

Court of Appeal No. B052118
(L.A. Superior Court No. C754458)

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

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.

PETITION FOR REVIEW

**After Decision by the Court of Appeal,
Second District, Division Five, on Appeal
from a Decision of the Superior Court
Granting a Petition for Writ of Mandate**

THOMAS F. COLEMAN
P.O. Box 65756
Los Angeles, CA 90065
(213) 258-8955

Attorney for Verna Terry
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ISSUES PRESENTED FOR REVIEW

1. Should this Court grant review and transfer the cause back to the Court of Appeal pursuant to Rule 29.4(e) with instructions to grant a rehearing in order to correct omissions and misstatements of fact in its opinion, to correct procedural abuses of discretion, and to correct errors of law?

(a) Does the opinion of the Court of Appeal contain omissions and misstatements of procedural and evidentiary facts?

(b) Did the Court of Appeal abuse its discretion in the process of deciding this appeal?

(1) Was it an abuse of discretion for the Court of Appeal to decide a constitutional issue that was not raised by the parties in the Superior Court and was not ruled upon by the Superior Court?

(2) Was it an abuse of discretion for the Court of Appeal to deny a timely request of the Los Angeles City Attorney to participate in the appeal as *amicus curiae*?

(c) Did the Court of Appeal err by failing to consider the state's interest in protecting a tenant's constitutional right to choose her living companions, her freedom of choice with respect to marriage, and her right to keep private the details of her personal life?

2. Should this Court grant full review of any or all of the issues raised by petitioners in order to settle the following important questions of law:

(a) Under the facts of this case, was there *any* burden on the Donahues' exercise of religion?

(1) Is a landlord who sincerely believes that sexual conduct outside of marriage is a sin entitled to a "free exercise of religion" exemption from state anti-discrimination laws on the basis of the landlord's *presumption* that two unmarried adults who seek to rent an apartment together may engage in sexual intercourse on the premises?

(b) Under the circumstances of this case, is any interest the state may have in protecting the Donahues' religious beliefs outweighed by the state's interest in promoting equal access to housing, in protecting a tenant's constitutional right to choose her living companions, in protecting her freedom of choice with respect to marriage, and in safeguarding her right to keep private the details of her personal life?

PETITION OF VERNA TERRY (Real Party in Interest)

Verna Terry, a real party in interest in this case, respectfully requests this Court to grant her petition to review the decision of the Court of Appeal.

Ms. Terry asks this Court to grant review pursuant to Rule 29.4(e) of the California Rules of Court and to transfer the cause to back to the Court of Appeal with instructions to vacate and refile its opinion and to grant a rehearing pursuant to timely filed petitions, or to give directions that the Court of Appeal reconsider its decision in light of precedents it overlooked, including precedents of this Court.

Alternatively, Ms. Terry asks this Court to grant full review of the important legal questions set forth above.

The opinion of the Court of Appeal erodes the constitutional and statutory rights of millions of tenants, married and unmarried alike. On the surface, the opinion of the Court of Appeal seems as if it affects only a small number of unmarried couples. However, a closer analysis shows that this precedent affects a much larger constituency. The Donahues and many other business owners with similar religious views, believe that all sexual relations outside of marriage are sinful. These landlords believe that it is sinful for them to rent to people who might be engaging in such conduct on the premises. In addition to unmarried couples, they

also believe that many inter-faith marriages and second marriages are not valid in God's eyes and that these secular spouses are sinful fornicators or adulterers.

According to the 1990 Census, 47.3 of California households do not contain a married couple.¹ Although 52.7% do include married couples, many of these relationships include spouses of different faiths or people in second marriages. The rights of people living alone to have overnight visitors or to take on a roommate for economic or social reasons are also implicated. Of course, gay and lesbian tenants are caught in a "Catch-22" because there is no way they can remain true to their nature and also satisfy a landlord's requirement of marriage. As a result of the scope of these religious beliefs and the diversity of living arrangements in this state, the housing rights of a majority of California's adult population are placed at risk by the decision of the Court of Appeal.

In addition, the decision would have serious and far-reaching consequences on the efficient enforcement of civil rights laws. The ability of local government attorneys to enforce the Unruh Act and of various state agencies to enforce fair housing statutes would be severely hindered. The government's dwindling financial resources would be redirected away from current pro-active efforts to protect civil rights in order that investigations and hearings could be conducted into the sincerity of religious beliefs as exemptions are claimed by business owners.

¹Source: Census of Population and Housing, 1990: Summary Tape File 1 (State of California, Department of Finance, Census Data Center)

JOINDER IN PETITION OF COMMISSION

Real Party in Interest, Verna Terry, joins in the petition for review filed by the Fair Employment and Housing Commission. Pursuant to Rule 28(e)(5) of the California Rules of Court, Ms. Terry incorporates by reference herein, the authorities and arguments contained in the Commission's petition, with the following exceptions:

(1) The Commission asks this Court to grant review or alternatively to order the opinion of the Court of Appeal depublished pursuant to Rule 976(c) of the California Rules of Court. (Petition, p. 4) Depublication will be of no benefit whatsoever to Ms. Terry. Therefore, if this Court does not grant full review, she respectfully requests that the cause be transferred back to the Court of Appeal for reconsideration pursuant to rule 29.4(e).

(2) In its "Statement of the Case," the Commission states that the decision of the Court of Appeal found that "the Donahues were entitled to a religious exemption based on the California Constitution from the FEH Act provisions regarding marital status discrimination" and that it is this portion of the decision which is the subject of the

Commission's petition for review. (Petition, p. 7)² Actually, the opinion of the Court of Appeal found that the Donahues were entitled to a religious exemption from the Unruh Civil Rights Act as well as the Fair Employment and Housing Act. (See Slip Opinion, attached, at p. 18, fn. 5.) The granting of an exemption as to both statutes is the subject of Ms. Terry's petition for review.

²Elsewhere in its petition, the Commission characterizes the opinion of the Court of Appeal with respect to the Unruh Act as "dicta." (Petition, p. 12, fn. 10) Ms. Terry does not view that holding as dicta inasmuch as the Court of Appeal directed the Commission to dismiss the entire complaint against the Donahues. (See Slip Opinion, p. 40) The complaint under the Unruh Act will also be dismissed on constitutional grounds because, by its own terms, the Court of Appeal concluded "our holding as to the Donahues' constitutionally based exemption disposes of the entire case." (Id, at p. 40, fn. 15) Dicta would not compel a dismissal of the Unruh complaint; a square constitutional holding would.

STATEMENT OF THE CASE

The Donahues refused to rent an apartment to Verna Terry and Robert Wilder. Terry and Wilder were rejected because they were not married to each other. The Donahues based their decision on a sincerely held religious belief that sexual conduct outside of marriage is a mortal sin and that the Donahues would commit a mortal sin if they rented to a couple who would engage in nonmarital sex on the premises. The Donahues presumed that Terry and Wilder would engage in such sinful sexual conduct on the premises. The Donahues did not know whether or not Terry and Wilder had a sexual relationship. The Donahues also claimed a religious right not to rent to Catholics who married outside of the faith and not to rent to married couples if one of the spouses had been divorced.

Real Party in Interest, Verna Terry, otherwise adopts the "Statement of Facts" as summarized by the Commission in its petition for review. (See Petition, pp. 4-6)

Furthermore, Ms. Terry requests this Court to take notice that the opinion of the Court of Appeal contains 19 omissions or misstatements of procedural facts and 7 omissions or misstatements of evidentiary facts.³

³Ms. Terry filed a Petition for Rehearing in which these deficiencies were brought to the attention of the Court of Appeal pursuant to Rule 29(b)(2) of the California Rules of Court. (See Petition for Rehearing, at pp. 6-17)

REASONS FOR GRANTING REVIEW

I

THIS COURT SHOULD GRANT REVIEW AND TRANSFER THE CAUSE BACK TO THE COURT OF APPEAL WITH INSTRUCTIONS TO RECONSIDER ITS DECISION IN ORDER TO CORRECT OMISSIONS AND MISSTATEMENTS OF FACT IN ITS OPINION, TO REMEDY PROCEDURAL ABUSES OF DISCRETION, AND TO CORRECT SIGNIFICANT ERRORS OF LAW

Pursuant to Rule 29.4(e) of the California Rules of Court, this Court should grant review and transfer this case to the Court of Appeal with directions to vacate and refile its opinion in order to facilitate a rehearing. *Tobin v. Stevens* (Cal. 1988) 246 Cal.Rptr. 468.

Alternatively, an order to grant review and transfer could contain specific directions that the Court of Appeal reconsider its decision in light of specific precedents.⁴

Either approach would enable the Court of Appeal to correct numerous

⁴For example, such an approach was used by this Court in *In re Richard T.* (Cal. 1988) 244 Cal.Rptr. 655.

misstatements and omissions of fact, to remedy procedural deficiencies, and to consider legal issues which its current opinion has ignored. After such reconsideration by the Court of Appeal, this case would be in a more appropriate posture for possible future review by this Court on the merits.

I(a)

**The Opinion of the Court of Appeal
Contains Numerous Omissions and Misstatements
of Procedural and Evidentiary Facts**

When Ms. Terry filed a Petition for Rehearing, the Court of Appeal was advised that its opinion contained numerous factual errors. Although the court did not affirmatively rule on the petition -- possibly because that panel lacked a quorum due to holiday vacations -- the Clerk of the Court sent a notice to the parties that the petition was denied "by operation of law."

OMISSIONS AND MISSTATEMENTS OF *PROCEDURAL* FACTS.

In paragraph 6 of the petition for a writ of mandate filed by the Donahues in the Superior Court, 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" (Joint Appendix, hereinafter "JA," p. 3) In their petition, the Donahues did not claim any exemption under the "free exercise"

clause of the California Constitution.⁵ This procedural fact should have appeared on page 8 of the Court's opinion and on 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 of Appeal's statement in footnote 10 that its decision in this case is based solely on a religious exemption under state constitutional grounds further underscores the importance of these procedural facts.

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) The Commission's answer did not mention any provision of the California Constitution. This procedural fact should have appeared on page 8 of the Court's opinion.

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

⁵The "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)

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 exclusively on the First Amendment to the United States Constitution. (Ibid.) This procedural fact should have appeared on page 8 of the Court's opinion.

On May 14, 1990, the case was called for a hearing. (JA, pp. 79, 84) 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 because 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, pages 2-26) These procedural facts

should have appeared on page 9 of the Court's opinion.

In footnote 4 of page 9 of the Court's opinion, the majority found, or at least implied, 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. Because 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 have appeared on page 9 of the Court's opinion and especially in footnote 4.

On August 28, 1990, the Donahues filed a notice of a cross-appeal from the judgment of the superior court.⁶ This procedural fact should have appeared on page 9 of the Court's opinion.

⁶The 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.

On October 4, 1990, the Clerk of the Court of Appeal sent to the Donahues a notice that they were in default on their cross-appeal. This procedural fact should have appeared on page 9 of the Court's opinion.⁷

On October 25, 1990, the Court of Appeal entered an order dismissing the cross-appeal of the Donahues.⁸ This procedural fact should have appeared on page 9 of the Court's opinion.

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."⁹ 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 have appeared on page 9 of the Court's

⁷This 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.

⁸This 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. The dismissal of the Donahues' cross-appeal may have precluded appellate review of the constitutional issue because the Donahues were the only parties arguably aggrieved by the failure of the Superior Court to rule on that issue. (See fn. 15, below.)

⁹This letter of the City Attorney is on file with the Clerk of the Court of Appeal and copies of it were served on the parties.

opinion.

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.

OMISSIONS AND MISSTATEMENTS OF *EVIDENTIARY* FACTS.

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 have mentioned the exact nature of Donahue's probing questions and how Ms. 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:¹⁰

"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,

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

which she felt were very personal and inappropriate. She told Donahue that she did not know when she and complainant Wilder might marry."

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 have mentioned that Mrs. Donahue testified about other "mortal sins" that may have caused her to reject other tenants. For example, Mrs. Donahue testified that she believed that "Remarrying after divorce is a mortal sin." (Administrative Hearing, Transcript of Proceedings, hereinafter "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)¹¹

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

¹¹These facts were brought to the Court's attention by the Commission. (Appellant's Opening Brief, "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.

relationship. (ARVII, p. 89) Ms. Terry did not tell Donahue whether she and Robert Wilder had a sexual relationship. (ARVII, p. 90)

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 have been that Terry and Wilder had 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.¹²

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 Ms. Terry and her boyfriend get married or they could not rent the apartment.

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

¹²What guidelines will the Commission use 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.

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."¹³

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.¹⁴

¹³Whether such practices are "common" was not a matter of which the Court of Appeal could have taken judicial notice, unless it had consulted with experts and had given notice to the parties so they might have rebutted 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 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 an apartment, the landlord can simply have both sign the lease so that they are jointly and severally liable for the rent. *Hess* does not authorize inquiries into the marital status of prospective tenants.

¹⁴Furthermore, 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.

I(b)

The Court of Appeal Abused Its Discretion in Procedural Matters

Without any discussion of the state's interests in passing the Unruh Civil Rights Act, the Court of Appeal wrote a mere footnote in which it extended to the Donahues an exemption to this statute. This cavalier treatment of the Unruh Act may not have occurred had the Court granted the timely request of the Los Angeles City Attorney to file an *amicus curiae* brief. Local prosecutors, such as a city attorney or district attorney, are specifically authorized by law to enforce the statute. Especially because the jurisdiction of dozens of prosecuting agencies were at risk of erosion and because no local prosecutor was a party to the action, it was a clear abuse of discretion to have denied *amicus curiae* participation to the only local prosecutor who requested permission to participate in that capacity. This error would be reason enough for this Court to grant review and remand the case to the Court of Appeal for reconsideration.

However, the Court of Appeal committed a more serious abuse of discretion by actively reaching into this appeal to decide a major constitutional issue that was not raised or argued in the trial court. A court should not reach such issues where it is not necessary or appropriate to resolve an appeal. *Palmero v. Stockton Theatres*

Inc. (1948) 32 Cal.2d 53, 65-66.

Even more fundamentally, review should be granted and the cause remanded to the Court of Appeal to reconsider whether it even had *jurisdiction* in light of the principles enunciated in *Kumar v. National Medical Enterprises* (1990) 218 Cal.App.3d 1050, 1056. 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, supra*.

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.¹⁵ At most, the Court of Appeal should have remanded the case for further briefing and consideration by the trial court.

¹⁵In *Central Mfg. Dist. Inc. v. Board of Supervisors* (1960) 176 Cal.App.2d 850, 857, the court noted that as a general rule, respondents, such as the Donahues, who have not pursued a cross-appeal cannot claim error in connection with the opposing party's appeal.

I(c)

The Court of Appeal Failed to Consider or Give Any Weight to the State's Interests in Protecting Several Fundamental Rights of Tenants

The opinion of the Court of Appeal found, albeit erroneously, that the Unruh Civil Rights Act and the Fair Employment and Housing Act burdened the Donahues' religious beliefs. In examining the state's interest in protecting Ms. Terry and Mr. Wilder from discrimination, the Court concluded that the interest of the state in prohibiting marital status discrimination against an unmarried cohabiting couple "does not rank very high." (Slip Opinion, p. 34)

Because the Court of Appeal viewed the state's interests in prohibiting housing discrimination in the narrowest possible way, it is not surprising that the Court found it "difficult to discern any compelling state interest regarding the cohabitation of unmarried couples." (Slip Opinion, p. 37) As a result of constitutional blindspots in its analysis, the Court of Appeal erroneously ruled that "the state's statutory interest in protecting unmarried cohabiting couples from discrimination ranks relatively low in the hierarchy of the state's governmental interests." (Slip Opinion, p. 39)

The Court of Appeal erred by failing to consider the state's interest in

protecting a tenant's constitutional right to choose her living companions, her freedom of choice with respect to marriage, and her right to keep private the details of her personal life.

Ms. Terry has a right of privacy under Article I, Section 1 of the state Constitution which protects her from overbroad inquiries by 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)) This informational privacy right would be seriously jeopardized if a *prima facie* religious exemption may be based on an assumption that two unmarried prospective tenants who plan to share an apartment are having an ongoing sexual relationship. To rebut this presumption, applicants or tenants would be forced to reveal intimate details of their sexual lives to landlords or to fair housing enforcement agencies. Such a result would conflict with both the letter and the spirit of the constitutional right of privacy which shields an individual's private sexual life from unwarranted scrutiny or regulation. *Vinson v. Superior Court* (1987) 43 Cal.3d 833, 841.

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, this 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. The decision of whether or not to marry is an extremely personal choice protected by the right of privacy. *Perez v. Sharp* (1948) 32 Cal.2d 711, 714; *In re Carrafa* (1978) 77 Cal.App.3d 788, 791-792.

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* (1989) 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.

Because the constitution itself protected Ms. Terry's choice to live with Mr. Wilder and not to be interrogated about her personal life, certainly the Legislature had several compelling reasons to prohibit marital status discrimination in the Fair Employment and Housing Act and to protect tenants and applicants from arbitrary discrimination under the Unruh Civil Rights Act.

In its balancing of interests, the Court of Appeal 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.

Accordingly, this Court should grant review and transfer the case to the Court of Appeal with directions to reconsider its decision in light of *Vinson v. Superior Court* (1987) 43 Cal.3d 833, 841; *City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123; *Robbins v. Superior Court* (1985) 38 Cal.3d 199, 213; and *Perez v. Sharp* (1948) 32 Cal.2d 711, 714. This would direct the attention of the Court of Appeal to precedents by which it is bound (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455) but which the Court failed to consider in its examination of possible state interests in protecting tenants or prospective tenants from housing discrimination.

II

UNDER THE FACTS OF THIS CASE, THERE WAS NO BURDEN ON THE DONAHUES' EXERCISE OF RELIGION

In its opinion, the Court of Appeal concluded that, on the basis of their religious convictions, "the Donahues declined to rent an apartment to an unmarried cohabiting couple." (Slip Opinion, p. 18) The Court emphasized that the "sincerity and depth of the Donahues' religious convictions are unquestioned." (Ibid.) Pinpointing exactly what those beliefs were, the Court stated: (Ibid.)¹⁶

"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 is a sin."

Being required to rent an apartment to Verna Terry and Robert Wilder without discrimination on the basis of their marital status does not burden this belief in any way. When they decided not to rent to Terry and Wilder, the Donahues had no information as to whether Terry and Wilder had ever engaged in sexual relations with each other or with anyone else or whether they would do so in the future.

As a result, the Donahues decision not to rent to Terry and Wilder was not

¹⁶In another portion of its opinion, the Court restated the basis of the religious belief as follows: "According to the religious convictions of the Donahues, sexual intercourse outside of marriage is a mortal sin, and assisting or facilitating such behavior is also a sin." (Slip Opinion, p. 27)

based on a sincerely held religious belief. Their decision to discriminate was premised on a factual assumption which was not supported by substantial evidence or by any legally recognized presumption.

The Donahues assumed that Terry and Wilder would be occupying the apartment for immoral purposes. In effect, the Donahues are claiming that Terry and Wilder are guilty of some type of wrongdoing. The Donahues have the burden of proof on that issue. (Evidence Code Section 520) The law presumes that occupancy of a dwelling is not for immoral purposes. *Lertora v. Globe & Rutgers Ins. Co.* (1937) 18 Cal.App.2d 142, 63 P.2d 313, 314. It also requires an affirmative and a strong evidentiary showing to rebut the presumption that a person is chaste. *Niyya v. Goto* (1960) 181 Cal.App.2d 682, 5 Cal.Rptr. 642, 644.

There is no presumption that an unmarried man and woman who live together are engaging in sexual intercourse. This Court has rejected the notion that sexual services are assumed to be an integral component of a nonmarital relationship. *Marvin v. Marvin* (1976) 18 Cal.3d 660, 671, fn. 6. If sexual relations were presumed to be at the foundation of all nonmarital relationships, then agreements between nonmarital partners would be unenforceable, per se.¹⁷

¹⁷Contrast this with a marital relationship which carries with it a presumption of sexual activity. *Gist v. French* (1955) 136 Cal.App.2d 247, 288 P.2d 1003, 1008-1009. Terry and Wilder did not hold themselves out to the Donahues as being husband and wife.

III

**THE STATE'S INTERESTS IN PROMOTING
EQUAL ACCESS TO HOUSING, IN PROTECTING
A TENANT'S CONSTITUTIONAL RIGHT TO
CHOOSE HER LIVING COMPANIONS, IN
PROTECTING HER FREEDOM OF CHOICE
WITH RESPECT TO MARRIAGE, AND IN
SAFEGUARDING HER RIGHT TO
INFORMATIONAL PRIVACY, FAR OUTWEIGH
ANY INTEREST THE STATE MAY HAVE
IN PROTECTING THE DONAHUES' RELIGIOUS
BELIEFS FROM PERCEIVED AFFRONT**

The state has a compelling interest in the provision of discrimination free housing.¹⁸ The state also has compelling interests to protect a tenant's constitutional right to choose her living companions, to protect her freedom of choice with respect to marriage, and to safeguard her right to keep private the details of her personal life. (See pages 20-23, supra.)

These interests, either alone or in combination, far outweigh any constitutional interest in protecting the Donahues from a *perceived* affront to their religious beliefs.

¹⁸Pursuant to Rule 28(e)(5), Ms. Terry incorporates by reference herein the arguments of the Commission on this point. (See Commission's Petition for Review, pp. 25-28)

CONCLUSION

For the foregoing reasons, Verna Terry respectfully requests this Court to grant a plenary review, or, alternatively, to grant review and transfer the case to the Court of Appeal with directions to reconsider its decision.

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Respectfully submitted:

THOMAS F. COLEMAN
Attorney for Verna Terry