Ed.2d at p. 890].) "Precisely because 'we are a cosmopolitan nation made up of people of almost every conceivable religious preference,' . . . and precisely because

we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The [compelling interest test] would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind . . . ." (Id. at p. ___ [108 L.Ed.2d at p. 892]; emphasis in original.)

I conclude, therefore, that under the "incidental effect test" of Smith, the Donahues are not entitled to a religious exemption from the provisions of Government Code section 12955. I also conclude that California has not adopted the "compelling interest test" on independent state grounds. Moreover, I conclude that the Donahues would not be entitled to a religious exemption even under the more rigorous "compelling interest test." I would reverse the decision of the trial court and remand for further proceedings consistent with this dissenting opinion and consistent with Walnut Creek Manor v. Fair Employment & Housing Com. (1991) 54 Cal.3d 245.

CERTIFIED FOR PUBLICATION.

GRIGNON, J.

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: Post Office Box 65756, Los Angeles, CA 90065.

On January 6, 1992, I served the within PETITION FOR REVIEW 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, address as follows:

Kathleen W. Mikkelson Deputy Attorney General 455 Golden Gate Ave. / #6200 San Francisco, CA 94102	Attorney for Commission (Appellant)
Steve Owyang F.E.H.C. 1390 Market St., Suite 410 San Francisco, CA 94102	Commission (Appellant)
Thomas F. Donahue 3100 Breakers Dr. Corona del Mar, CA 92625	Attorney for Landlords (Respondents)
Hon. David P. Yaffe Superior Court 111 N. Hill St. Los Angeles, CA 90012	
Robert Wilder c/o Verna Terry 9510 Mayne St., Unit B Bellflower, CA 90706	Complainant and Real Party in Interest
Court of Appeal 300 S. Spring St. Second Floor Los Angeles, CA 90013	

I declare under penalty of perjury that the foregoing is true and correct. Executed at Los Angeles, CA, on January 6, 1992.

THOMAS F. COLEMAN