No. B052118
(L.A. No. C754458)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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JOHN V. DONAHUE and AGNES D. DONAHUE,

Petitioners and Respondents,

vs.

FAIR EMPLOYMENT AND HOUSING COMMISSION,

Defendants and Appellants.

VERNA TERRY,

Complainant and Real Party in Interest.

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# PETITION FOR REHEARING

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# PETITION FOR REHEARING

Verna Terry, through her attorney, Thomas F. Coleman, hereby petitions this Court to grant a rehearing.[1] This petition is made pursuant to Rule 27 and Rule 29 of the California Rules of Court. Alternatively, this Court is requested to grant rehearing on its own motion.[2]

## GROUNDS

The Court of Appeal may grant a rehearing on petition, or on its own motion, before its decision becomes final. (Rule 27, California Rules of Court)

Verna Terry petitions this Court to vacate its judgment and to grant a rehearing because the opinion of the court contains errors of law, omissions of fact, and misstatements of fact.

These errors and omissions are of such a magnitude that either alone or collectively they affect the substantial rights of Verna Terry and entitle her to a

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[1]Verna Terry is a complainant and a Real Party in Interest in this case. On December 2, 1991, she filed a "Notice of Appearance" with the Clerk of this Court.

[2]A party who is aggrieved but who did not previously participate in an appeal, may request the court to grant rehearing on its own motion. (Eisenberg, Horwitz, and Weiner, *California Practice Guide: Civil Appeals and Writs*, Section 12:13, p. 12-3 [Rutter Group, 1990])

different judgment.[3]

A rehearing is proper when an opinion contains an error of law. *In re Jessup* (1889) 81 Cal. 408, 471-472. A rehearing is also appropriate when an opinion contains any misstatements or omissions of material fact. (Rule 28(b)(1), California Rules of Court.)

## SUMMARY OF ARGUMENT

Without participation of the party most affected by the Court's ruling in this case,[4] this Court has decided that landlords may refuse to rent to individuals whose

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[3]Verna Terry has standing to appear and to petition for a rehearing. The California Supreme Court has acknowledged that a complainant who is the victim of discrimination is a real party in interest in appellate proceedings involving her complaint. *State Personnel Board v. Fair Employment and Housing Commission* (1985) 39 Cal.3d 422, 425-426. The Supreme Court has also held that one who is legally aggrieved by a judgment may appear in the action, move to vacate the judgment, and appeal if the motion to vacate is denied. *California Association of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 9-10. Clearly, Verna Terry is aggrieved by the opinion and judgment of this Court. The opinion of the Court creates an exemption to her statutory housing rights. Her constitutional right of privacy has been eroded. Also, the judgment of the Court orders the Commission to vacate its award of damages to her. Her statutory rights, constitutional rights, and pecuniary interest are at stake.

[4]Real Party in Interest, Verna Terry, did not receive notice of the petition for the writ when it was filed in the Superior Court nor did he receive notice of the appeal by the Commission from the judgment below. Apparently, the Commission and the Attorney General felt confident enough about their vicarious representation of Ms. Terry that these agencies did not deem it necessary to giver her notice or provide her with an adequate opportunity to be heard. Ironically, the Donahues did send Ms. Terry notice of their cross-appeal from the judgment, apparently filed by the Donahues because they felt aggrieved by the court's refusal to decide the First Amendment issue. After the Donahues allowed the cross-appeal to fall into default, the cross-appeal was ultimately dismissed, leaving the distinct impression that the federal constitutional issue was being abandoned by the Donahues, for strategic reasons or otherwise.

lifestyles or status might not be consistent with the landlord's religious beliefs.

The decision creates a gigantic loophole in the state's civil rights laws prohibiting arbitrary and invidious discrimination by business owners against consumers seeking life's basic necessities such as shelter, food, or employment. This loophole is allegedly based on respect for the business owner's personal religious beliefs, ignoring, however, the religious and moral views of the consumer.

In a state as religiously diverse as California, the consequences of allowing the state Constitution's "free exercise" clause as a means for one segment of the business marketplace to control the lives of others, is very serious and far reaching. The "free exercise" clause is intended to be used as a shield from oppression, not as a sword of intolerance.

Without evidence (a) that the prospective renters would actually be engaging in the activity to which the landlord objects, or (b) that renting to people who might engage in such conduct actually intrudes on the landlord's exercise of religious -- as opposed to personal -- principles,[5] the decision in this case allows every business owner to claim an exemption from the laws of general application in this state,

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[5]Any value judgment about how people should conduct their personal affairs could be called "religious." However, while it may violate a business owner's religious convictions to engage in premarital sexual activity, to avoid business dealing with people who may hold different religious views on the subject is a personal, not a religious decision, unless the business owner's religion teaches that tolerance of religious diversity is itself sinful. To that extent, in a diverse society with establishment clause protections, such a belief could not legally justify such discrimination. It is, thus, Verna Terry who is suffering a violation of the protection of the establishment clause when, in order to obtain shelter, she must conform to the lifestyle advocated by the landlord's religion.

enacted to protect people from the arbitrary denial of equal access to housing or other essential goods and services.

If the sincerity of the religious belief is the only test for a prima facie exemption from the law, the Unruh Civil Rights Act and the Fair Employment and Housing Act virtually become unenforceable, and the ability of district attorneys, city attorneys, and the attorney general to administer these laws is severely eroded. These agencies do not have divine insight, let alone the financial wherewithal, to investigate, determine, and weigh the relative sincerity level of competing religious beliefs between business owners and consumers, nor should they in a political system premised on separation of church and state.

In addition, the procedural posture of this case was such that this Court did not have to reach, and did not have before it sufficient argument to decide, whether the state Constitution's "free exercise" clause creates an exemption to the state's civil rights laws. The state constitutional issue was not raised, argued, or decided in the trial court.

Although the Donahues did urge the trial court to decide the federal "free exercise" issue, the trial court exercised appropriate judicial restraint, requiring the parties to brief various nonconstitutional issues first. However, the trial court's order remanding the matter to the Commission for further briefing on, and

reconsideration of, these statutory issues, was circumvented by this appeal.[6]

This petition also requests that this Court correct numerous omissions of fact and misstatements of fact, many of which give rise to the implication that only the rights of unmarried couples are at stake. In fact, the Donahues have claimed that their right of religious freedom gives them the right to inquire into anyone's marital status. Further, Mrs. Donahue testified that she would have the right to deny housing to Catholics who marry outside of the faith and could deny housing to people who divorced and then remarried. She sincerely believes that all such couples are not married in the eyes of the Church and therefore they are committing the mortal sins of adultery and fornication.

Probably half of the adult population of California have lifestyles that offend the Donahues and have religious beliefs that conflict with the Donahues'. A rehearing could help avoid the unnecessary hostility and religious friction which could be generated if this Court's opinion were to become final. The significant procedural and substantive errors could then be addressed, examined, and rectified.

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[6]It is questionable whether the judgment below, remanding the matter to the Commission for further briefing and reconsideration, was even appealable. The Commission was not aggrieved by the judgment and the order below in no way could be considered a final judgment on the merits of any contested issues. *Kumar v. National Medical Enterprises* (1990) 218 Cal.App.3d 1050, 1056. This Court should grant a rehearing, even on its own motion, to consider whether this Court even had jurisdiction to render an opinion and judgment. Furthermore, to the extent that the Donahues may claim to have been aggrieved by the trial court's decision to postpone making a judgment on the federal "free exercise" issue -- the only constitutional issue placed before it by the Donahues -- it would appear that the Donahues abandoned that potential appellate issue when they allowed their cross-appeal to be dismissed.

# I

# THE COURT'S OPINION CONTAINS MANY FACTUAL OMISSIONS AND MISSTATEMENTS

Pursuant to Rule 29(b)(2), complainant and real party in interest, Verna Terry, hereby brings to the attention of this Court material facts that were omitted from or misstated in the Court's opinion and judgment filed on November 27, 1991.

## A. OMISSIONS AND MISSTATEMENTS OF *PROCEDURAL FACTS*

The following procedural facts were omitted from the Court's opinion:

(1) Although Verna Terry appeared at the administrative law hearing in July of 1988, she was not represented by counsel nor was she advised on the record of her right to be represented by counsel. (Administrative Record, Vol. I, Tab. 1, hereinafter referred to as "ARVI," pp. 5-26)[7] This procedural fact should appear on page 7 of the Court's opinion.

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[7]On May 22, 1990, the entire administrative record in the action held before the Commission was lodged with the Superior Court in the writ proceedings. (See Joint Appendix In Lieu of Clerk's Transcript, p. 77, hereinafter referred to as "JA.") Pursuant to stipulation, the proceedings before the Commission were deemed to be a part of the Joint Appendix on appeal. (JA, p. 94) This Court's opinion refers to "an administrative hearing in July of 1988," conducted by a hearing officer. (See Slip Opinion, p. 7) The administrative hearing was transcribed in two parts. The first part is entitled "Transcript of Proceedings, Los Angeles, California, July 7, 1988." In this Petition for Rehearing, that administrative transcript is referred to as "ARVI" and the administrative proceeding on July 8, 1988 is referred to as "ARVII."

(2) Although the Donahues filed a petition for writ of mandate in the Superior Court on March 8, 1990, the petition was not served on Verna Terry, even though the caption of the petition had acknowledged that she was a Real Party in Interest. (JA, pp. 1-46)[8] This procedural fact should appear on page 7 of the Court's opinion.

(3) In paragraph 6 of their petition, the Donahues claimed they "are entitled to an exception to the application of the laws under the free exercise clause of the First Amendment of the United States Constitution . . . ." (JA, p. 3) In their petition, the Donahues did not claim any exemption under the "free exercise" clause of the California Constitution.[9] This procedural fact was should appear on page 8 of the Court's opinion and from page 18 of the Court's opinion. The sentence beginning on the bottom of page 18 and footnote 7 on page 19 of the opinion give the false impression that the state Constitutional "free exercise" clause was invoked by the Donahues in the writ proceedings. It was not. The Court's statement in

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[8]The "Declaration of Service" which is not signed, indicated that a copy of the petition was served on The Commission and on the Attorney General. The Attorney General, of course, was served in his capacity of attorney for the Commission. (JA, p. 45)

[9]The "Points and Authorities" filed by the Donahues in support of their petition for a writ also did not include any reference to the "free exercise" clause of the California Constitution. (JA, pp. 8-27) The "Table of Authorities" makes no reference to Article I, Section 4 of the California Constitution. (JA, p. 14) The substantive arguments in their brief do not rely on the "free exercise" clause of the State Constitution. (JA, pp. 20-27) Furthermore, their brief only cited federal cases decided under the First Amendment. (Ibid.) Not one California case involving a "free exercise" claim was mentioned in the brief. In the "conclusion" to their brief, the Donahues rely exclusively on the First Amendment for their claimed exemption from the fair housing laws and the Unruh Civil Rights Act. (JA, p. 43)

footnote 10 that its decision is this case is based solely on a religious exemption under state constitutional grounds further underscores the importance of these procedural facts.

(4) On March 8, 1990, an "Alternative Writ of Mandamus" was issued by the Superior Court. (JA, p. 47) It was directed to the Commission. Although Verna Terry was recognized in the caption as a Real Party in Interest, she was not served with a copy of the Alternative Writ. This procedural fact should appear on page 8 of the Court's opinion.

(5) The Commission filed an "Answer to Petition for Writ of Mandate" in which the Commission denied the allegations in paragraph 6 of the petition, that is, the Commission denied that its ruling violated the Donahues' First Amendment right to free exercise of religion. (JA, pp. 81-82)[10] The Commission's answer did not mention any provision of the California Constitution. This procedural fact should appear on page 8 of the Court's opinion.

(6) On May 7, 1990, the Commission filed its "Memorandum in Opposition to Petition for Writ of Mandate" in the Superior Court. (JA, pp. 49-82) The Commission's brief does not mention the "free exercise" clause of the California Constitution. (JA, pp. 63-66) The Commission's sole legal argument against the Donahues' "free exercise" exemption focused solely on the First Amendment to the

[10]Although the "Proof of Service" indicates that Verna Terry was sent a copy of the Answer, it is noteworthy that the Answer was mailed to her on May 15, 1990, the day after the Superior Court granted the writ of mandate. (JA, p. 83)

United States Constitution. (Ibid.) This procedural fact should appear on page 8 of the Court's opinion.

(7) On May 14, 1990, the case was called for a hearing. Real Party In Interest, Verna Terry, was not present in court nor was she represented by counsel. (JA, pp. 79, 84)[11] At the hearing, the Donahues asked the court to decide the First Amendment "free exercise" issue raised in the petition for the writ. The court indicated its intention to exercise judicial restraint and declined to decide the First Amendment issue on the ground that the case might be disposed of on nonconstitutional issues. The court noted that the parties had not briefed, either before the Commission or in superior court, the issue of the legislative intent regarding the term "marital status." The court also noted that the application of the Unruh Act was intertwined with the "marital status" issue under the housing statutes since both statutes were expressly intertwined by the Legislature. The court informed the parties that the matter would be remanded to the Commission and that when the case eventually returned to superior court, the court would decide the statutory issues, and, if necessary, the First Amendment issue. At the hearing, neither party mentioned anything about the state constitutional "free exercise" clause. The court did not mention the state constitution nor did it make any ruling on the state constitution. (Reporter's Transcript of Proceedings in Superior Court,

[11]Since she was not given any notice of the petition, and since notice of the answer was not sent to her by mail until the day after the hearing (JA, p. 83), Verna Terry was not given any meaningful notice of, or opportunity to participate in, the hearing on May 14, 1990.

pages 2-26) These procedural facts should appear on page 9 of the Court's opinion.

(8) In footnote 4 of page 9 of the Court's opinion, the majority finds, or at least implies, that the trial court avoided its obligation to decide the case before it. This is a misstatement of a material procedural fact. With respect to the California Constitution's "free exercise" clause, that issue was not before the court. The Donahues did not raise that claim in their petition for a writ, the Commission did not raise that issue in their brief, and neither party argued that issue to the court at the hearing. With respect to the First Amendment issue, the court merely did what all courts should do, namely, attempt to resolve a lawsuit on nonconstitutional grounds if possible. Since the trial court found that the statutory issues had not been properly briefed before the Commission or before the court, it remanded the matter to the Commission for further briefing on that issue. The court indicated that it was well aware that the case would eventually return to superior court and that the statutory, and if necessary, First Amendment issue would ultimately be decided by the court. These material procedural facts should appear on page 9 of the Court's opinion and especially from footnote 4.

(9) On May 31, 1990, the Superior Court issued its judgment in favor of the Donahues. (JA, pp. 84-85) Verna Terry was not served with a copy of the judgment nor was she served with a copy of the Peremptory Writ of Mandate. (JA, pp. 87-89) These procedural facts should appear on page 9 of the Court's opinion.

(10) The Commission filed a notice of appeal on July 30, 1990. (JA, 90)

Verna Terry was not served with a copy of the notice of appeal either by the Commission or by the Clerk of the Superior Court.[12] This procedural fact should appear on page 9 of the Court's opinion.

(11) On August 28, 1990, the Donahues filed a notice of a cross-appeal from the judgment of the superior court.[13] This procedural fact should appear on page 9 of the Court's opinion.

(12) The Clerk of the Superior Court sent Verna Terry a notice of the Donahues' cross-appeal on September 12, 1990. This procedural fact should appear on page 9 of the Court's opinion.[14]

(13) On October 4, 1990, the Clerk of the Court of Appeal sent to the Donahues and also sent to Verna Terry a notice that the Donahues were in default on their cross-appeal. This procedural fact should appear on page 9 of the Court's opinion.[15]

(14) On October 25, 1990, this Court entered an order dismissing the cross-

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[12]The "Proof of Service" attached to the Commission's notice of appeal shows that the Commission only gave notice to the Donahues of the filing of the notice of appeal. The notice sent out by the Superior Court Clerk and the Commission's "Proof of Service" are a part of the record on appeal and can be found in the case file in the Clerk's Office of the Court of Appeal.

[13]The notice is part of the record on appeal in this case and was discovered by counsel for Verna Terry in the case file in the Clerk's Office of the Court of Appeal.

[14]This notice is part of the record on appeal in this case and was discovered by counsel for Verna Terry in the case file in the Clerk's Office of the Court of Appeal.

[15]This notice is part of the record on appeal in this case and was discovered by counsel for Verna Terry in the case file in the Clerk's Office of the Court of Appeal.

appeal of the Donahues.[16] This procedural fact should appear on page 9 of the Court's opinion

(15) Verna Terry was not given notice that, with respect to its appeal, the Commission's elected to proceed under Rule 5.1. (JA, pp. 91-92) This procedural fact should appear on page 9 of the Court's opinion.

(16) On January 31, 1991, the Los Angeles City Attorney filed with the Clerk of the Court of Appeal a letter requesting permission to file an *amicus curiae* brief in this case "in its designated role as a local agency having the ability to enforce the Unruh Civil Rights Act." The City Attorney's letter urged the Court to grant the request inasmuch as the City Attorney "has an interest in bringing to this Court its perspective as a law enforcement agency, a perspective none of the other parties brings to this litigation."[17] The Court denied the City Attorney's request on February 4, 1991. The Donahues filed their first brief with this Court in March 1991. These procedural facts should appear on page 9 of the Court's opinion.

(17) Verna Terry was not given notice by the Court of Appeal when the record on appeal was filed with the Clerk of the Court of Appeal. The Court of Appeal did not give her notice of briefing dates. The Court of Appeal did not give her notice of the date of oral argument. The Court of Appeal did not send her a

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[16]This order of dismissal is a part of the record on appeal in this case and is found in the case file in the Office of the Clerk of the Court of Appeal.

[17]This letter of the City Attorney is on file with the Court and copies of it were served on the parties.

copy of the Opinion and Judgment filed by the Court on November 27, 1991.[18] These procedural should appear on page 9 of the Court's opinion.

(18) On appeal, the Donahues claimed that even if prospective tenants do not voluntarily raise the issue of their marital status, the Donahues would be "entitled to make the inquiries as part and parcel of their free exercise." (Respondent's Brief, hereinafter "RB," p. 23) The Court's opinion does not mention that such a claim has been made by the Donahues.

(19) Footnote 12 of the opinion states that the Commission's factfinding process can weed out false religious claims from legitimate exemptions. There is not any factual basis in the record to support this procedural fact.[19]

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[18]Verna Terry learned of the decision of the Court of Appeal through the media. Thereafter, she retained attorney Thomas F. Coleman to appear on her behalf and to represent her in the Court of Appeal and in the Supreme Court if necessary. The Clerk of the Court of Appeal did mail a copy of the Court's opinion and judgment to Verna Terry on December 3, 1991, one day after Mr. Coleman filed a "Notice of Appearance on Behalf of Verna Terry, Real Party in Interest" with the Court of Appeal.

[19]In its brief to this Court, the Commission has cited numerous examples of religious claims that will undoubtedly be thrust on it, e.g., religiously motivated discrimination against atheists, against mixed-race couples, against working couples, and against people who do not declare that they are "born again." (Appellant's Opening Brief, hereinafter "AOB," p. 45) The Commission presaged that "it is not unreasonable to assume that there is someone who will have a religious objection to virtually every statutory prohibition on the books." (AOB, p. 43, fn. 25)

## B. OMISSIONS AND MISSTATEMENTS OF *EVIDENTIARY FACTS*

The following evidentiary facts were omitted from or misstated in the Court's opinion:

(1) The Court's opinion makes a vague reference to the fact that Mrs. Donahue asked Verna Terry "questions" after the word "boyfriend" was used by Terry. The opinion should mention the exact nature of Donahue's probing questions and how Terry felt that her privacy was being invaded by the questions. On pages 3 and 4, the opinion should have included the following factual finding of the Commission:[20]

> "When complainant Terry mentioned her 'boyfriend,' Agnes Donahue asked if she and complainant Wilder were married, and Terry said they were not. Donahue asked if they were planning to marry, and Terry replied that they might at some future time. Donahue asked when. Terry was taken aback and a little offended by these questions, which she felt were very personal and inappropriate. She told Donahue that she did not know when she and complainant Wilder might marry."

(2) Footnote 1 of the Court's opinion discusses only some of the types of tenants to whom the Donahues would refuse to rent. The opinion should mention

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[20]See paragraph 10 of the "Findings of Fact" of the Commission's Decision.

that Mrs. Donahue testified about other "mortal sins" that would lead to a "religious" decision to reject a tenant. For example, Mrs. Donahue testified that she believed that "Remarrying after divorce is a mortal sin." (ARVII, p. 105) She also testified that she believed that a marriage between a Catholic and a non-Catholic is a mortal sin and that sexual relations between such a married couple would be a mortal sin. (ARVII, p. 108) She would not want such people living in her apartment building and her religious beliefs would preclude her from renting to them. (ARVII, p. 110)[21]

(3) Footnote 1 of the Court's opinion mentions that Mrs. Donahue believed that sexual intercourse outside of marriage is a mortal sin. The opinion does not mention that, at the time she refused to rent to Verna Terry, Mrs. Donahue did not know whether or not Terry and Robert Wilder had a sexual relationship. Mrs. Donahue testified that she did not ask Terry if she and her boyfriend had a sexual relationship. (ARVII, p. 89) Terry did not tell Donahue whether she and Robert Wilder had a sexual relationship. (ARVII, p. 90)

(4) The opinion states at page 27 that "The Donahues do not require their tenants to adhere to any religious beliefs." This is a misstatement of fact. There is no basis in the record for this statement. It may be that Terry and Wilder had

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[21]These facts were brought to the Court's attention by the Commission. (AOB, p. 45, fn. 29) Their omission from the opinion creates the false impression that only a small number of tenants (i.e. unmarried couples) will be affected by the religious exemption this opinion would grant to landlords such as the Donahues.

sincerely held religious beliefs that precluded them from marrying until they were sure that they could honestly say "till death do us part." The Court's opinion operates under a false assumption that landlords are the only people with sincerely held religious beliefs. In fact, many behaviors or lifestyles of tenants that landlords may find offensive may be manifestations of religious beliefs of the tenants.[22]

(5) On page 27 of the opinion no mention is made of the fact that Mrs. Donahue's religious beliefs formed the basis of a business decision not to rent to Verna Terry unless Ms. Terry conformed her conduct and lifestyle to Mrs. Donahue's religious beliefs. In other words, the factual effect of Mrs. Donahue's decision was that either Terry and her boyfriend get married or they could not rent the apartment.

(6) The opinion states on page 33 that "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." There is no factual basis in the record to support this statement."[23]

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[22]What guidelines will the Commission have to determine whether the sincerely held religious beliefs of tenants to live together outside of marriage, or to divorce and remarry, or to marry someone of a different faith, are more sincere or carry more weight than the beliefs of the landlord? It does not take much imagination to see how Commission hearings could become a forum for religious warfare between landlords and tenants.

[23]Whether such practices are "common" is not a matter of which this Court can take judicial notice, unless it has consulted with experts and has given notice to the parties so they might rebut this assertion. Furthermore, if such practices were "common," they would be illegal. The Legislature has prohibited landlords from making any oral or written inquiry concerning the marital status of applicants. (Government Code Section 12955(b)) Furthermore, the case cited by the

(continued...)

(7) The opinion states on page 38 that "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.'" There is no basis in the record to support this misstatement of fact. The opinion gives the impression that only a small number of housing units will be removed from a small number of prospective or actual tenants. There is no evidence in the record as to the percentage of landlords who hold views similar to the Donahues. There is no evidence in the record as to the percentage of tenants who may be unmarried couples.[24]

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[23](...continued)
Court's opinion, *Hess v. Fair Employment and Housing Commission* (1982) 138 Cal.App.3d 232, 236, does not authorize such inquiries. That case holds that if there are two people who want to rent the apartment, the landlord can simply have both sign the lease and be personally liable for the rent. *Hess* does not authorize inquiries into the marital status of prospective tenants.

[24]Furthermore, since the underlying premise of the decision is that a "religiously motivated" landlord may refuse to rent to prospective tenants who might commit mortal sins on the premises, possibly a majority of tenants in California may have their civil rights restricted by the "Donahue exemption." Many landlords may have strong religious beliefs. Most tenants probably commit sins that may offend the landlords. The exemption this opinion creates to the state's civil rights laws could very well drain the resources of the Department of Fair Employment and Housing and the Commission in investigating the sincerity of such religious exemptions and conducting hearings into their legitimacy. Given the state's fiscal crisis and reductions in agency budgets, active enforcement of civil rights complaints may yield to the administrative nightmare of sorting out the so-called "sincere" claims from those that are hidden attempts to circumvent the law.

# II

# THE COURT'S OPINION CONTAINS NUMEROUS ERRORS OF LAW

## II(a)

## The Court's Opinion Failed to Properly Interpret the Provision of the California Constitution Protecting "Free Exercise of Religion"

Neither the majority opinion in this case nor the dissent adequately address a central issue regarding the free exercise of religion: the textual difference between the federal and state constitutional protections in this area.

In addition to overlooking a critical part of Article I, section 4 of the California Constitution, both the majority and the dissent also neglect relevant language in the Fair Employment and Housing Act which would resolve this case. It is a paramount rule when construing constitutional provisions that the intent is to be ascertained from the constitution's text. *Helping Hand Home for Children v. County of San Diego* (1938) 26 Cal.App.2d 452, 456 [79 P.2d 778]. The same rule applies when interpreting statutes: the text of the relevant provision must be the first

source of analysis in determining legislative intent. *Dickey v. Raisin Proration Zone No. 1* (1944) 24 Cal.2d 796, 802 [151 P.2d 505]

Because the explicit language of both the state constitution and the state statute at issue here were not addressed, a rehearing is required.

### 1. The Opinion Failed to Analyze Relevant and Dispositive Language in the State Constitution.

The California Supreme Court has recently debated the issue of whether the U.S. Constitution or the state constitution should be the primary reference when deciding cases raising the question of establishment of religion. *Sands v. Morongo Unified School Dist.* (1991) 53 Cal.3d 863 [--- Cal.Rptr. ---, --- P.2d ---]. A clear majority of the court in *Sands* based its decision on the First Amendment to the U.S. Constitution, while recognizing that "[a]lthough federal cases may supply guidance for interpreting [the establishment clause of the state constitution] California courts must independently determine its scope." Id. at p. 883.[25]

The question in free exercise cases presents a more complex question than

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[25]The Chief Justice and Justice Arabian expressly felt that the state constitutional issue should not have been addressed at all, since the federal constitution was dispositive. Id. at p. 885 (Lucas, C.J., concurring); id. at p. 915 (Arabian, J., concurring). A single justice, however, argued that "[i]t is unnecessary to rest our decision on federal authority when the California Constitution alone provides an independent and adequate state constitutional basis on which to decide." Id. at p. 906 (Mosk, J., concurring) Thus, at a minimum, federal cases, and particularly those of the U.S. Supreme Court, are relevant authority in interpreting the state constitution's provisions regarding religion, and the Court's decision in Employment Division v. Smith (1990) 494 U.S. 872 [110 S.Ct. 1595, 109 L.Ed.2d 876] provides persuasive guidance in this case

was presented to the courtin Sands under the establishment clause. The court in *Sands* recognized that the language in the establishment clause of the first amendment was "virtually identical" to the language in the state constitution. *Sands v. Morongo Unified School Dist., supra*, 53 Cal.3d at p 882. This is not true in free exercise cases.

The First Amendment to the United States Constitution reads:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . "

In contrast, the wording of Article I, section 4 of the California State Constitution is significantly different:

> "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. . .**" (emphasis added)

Thus, while the U.S. Supreme Court may provide relevant analysis, its opinions on the free exercise clause of the First Amendment must be assessed in light of that clause's language. Different language in the state constitution must be interpreted in light of its own history, and its text must be considered. The opinion in this case did not do so.

### 2. The California Constitution Does Not Provide More Protection For the Free Exercise Of Religion Than Is Provided Under the Federal Constitution.

California's constitution expressly provides an exception to the free exercise of religion when religiously motivated conduct would be inconsistent with the peace or safety of the state. The majority in the present case nowhere analyzes this aspect of Article I, Section 4, of the California Constitution, or its history, and cites the text only in a footnote. This is significant error.

The explicit exception in Article I, section 4 suggests that the drafters of the state constitution did not intend to provide unconstrained protection to the exercise of religion in cases where free exercise would conflict with an articulated public policy involving the peace or safety of the state. This conclusion is further supported by the fact that Article I, Section 4 states that the free exercise of religion is a "liberty of conscience." In addition, the legislative history of the California Constitution demonstrates the same conclusion.

One of the state constitution's drafters, Charles T. Botts, expressed concern about including the exclusion language in the constitution, feeling that it would be used to justify the suppression of unpopular sects. (Report on the Debates in the Convention of California on the Formation of the State Constitution in September and October, 1849 (1850) at pp. 39, 292, quoted in *Sands v. Morongo Unified School*

*Dist.*, *supra*, 53 Cal.3d at p. 933 (Panelli, J., dissenting))

The delegates rejected this position, finding that the unfettered exercise of religion without respect to the demands of the public interest could lead to a breakdown of public order. *Id.* The history of this exception thus demonstrates that the framers intended the language to provide limited protection.

This is consistent with the language of Article I, section 4 that the free exercise of religion is a "liberty of conscience," as opposed to a liberty of action.

This is also consistent with the rule in the federal courts, which have long distinguished between religious belief, which is absolutely protected, *Sherbert v. Verner* (1963) 374 U.S. 398, 402-03 [83 S.Ct. 1790, 10 L.Ed.2d 965], and religiously motivated conduct, which is "subject to regulation for the protection of society." *Cantwell v. Connecticut* (1940) 310 U.S. 296, 304 [60 S.Ct. 900, 84 L.Ed. 1213].

The California Supreme Court has observed that the free exercise clause "guarantees the government will not prevent us from freely pursing any religion we choose." *Molko v. Holy Spirit Ass'n* (1988) 46 Cal.3d 1092, 1112 [252 Cal.Rptr. 122, 762 P.2d 46].

The present case, though, is not about the pursuit of religion. It is about religiously motivated conduct. The majority's reliance on *People v. Woody* (1964) 61 Cal.2d 716 [40 Cal.Rptr. 69, 394 P.2d 813] is therefore misplaced. *Woody* clearly did not involve the constitutional exception which guides this case. In *Woody*, Indians were required to use peyote as part of their required religious practices.

The court found that the religious use of peyote was "the sine qua non of defendants' faith. It is the sole means by which defendants are able to experience their religion." *Id.* at p. 725. This fact alone is sufficient to distinguish *Woody* from the facts in the present case. The plaintiff landlords here do not contend that they cannot practice their faith unless they can be allowed to refuse to rent to unmarried couples, interfaith couples, remarried persons, or others the landlord believes may be committing sin on the premises. Nor do they contend that the law requires them to personally approve of nonmarital relationships. At most, the state's civil rights laws require business establishments to allow equal access to housing, despite their firmly held belief that such equality is improper.

But *Woody* is distinguishable for another, more important reason. The opinion also made note of the fact that the use of peyote would not affect the peace or safety of the public, finding nothing in the record to show that this religious practice would have any affect on nonbelievers. *Id.* at 722-23. The court found that when peyote use was confined within the context of religious practice, "the use of peyote presents only slight danger to the state and to the enforcement of its laws." *Id.* at 727. Thus, in that case there was no inconsistency between the free exercise of religion and the peace or safety of the state.

Here, however, the plaintiffs' religious beliefs directly affect the clearly stated public policy of providing nondiscriminatory access to housing. The Legislature has explicitly stated that discrimination on the basis of factors such as marital status

"foments domestic strife and unrest." (Gov. Code § 12920.) Further, the Legislature declared in no uncertain terms that the Fair Employment and Housing Act "shall be deemed an exercise of the police power of the state for the protection of the welfare, health and peace of the people of this state." *Id.* Thus, these legislative findings parallel the state constitution's provision that when the free exercise of religion is "inconsistent with the peace or safety of the State," free exercise is not absolute.

Given these facts, the U.S. Supreme Court's ruling in *Smith* is more relevant than *Woody*, since it reads into the First Amendment an exception very much like the textual exception in California's Constitution, when the government seeks to regulate "socially harmful conduct." *Unemployment Division v. Smith, supra*, 110 S.Ct. at 1603. Citing the early case of *Reynolds v. United States* (1879) 98 U.S. 145 [25 L.Ed. 244], the Court in *Smith* expressed the same concern that is at issue here:

> "Laws . . . are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Id.*, 110 S.Ct. at 1600 (citation omitted)

Further, the *Smith* Court expressly rejected a requirement that government must

demonstrate a compelling interest in order to justify neutral laws which incidentally burden religious practices. While the compelling interest test produces constitutional norms in most contexts, such as free speech or equality of treatment, in the religious context it would produce "a private right to ignore generally applicable laws," *Id.*, 110 S.Ct. at 1604, which the Court referred to as a "constitutional anomaly." This, again, echoes the intent of the drafters when approving the language in Article I, Section 4 of the state constitution.

Such an anomaly arises here. The majority's decision in this case, requiring under the state constitution a governmental burden that is not required under the federal constitution, would permit landlords license to rent their properties exclusively to tenants whose lifestyles are consistent with the landlord's religion. Rather than providing for the equality of all citizens that the civil rights laws were designed to achieve, the opinion here would permit a fragmented and contentious housing market, where apartment buildings could post signs labeled Catholic-only, Jewish-only, Muslim-only or Buddhist-only.

Rather than the policy of equal access the civil rights laws were designed to assure, this decision has the potential to turn rental housing into islands of religious conformity, allowing landlords to use their religion as a sword against non-believers, or partial believers, or even believers with an honestly held difference of opinion with their church. Thus, every landlord is permitted to become "a law unto himself."

Further, it is not clear where such a rule of law would lead. Would a landlord

who has a sincerely held religious belief that drinking alcohol is a sin be able to evict a tenant because the tenant was drinking a beer on his front porch as he watched a football game? Or, would those, who, like the plaintiffs here, are members of the Catholic faith be able to refuse to rent to married couples who may be practicing birth control?

The majority in this case felt that the plaintiffs' objection to premarital sexual activity was a "core value" of their belief. The Court in *Smith* exposed the problems with such aa rule of law:

> "What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.' As we reaffirmed only last Term, '[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretation of those creeds.' *Employment Division v. Smith*, *supra*, 110 S.Ct. at p. 1604 (citations omitted).

These were clearly the kinds of problems the drafters faced when they approved the exclusion clause of Article I, section 4. It should be clear, then, that the state's constitution was intended to permit neutral laws like the Fair Employment and Housing Act or the Unruh Civil Rights Act to have effect as against those whose

religious belief, but not their religious practice, is incidentally affected by them.

## II(b)

## Federal Precedents Interpreting the Scope of the "Free Exercise" Clause of the First Amendment Are Persuasive that Religious Beliefs Do Not Justify Discrimination by Business Owners

In *Runyon v. McCrary* (1976) 427 U.S. 160, the United States Supreme Court held that "'the Constitution . . . places no value on discrimination' [citation] . . . . '[I]nvidious private discrimination . . . has never been accorded affirmative constitutional protections.'" *Id.* at p. 176.; *accord, Hishon v. King & Spaulding* (1984) 467 U.S. 69.

Although *Runyon* and *Hishon* rejected an exemption for private discrimination under a claimed First Amendment associational right, in a series of decisions the federal courts have found that carefully constructed regulatory schemes targeted at ending discrimination may override a free exercise or establishment clause claim. The courts' decisions have been consistent across a range of regulatory schemes.

For example, in addressing violations of Title VII of the federal Civil Rights Act of 1964 (42 U.S.C., Sec. 2000-e, et seq.) aimed at eliminating discrimination by

private employers, the courts have held that the statute may be applied to religiously-affiliated institutions and organizations without offending the First Amendment. So, for example, in *Kings Garden, Inc. v. Federal Communications Commission* (D.C. Cir.) 498 F.2d 51, *cert. denied*, 419 U.S. 996 (1974), the religious freedom claim of a nonprofit religious radio station was denied in an appeal from a FCC decision that the radio station had discriminated in employment in violation of FCC regulations.

Similarly, in *E.E.O.C. v. Fremont Christian School* (9th Cir. 1986) 781 F.2d 1362, 1364, the court rejected an exemption to anti-discrimination laws based on the sincerely held religious belief that the husband is the "head of the household," thereby justifying a denial of fringe benefits to married female employees.

Again, in *N.L.R.B. v. World Evangelism, Inc.* (9th Cir. 1981) 656 F.2d 1349, the Ninth Circuit upheld the application of federal labor laws aimed at eradicating discrimination in work conditions against a claim for exemption by a nonprofit religious organization. This decision is particularly instructive as the religious group there owned and operated three hotels, a conference center and an office complex with 18 commercial tenants, all of which was open to the public. The involvement of the religious group in secular activities was a significant factor in the court's analysis of the balancing of interests. *Id.*, at p. 1353.

As Justice O'Connor's concurrence in *Corporation of Presiding Bishop v. Amos* (1987) 483 U.S. 327 makes clear, much less deference is applied when a religious

exemption is sought for "for profit activities of religious organizations . . . ." *Id.*, at p. 349.

Moreover, even where religious groups were not involved in purely secular activities, courts have been reluctant to craft broad judicial exemptions to general laws aimed at eradicating discrimination. See, e.g., *Dole v. Shenandoah Baptist Church* (4th Cir. 1990) 899 F.2d 1389 [no free exercise defense to an alleged violation of the Fair Labor Standards Act]; *Minker v. Baltimore Annual Conference* (D.C. Cir, 1990) 894 F.2d 1354.

The judicially crafted exemption to the state's housing discrimination laws in this instance vests each individual landlord with the power to nullify or veto fundamental rights of tenants. See *State by McClure v. Sports & Health Club, Inc.* (Minn. 1985) 370 N.W.2d 844, 853, fn. 16, *appeal dismissed sub nom. Sports & Health Club, Inc. v. Minnesota* (1986) 106 S.Ct. 3315 [denying free exercise exemption to private employer from anti-discrimination law despite evidence of sincerely held religious belief because granting such an exemption would "significantly encourag[e] private discrimination."]

In no case where the United States Supreme Court has sustained an exemption to accommodate religion or suggested such an exemption might exist has the accommodation of an individual's religious claim resulted in imposing a significant burden on the religious liberty of others. See, e.g. *Bowen v. Roy* (1986) 106 S.Ct. 2147, 2158, fn. 19.

## II(c)

## Even if a Compelling State Interest Were Required to Overcome the Donahues' Religious Claim, the State Has Several Compelling Reasons to Protect Tenants from Marital Status Discrimination

In this case, the Donahues' claim of religious freedom directly assaults several fundamental constitutional rights of Verna Terry, or, for that matter, any prospective tenant who might be faced with a similar confrontation.

Ms. Terry has a right of privacy under Article I, Section 1 of the state Constitution which protects her from overbroad inquiries by both government and business interests. *White v. Davis* (1975) 13 Cal.3d 757, 775. By prohibiting landlords from inquiring into the marital status of tenants, the Legislature has implemented this aspect of the right of privacy. (Government Code Section 12955(b))

Ms. Terry has a freedom of choice and association which are also protected under the state Constitution's privacy clause. The right of privacy in the state Constitution protects her freedom to choose her living companions and to live in a relationship that some might view as "nontraditional." *City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123. In *Robbins v. Superior Court* (1985) 38 Cal.3d 199, at p. 213, the Supreme Court stated:

> "[T]he right to privacy has been held to protect a diverse range of personal freedoms. (See, e.g., *Committee to Defend Reproductive*

*Rights v. Myers* (1981) 29 Cal.3d 252, 172 Cal.Rptr. 866, 625 P.2d 779 [right of procreative choice]; *Atkisson v. Kern County Housing Authority* (1976) 59 Cal.App.3d 89, 130 Cal. Rptr. 375 [**right of unmarried persons to cohabit**] (emphasis added)

"In [*Adamson*], the right to privacy was held to encompass **the right to choose the people with whom one lives.** [citation] The court stated that the constitutional amendment was intended 'to insure the right to privacy not only in one's family but also in one's home.' [citation] Moreover, the '[f]reedom to association with people of one's choice is a necessary adjunct to privacy in the family and the home.'" (emphasis added)

Furthermore, the right of privacy protects Ms. Terry's decisions regarding whether to marry, when to marry, and whom she might marry. California courts have repeatedly acknowledged a right of privacy in "matters related to marriage, family, and sex." *Meyers, supra,* at p. 263.

These three privacy protections of the state Constitution shield a person, such as Ms. Terry, from interference by private businesses and not merely from state interference. *Wilkinson v. Times Mirror* (189) 215 Cal.App.3d 1034; *Porten v. University of San Francisco* (1976) 64 Cal.App.3d 825; *Cutter v. Brownbridge* (1986) 183 Cal.App.3d 836; *Miller v. NBC* (1986) 187 Cal.App.3d 1463.

Since the constitution itself protected Ms. Terry's choice to live with Mr.

Wilder, certainly the Legislature had a compelling interest in prohibiting marital status discrimination in the Fair Employment and Housing Act and in protecting tenants from arbitrary discrimination under the Unruh Civil Rights Act.

In its balancing of interests, the Court failed to take into account these three fundamental rights of Ms. Terry which were being violated by the Donahues. Any one of these would have been sufficient to override the Donahues' religious claim.

## II(d)

## The State Constitutional "Free Exercise" Claim Was Not Presented Nor Decided Below and Therefore Was Not Ripe for Decision on Appeal

This Court's decision rests squarely on the "free exercise" clause of the California Constitution. The Court erred in deciding this issue.

Article I, Section 4 was not invoked when the Donahues filed their petition for a writ in the Superior Court. The Commission did not address that issue in its answer to the petition. None of the briefs filed in the Superior Court mentioned the state Constitution's "free exercise" clause. The parties did not mention it in oral argument at the hearing in the trial court. The trial judge did not rule on the issue.

Courts should not reach constitutional questions unless absolutely required to do so to dispose of the case at hand. *People v. Williams* (1976) 16 Cal.3d 663, 667.

Courts should follow a policy of judicial self-restraint and avoid unnecessary defemination of constitutional issues. *California Teachers Assn. v. Board of Trustees* (1977) 70 Cal.App.3d 431, 442.

Here, the trial judge did not reach any constitutional issues because the statutory issues had not been adequately briefed either before the Commission or before the trial court. The trial court acted properly by postponing any constitutional adjudication until those issues were resolved.

Furthermore, it would appear that even the First Amendment "free exercise" issue is not ripe for decision. The Donahues were the parties allegedly aggrieved by the trial court's refusal to rule on that federal issue. The Donahues filed a cross-appeal from the judgment, presumably to appeal that aspect of the trial court's ruling. They let their cross-appeal go into default and the cross-appeal was dismissed.

In reality, neither the federal nor the state "free exercise" claims are ripe for decision in this Court. Courts should refrain from issuing advisory opinions. Since the stakes are so high, the issues so complex, and since all interested parties were not before this Court, judicial economy is an insufficient reason to depart from traditional principles of restraint.

## CONCLUSION

In addition to the arguments raised above, the fact that Ms. Terry's rights to procedural due process were repeatedly violated in the Superior Court and on appeal should be sufficient for the Court to grant rehearing.

Ms. Terry requests this Court either to grant her petition for rehearing or to grant a rehearing on its own motion.

Dated: December 11, 1991

Respectfully submitted:

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Real Party in Interest acknowledges the assistance of law graduate Zeke Zeidler in the preparation of this petition.

**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 December 11, 1991, I served the within PETITION FOR REHEARING 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:

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I declare under penalty of perjury that the foregoing is true and correct. Executed at Los Angeles, CA, on December 11, 1991.

Michael A. Vasquez