Supreme Court No. S 024538

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,

Real Party in Interest.

Second Appellate District, Division Five, No. B052118
Los Angeles County Superior Court No. C754458
Honorable David P. Yaffe, Judge

REAL PARTY IN INTEREST'S OPENING BRIEF ON THE MERITS

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

Attorney for Verna Terry
Real Party in Interest

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ISSUES PRESENTED FOR REVIEW

(By Appellant Fair Employment and Housing Commission)

1. Whether the Court of Appeal correctly ruled that landlords Agnes and John Donahue were entitled to a religious exemption based on the California Constitution from state laws protecting unmarried cohabiting couples from discrimination in housing.

(By Respondents John and Agnes Donahue)

1. Whether the prohibition against discrimination on the basis of marital status protects unmarried couples.

(By Real Party in Interest, Verna Terry)

1. Whether, under the facts of this case, was there *any* burden on the Donahues' exercise of religion.

   (a) Whether a landlord who sincerely believes that sexual conduct outside of marriage is a sin is 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.

2. Whether any interest the state may have in protecting the Donahues' religious beliefs is outweighed by 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 keep private the details of her personal life.

STATEMENT OF THE CASE

Real Party in Interest adopts the statement of the case set forth in Appellant Fair Employment and Housing Commission's Opening Brief on the Merits. (AOBM, pp. 2-3) The following is a brief summary of the case.[1]

The Donahues filed a petition for writ of mandate in the Superior Court to set aside a decision of the Fair Employment and Housing Commission (hereinafter the "FEHC") finding them in violation of the Fair Employment and Housing Act (hereinafter the "FEH Act") and the Unruh Civil Rights Act (hereinafter the "Unruh Act") for refusing to rent an apartment to Ms. Terry and her boyfriend. In the writ proceedings, the Donahues sought an exemption from those civil rights statutes based on the free exercise of religion clause of the United States Constitution. The Donahues also argued that the statutes themselves did not prohibit them from refusing to rent to an unmarried couple. The trial court granted the writ, but not on constitutional grounds. It reserved a decision on the constitutional issue and instead remanded the case to the FEHC for further consideration of the statutory issues. The FEHC appealed from the judgment granting the writ.

The Court of Appeal rendered its decision on November 27, 1991. It ruled that the FEH Act prohibits a landlord from refusing to rent to an unmarried couple. It did not rule on the statutory interpretation of the Unruh Act and whether it prohibits such discrimination. The Court of Appeal, however, ruled that, under the free exercise of religion clause of the California Constitution, the Donahues must be granted an exemption from both statutes. The Court of Appeal did not decide whether the federal Constitution would require such an exemption.

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[1] Real Party in Interest does not accept the factual and procedural assertions contained in the opinion of the Court of Appeal. The opinion included 19 misstatements and omissions of procedural facts and 7 misstatements and omissions of evidentiary facts. Those omissions and misstatements were brought to the attention of the Court of Appeal in a Petition for Rehearing filed by Real Party in Interest. (See Petition for Rehearing filed by Verna Terry, pp. 6-17)

STATEMENT OF FACTS

Real Party in Interest adopts the statement of fact contained in the FEHC's Brief on the Merits (AOBM, pp. 3-5, 14) The following is a short summary.

In early 1987, Ms. Terry sought to rent an apartment from Mrs. Donahue. There was no problem until Ms. Terry mentioned in casual conversation with Mrs. Donahue that it would be helpful if there was a secure area in the garage where her boyfriend, Robert Wilder, could store his tools. Mrs. Donahue changed her demeanor and became very inquisitive. She wanted to know if Ms. Terry and Mr. Wilder were married. When she was told they were not, Mrs. Donahue asked if they were engaged. When she was told they were not, Mrs. Donahue wanted to know if they had plans to become engaged. When Ms. Terry responded that she did not know the answer to that question, Mrs. Donahue flatly stated that she would not rent to an unmarried couple.

Ms. Terry and Mr. Wilder filed a complaint with the Fair Employment and Housing Department. Two investigators verified that the Donahues would not rent to unmarried couples. The Department then filed an accusation of housing discrimination against the Donahues with the FEHC.

During the administrative proceedings before the FEHC, the Donahues raised a claim that they were exempt from the FEH Act and Unruh Act because their refusal to rent to unmarried couples was based on their sincerely-held religious beliefs. At the administrative hearing, Mrs. Donahue testified that she believed sexual relations outside of marriage are a mortal sin. She said she believed it would be a sin for her to aid and abet another in the commission of a sin.

When she declined to rent to the apartment to Ms. Terry and Mr. Wilder, Mrs. Donahue did not know whether or not the prospective tenants had a sexual relationship.

Mrs. Donahue also testified that she believed sexual relations between a Catholic and non-Catholic spouse or between a remarried Catholic and his new spouse would be mortal sins. She claimed she had the right to refuse to rent to such couples.

ARGUMENT

I

UNDER THE "MARITAL STATUS" PROVISION OF THE FAIR EMPLOYMENT AND HOUSING ACT, A LANDLORD MAY NOT REFUSE TO RENT TO TWO ADULTS BECAUSE THEY ARE NOT MARRIED TO EACH OTHER

The "marital status" provision of the FEH Act prohibits a landlord from adopting and enforcing a policy that allows two adults to rent a housing unit if they are married to each other but which automatically excludes two unmarried adults from consideration as renters. The Donahues violated this prohibition when they refused to rent an apartment to Ms. Terry and Mr. Wilder because they were not married to each other. As argued below, the FEHC's finding, in which the Court of Appeal concurred, that the Donahues engaged in prohibited marital status discrimination is based upon a correct interpretation of the FEH Act.

Statutes are to be given a reasonable interpretation according to the real, or at least apparent, intention of the Legislature. A construction that will promote a legislative purpose will override a construction that will defeat it. To determine the legislative purpose, courts look to the words used, the object in view, the context, the history of the legislation, and public policy. (*In re Marriage of Atwell* (1974) 39 Cal.App.3d 383, 387.) The historical circumstances of the enactment of the provision in question are also relevant in determining the intent of the Legislature. (*People v. Black* (1982) 32 Cal.3d 1, 5.)[2]

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[2] The historical circumstances of the "marital status" amendment to the FEH Act are very informative. The Legislature made several major policy decisions in 1975 to end discrimination on the basis of marital status. Civil Code §7002 declares marital status discrimination against unwed parents and their children to be against public policy. (Stats.1975, ch. 1244, §11, p. 3196.) (continued...)

The term "marital status" in Government Code §12955 is not defined. Because the words of the statute do not provide an explicit definition, the Court of Appeal looked to extrinsic sources to determine the intent of the Legislature. (*Donahue v. FEHC* (1991) 1 Cal.App.4th 387, 2 Cal.Rptr.2d 32, 35-38.) Because it found the legislative history behind the original passage of the marital status provision was not particularly helpful, the Court of Appeal looked for guidance to the "chronology of relevant case law" and subsequent amendments of the statute by the Legislature. (Ibid.)

The Court of Appeal noted that the prohibition against marital status discrimination was added by the Legislature in 1975. (Stats.1975, ch. 1189, §3, p. 2943.) The following year, an appellate court interpreted the term "marital status" to indicate a general policy statement by the Legislature to prohibit housing discrimination against unmarried cohabiting couples. (*Atkisson v. Kern County Housing Authority* (1976) 59 Cal.App.3d 89, 95.) In 1980, the Legislature reenacted the statute without any substantive changes. The Court of Appeal correctly observed that "[t]he Legislature is deemed to be aware of existing judicial decisions and to have amended statutes in light of such decisions which have a direct bearing on the statute. [citation omitted]" (*Donahue, supra*, 2 Cal.Rptr.2d, at p. 37.) As a result, the Court of Appeal correctly concluded that the Legislature was aware of *Atkisson's* interpretation of the term "marital status" and therefore acquiesced in this judicial interpretation by reenacting the statute without any substantive change in this provision. (Ibid.)

The Court of Appeal also focused on a related provision in the FEH Act which supports the interpretation that "marital status" includes protection for two adults who are not married to each other. The statute prohibits marital status discrimination

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[2](...continued)
Discrimination by credit institutions against men and women regardless of their marital status was made illegal. (Stats.1975, ch. 332, p. 778, §1.) A similar federal law has been interpreted to protect unmarried couples from credit discrimination. (*Markman v. Colonial Mortgage Co.* (D.C. Cir. 1979) 605 F.2d 566, 569.) Also, the Legislature repealed all remaining criminal penalties for private sexual relations between consenting adults, whether married or unmarried. (Stats.1975, c. 71, §§ 5, 6, p. 133.)

against any "person" (Gov. Code §12925(a)) and "person" includes "one or more individuals" (Gov. Code §12925(d)).[3] The Court of Appeal noted that the Supreme Courts of two other jurisdictions had relied upon identical statutory language to support their conclusions that protections against "marital status" discrimination prohibit landlords from refusing to rent to two adults because they are not married to each other. (*Foreman v. Anchorage Equal Rights Com'n* (Alaska 1989) 779 P.2d 1199, 1201-1202; *Housing Auth. v. Com'n Against Discrim.* (Mass. 1989) 547 N.E.2d 43, 45.) Where California law parallels sister state legislation on the same subject, judicial interpretation of those statutes by sister state courts may be relevant in construing the California legislation. (*Webster v. State Bd. of Control* (1987) 197 Cal.App.3d 29, 37, fn. 3.) In the case at bench, the Court of Appeal found these other precedents to be persuasive. (*Donahue, supra*, 2 Cal.Rptr.2d, at p.37.)[4]

The Court of Appeal reviewed contrary judicial decisions from two other states but found them to be distinguishable, because, unlike California, the public policy in those states was so hostile to unmarried cohabitation that fornication and cohabitation were crimes in those jurisdictions. Appellate courts in those two states had expressly relied on the existence of such criminal penalties in reaching a conclusion that their legislators did not intend to subject cohabitors to criminal penalties through one statute and yet protect the cohabitors from discrimination through another statute. (*State by Cooper v. French* (Minn. 1990) 460 N.W.2d 2, 10; *McFadden v. Elma Country Club*

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[3] Courts should avoid the interpretation of a statute that renders some words surplusage. (*California Manufacturer's Assn. v. Public Utilities Com'n.* (1979) 24 Cal.3d 836, 844.) The Legislature's definition of "person" as including protection for more than one person, would be nullified by an interpretation that discrimination against one unmarried individual on the basis of his or her marital status is prohibited but discrimination against two people on the basis of their marital status is not.

[4] Courts in two other states have also interpreted the term "marital status" in their civil rights statutes to prohibit discrimination against two individuals because they are not married to each other. (*Whitman v. Mercy-Memorial Hospital* (Mich. App. 1983) 339 N.W.2d 730, 732; *Zahorian v. Russell Fitt Real Estate Agency* (N.J. 1973) 301 A.2d 754, 757.) It is noteworthy that in each of these states the constitutions protect the right of a person to live with others of his or her choice. (*Delta v. Dinolfo* (Mich. 1984) 351 N.W.2d 831; *State v. Baker* (N.J. 1979) 405 A.2d 368.)

(Wash. App. 1980) 613 P.2d 146, 148.)[5] The same rationale has been used in Illinois which has a statute prohibiting open and notorious cohabitation. The Illinois Court of Appeal found that statute inconsistent with any possible legislative intent to protect unmarried couples from housing discrimination, holding that the mere fact that such a couple would attempt to rent an apartment would satisfy the open and notorious requirement of the criminal law. (*Mister v. A.R.K. Partnership* (Ill. App. 1990) 553 N.E.2d 1152, cert. den. 561 N.E.2d 694.) Maryland's highest court has also adopted a restrictive definition of the term "marital status" in that state's civil rights statute. (*Maryland Commission on Human Relations v. Greenbelt Homes* (Md. 1984) 475 A.2d 1192.) Maryland's statute was enacted in 1971, when the public policy of Maryland did not respect the privacy of consenting adults. Just two years ago, noncommercial heterosexual sex in private between consenting adults judicially was excised from the criminal law in that state. (*Schocket v. State* (Md. 1990) 580 A.2d 176.)

Public policy in California with respect to marital status and living arrangements is quite dissimilar from that in Minnesota, Maryland and Illinois. For more than 20 years, Californians have witnessed an unbroken line of constitutional and statutory manifestations of public policy protecting the rights of unmarried adults. In 1969, the Legislature passed the "No Fault Divorce" law, greatly increasing the ease by which people could change their marital status. (Stats.1969, c. 1608, p. 3324, §8.) In 1972, the voters added "privacy" to the list of inalienable rights guaranteed to every person by the California Constitution. In 1975, the Legislature passed the "Consenting Adults Act" (Stats.1975, ch. 71, §§ 5, 6, p. 133), outlawed credit discrimination against all adults regardless of marital status (Stats.1975, ch. 332, p. 778, §1) and declared marital status discrimination against unwed parents and their children to be contrary to public policy (Stats.1975, ch. 1244, §11, p. 3196). During that same legislative session, shortly after

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[5] It should be noted that, despite the decision in *McFadden, supra*, whether or not "marital status" protects unmarried couples is still an open question in Washington. (*Loveland v. Leslie* (Wash. App. 1978) 583 P.2d 664; *Yamauchi v. Dept. of Employment Security* (Wash. 1982) 638 P.2d 1253, 1256-1257, fn. 2.)

passage of the Consenting Adults Act, the Legislature added "marital status" to the housing provisions of the FEH Act. (Stats.1975, c. 1189, §3, p. 2943.) In 1978, the Legislature further expanded the right to be unmarried when it passed the "Summary Dissolution Act." (Stats.1978, c. 508, p. 1655, §2.) In 1980, this Court concluded that the privacy provision of the California Constitution protects the right to choose the people with whom one lives, even if they are not related by blood, marriage, or adoption. (*City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123.) In 1985, this Court cited *Atkisson v. Kern County Housing Authority* (1976) 59 Cal.App.3d 89, for the principle that the privacy clause protects the right of unmarried persons to cohabit. (*Robbins v. Superior Court* (1985) 38 Cal.3d 199, 213.) In a unanimous decision in 1987, this Court acknowledged that California's constitutional privacy protection embraces sexual relations of unmarried adults. (*Vinson v. Superior Court* (1987) 43 Cal.3d 833, 841.) Furthermore, appellate decisions in this state have affirmed that a parent is not rendered unfit for child custody or visitation merely because the parent lives with an unmarried partner. (*In re Marriage of Wellman* (1980) 104 Cal.App.3d 992; *In re Birdsall* (1988) 197 Cal.App.3d 1024)

Furthermore, as the Court of Appeal observed, California has never prohibited cohabitation by two unmarried adults. It aptly noted that even cohabitation by a married person with an unmarried person, which was once a crime, was decriminalized the same year that marital status was added to the FEH Act. (*Donahue, supra*, 2 Cal.Rptr.2d at p.38.) Accordingly, the Court of Appeal concluded that there was no obvious legislation that would contradict a finding that two unmarried adults who sought to rent an apartment were protected from housing discrimination. Had the Court of Appeal taken note of other strong indicators of public policy respecting the rights of unmarried adults, as described above, its conclusion, no doubt, would have been articulated in even stronger terms.

The Court of Appeal found one explicit passage in the FEH Act (Gov. Code §12995(b), dealing with university housing for students, indicating the Legislature contemplated that the FEH Act encompassed marital status situations involving two

adults and not merely one individual. (*Donahue, supra*, 2 Cal.Rptr.2d, at p.38.) However, it overlooked another provision supporting this conclusion. Government Code §12940(a)(3) specifically authorizes employers to regulate the working of spouses in the same department with each other. The Legislature must have concluded that, without the addition of this provision, the Act would have prohibited employers from adopting regulations affecting the employment of two people on the basis of whether or not they are married to each other.

There are yet other reasons not mentioned by the Court of Appeal that support the conclusion that under the FEH Act, business enterprises may not refuse to rent to two adults because they are not married to each other.

In 1980, the Legislature repealed the Fair Employment Practices Act (Lab.Code, §§ 1410 et seq.) and reenacted it as the Fair Employment and Housing Act. (Stats.1980, ch. 992, §4.) Shortly after passage of the new Act, the FEHC issued two decisions interpreting the "marital status" provisions of the Act, one in the area of housing discrimination and the other in the area of employment discrimination. Although the interpretation of a statute is ultimately a judicial task, "the contemporaneous construction of a statute by an administrative agency charged with its administration and interpretation, while not necessarily controlling, is entitled to great weight and should be respected by the courts unless it is clearly erroneous or unauthorized." (*City of Santa Ana v. City of Garden Grove* (1979) 100 Cal.App.3d 521, 530; accord *Wilkerson v. Worker's Comp. Appeals Bd.* (1977) 19 Cal.3d 491, 501.)

In 1981, the FEHC issued a precedential decision in which it held "that a complaint of employment discrimination based on marital status may be grounded in an individual's unmarried cohabitation with a member of the opposite sex." (*Department of Fair Employment and Housing v. Boy Scouts of America* (1981) FEHC Dec. No. 78-79.)[6] The FEHC awarded damages to the complainant, Robert Henderson, because

[6] The Legislature has specifically authorized the FEHC to establish a system of published opinions which shall serve as precedent in interpreting the FEH Act. (Gov. Code §12935(h))

it found the Boy Scouts in violation of the FEH Act. The organization had refused to hire Henderson because he was not married to the woman with whom he was living. In its ruling, the FEHC cited *Atkisson, supra*, 59 Cal.App.3d 89, noting that *Atkisson* had been cited with approval on two occasions by this Court: *City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 129, and *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 264, fn. 10. The FEHC also relied on an administrative decision it had rendered in 1980 in a housing discrimination case: *DFEH v. Hess and Hess* (1980) FEHC Dec. No. 80-10.[7]

In 1988, the FEHC issued its decision in the instant case. It reaffirmed its previous interpretations of the FEH Act and ordered the Donahues to pay damages to Ms. Terry and Mr. Wilder because the Donahues had engaged in illegal marital status discrimination in violation of the Act. (*Donahue, supra*, 2 Cal.Rptr.2d, at p.35.) In its brief on the merits in this Court, the FEHC has continued to adhere to its interpretation of the marital status provision of the FEH Act. (AOBM, pp. 36-40) Thus, the FEHC's initial interpretation was not only contemporaneous with the passage of the FEH Act in 1980, but has been consistent for 12 years. Therefore, this Court should defer to the FEHC's interpretation; the agency's interpretations have been in formal proceedings, are long-standing, have remained uniform, and are not arbitrary, capricious, or without a reasonable or rational basis. (*Engs Motor Truck Co. v. State Bd. of Equalization* (1987) 189 Cal.App.3d 1458, 1471; *Culligan Water Conditioning v. State Bd. of Equalization* (1976) 17 Cal.3d 86, 93, fn. 4.) This rule of construction was recently applied when this Court adopted an administrative construction given to another statute by the FEHC. (*Robinson v. Fair Employment and Housing Commission* (1992) 92 Daily Journal D.A.R. 3599, 3601.)

Provisions of the FEH Act pertaining to unlawful employment practices have been amended several times since the FEHC's issued its precedential decision in *Boy*

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[7] The FEHC's interpretation in *Hess* was upheld by the Superior Court and by the Court of Appeal in *Hess v. Fair Employment and Housing Commission* (1982) 138 Cal.App.3d 232.

Scouts of America, supra. (Stats.1982, c. 1184, p. 4219; Stats.1984, c. 1754, §2; Stats.1985, c. 1151, §2; Stats.1987, c. 605, §1; Stats.1989, c. 1309, §3.) Provisions pertaining to housing discrimination have been amended several times since the FEHC's decision in *Hess, supra*. (Stats.1982, c. 454, p. 1847; Stats.1984, c. 217, §2; Stats.1987, c. 605, §6.) It is noteworthy that the Legislature has never altered the FEHC's interpretation of the term "marital status" as used in either the employment or the housing context. Reenactment of a provision which has a meaning well established by administrative construction is persuasive that the intent was to continue the same construction previously recognized and applied. (*Industrial Welfare Commission v. Superior Court* (1980) 27 Cal.3d 690, 709.)

Finally, as this Court noted in *Robinson, supra*, since the FEH Act is remedial legislation it must be construed broadly. The Legislature has explicitly directed that the Act should be liberally construed. Therefore, if any ambiguity exists that is not resolved by legislative history or extrinsic sources, this Court is required to construe the Act so as to facilitate the exercise of jurisdiction by the FEHC. (*Brown v. Superior Court* (1984) 37 Cal.3d 477, 486; *Robinson, supra.*) Put another way, when the meaning of a remedial statute is in doubt, it will be interpreted so as to suppress the mischief at which it is directed, to advance or extend the remedy provided, and to bring within the scope of the law every case which comes clearly within its spirit and policy. (*Booth v. Robinson* (1983) 147 Cal.App.3d 371, 378.)

For the reasons articulated in the opinion of the Court of Appeal, and expanded upon herein, the "marital status" provision of the FEH Act should be interpreted to prohibit a landlord from refusing to rent to two persons because they are not married to each other. Protecting the rights of unmarried adults who seek to rent an apartment together -- whether for emotional, economic, or other reasons -- clearly comes within the spirit and policy of the FEH Act which is intended to ensure equal housing opportunities to all prospective renters. It is also consistent with California's strong public policy respecting the decisional, associational, and informational privacy rights of all individuals, whether married or unmarried.

II

THE UNRUH CIVIL RIGHTS ACT ALSO PROHIBITS A LANDLORD FROM REFUSING TO RENT TO TWO ADULTS BECAUSE THEY ARE NOT MARRIED TO EACH OTHER

The FEHC found that the refusal of the Donahues to rent to Ms. Terry and Mr. Wilder was a violation of the Unruh Act.[7] The FEHC noted that the Unruh Act does not specifically mention "marital status" discrimination. However, based on judicial decisions and legislative history, the FEHC concluded that the Unruh Act prohibits discrimination in housing on the basis of unmarried cohabitation.

Although the Donahues claimed that the Unruh Act does not afford protection to Ms. Terry and Mr. Wilder, the Court of Appeal bypassed this issue of statutory interpretation. Instead, the court jumped right to the issue of whether or not the Donahues were entitled to a constitutional exemption from the statute. (*Donahue, supra*, 2 Cal.Rptr.2d, at p. 38, fn. 5.) In doing so, the court overlooked a longstanding rule of judicial restraint that statutory issues are to be decided before reaching constitutional issues. (*California Teachers Assn. v. Board of Trustees* (1977) 70 Cal.App.3d 41, 43; *People v. Williams* (1976) 16 Cal.3d 663, 667.) However, the court's error in failing to decide the statutory issue is of little moment. The Unruh Act *does* prohibit landlords from refusing to rent to two adults because they are not married to each other. Therefore, if the Court of Appeal had interpreted the statute, it likely would have decided the constitutional issue anyway.

In *Harris v. Capital Growth Investors* (1991) 52 Cal.3d 1142, this Court declined to adopt the position urged by the plaintiff (that all arbitrary discrimination was prohibited by the Unruh Act) and also rejected the position of the defendant (that protection was limited to those categories specifically enumerated in the statute, i.e.,

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[7] Civil Code §51 is known as the Unruh Civil Rights Act. Government Code §12948 declares that violations of Civil Code §51 are also violations of the FEH Act, thereby giving the FEHC jurisdiction over Unruh violations.

sex, race, color, religion, ancestry, national origin, or blindness or other physical disability). The Court reaffirmed its previous holdings that the Unruh Act prohibits discrimination by business establishments against persons with unconventional dress or physical appearance, families with children, persons under 18, and against persons with a homosexual orientation. (*Harris, supra*, 52 Cal.3d, at p. 1155.)

Based on the history and language of the statute, as well as several specific cases, this Court concluded that, in addition to those bases listed in the statute, the Unruh Act prohibits intentional discrimination based on personal characteristics of individuals that bear little or no relationship to their abilities to be responsible consumers. (*Harris, supra*, 52 Cal.3d, at pp. 1147-1149; 1168-1169.)

Harris indicates that several factors should be considered in determining whether or not discrimination based on categories not enumerated is prohibited by the Unruh Act. Those factors include statutory language, prior case law, the legitimate business interests of the defendants, and the consequences that would flow from protection of the plaintiff under the circumstances. (*Gayer v. Polk Gulch, Inc.* (1991) 231 Cal.App.3d 515, 521.)

Since the Unruh Act and the FEH Act are expressly linked, the language of both statutes should be considered in determining whether the Unruh Act prohibits marital status discrimination. Two specific provisions of the FEH Act support the conclusion that marital status is a personal characteristic implicitly protected from discrimination under the Unruh Act. Government Code §12955(e) makes it unlawful for any person who is subject to the provisions of the Unruh Act to discriminate in housing accommodations on the basis of marital status. Furthermore, violations of the Unruh Act are automatically deemed to be violations of the FEH Act. (Gov.Code §12948)

Prior case law also supports the conclusion that the Unruh Act prohibits marital status discrimination. Citing an Attorney General opinion concluding that marital status discrimination is prohibited by the Unruh Act (58 Ops.Cal.Atty.Gen. 608, 613 (1975)), this Court ruled that other classes, such as families with children, are protected by the statute. (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 736.) The Attorney

General later reaffirmed its position that marital status discrimination is prohibited by the Unruh Act. (59 Ops.Cal.Atty.Gen. 223, 224 (1976).) According to the Attorney General, the Unruh Act prohibits discrimination in housing based on any classification covered by the FEH Act. (*Unlawful Discrimination: Your Rights and Remedies*, Civil Rights Handbook, November 1990, Second Edition, California Attorney General's Office, p. 26.) Thus, for 15 years, the Attorney General has consistently concluded that the Unruh Act prohibits marital status discrimination.

This Court has held that, while not controlling authority, opinions of the Attorney General are entitled to consideration in the construction of the Unruh Act. (*Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 30.) The Attorney General's opinion is entitled to even greater weight because the Unruh Act was amended by the Legislature in 1987 without overruling the opinions issued by the Attorney General in 1975 and 1976 concluding that marital status is covered by the Unruh Act. If these opinions were contrary to legislative intent, it is presumed that some corrective measure would have been taken by the Legislature when it subsequently amended the statute. (*Tiffany v. Sierra Santa Unified School Dist.* (1980) 103 Cal.App.3d 218, 227.)

With respect to the next consideration -- the legitimate *business* interests of the defendants -- the Legislature has already spoken. By prohibiting marital status discrimination in the FEH Act, the Legislature has expressly determined the marital status of a tenant to be a personal characteristic that has no relationship to his or her ability to be a responsible renter. No legitimate business interest exists to justify a landlord's refusal to rent to two people because they are not married to each other. (*Hess v. Fair Employment and Housing Com'n.* (1982) 138 Cal.App.3d 232, 236.)[8] In the instant case, it is noteworthy that the Donahues did not cite any business reasons for refusing to rent to Ms. Terry and Mr. Wilder. Their act of discrimination was

[8] A landlord's financial interests are not harmed by requiring him to apply the same financial standards to two persons whether or not they are married to each other. A landlord can require each tenant to be personally liable for the amount of the rent, thus giving the landlord a cause of action against each tenant, whether married or not. (*Hess, supra*, 138 Cal.App.3d, at p. 236.)

motivated by religious beliefs, not business concerns.

Two significant consequences result from construing the Unruh Act to protect consumers from marital status discrimination. One is factual and the other is procedural.

As a factual matter, a very large segment of the population is protected from the discrimination of people who are biased against unmarried adults who live together. According to the 1990 Census, more than 47% of California households do not contain a married couple and over 44% of the state's households are occupied by renters.[9] Thus, a rule of law that would allow landlords to dictate the lifestyles of unmarried adult tenants would affect millions of California renters. The ability of people living alone to take on a roommate would be jeopardized.[10] The rights of those living in single-parent households would be affected.[11] Blood relatives who decide to live together could suffer from a rental practice excluding two adults who are not married to each other.[12] And, of course, millions of unmarried adults who live together would be affected if a married-couple-only policy is permitted by law.[13]

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[9] Tabulations from: 1990 Census for California and Select Cities; Census of Population and Housing, 1990: Summary Tape File 1 (State of California, Department of Finance, Census Data Center), as contained in Real Party in Interest's Request for Judicial Notice of Census Reports, hereinafter referred to as "Census Reports," RJN, pp. 52-53, 68, 70-71.

[10] According to the 1990 Census, more than 23% of California households consist of one person living alone. (See "Census Reports," RJN, pp. 52, 68.)

[11] About 10% of the state's households consist of a minors living with a single parent. (See "Census Reports," RJN, pp. 52, 68.)

[12] More than 6% of California housing units consist of blood relatives living together without a married couple present in the household. (See "Census Reports," RJN, pp. 52, 68.)

[13] Nearly 8% of California households consist of unrelated adults living together. (See "Census Reports," RJN, pp. 52, 68) There are many reasons why two unmarried adults may decide to live together. For same-sex couples, marriage is not an option under current law. For many young opposite-sex couples, "trial marriages" may be prompted by a fear of making a wrong decision, a fear perhaps justified by high divorce rates. Long periods, sometimes years, of unmarried cohabitation may provide an answer for divorcees trying to avoid renewing old mistakes. For elderly widows or widowers, unmarried cohabitation may be a matter of economic survival, since

(continued...)

In the real world, the incidence of such housing discrimination would likely be significant. Public opinion surveys show that there are large numbers of people who are, like the Donahues, biased against unmarried men and women who live together. In one national poll conducted in 1986, 43% of the respondents stated it was always wrong for unmarried couples to live together without being married.[14] In a national poll conducted in 1989, 23% of the respondents indicated they would not like to have an unmarried couple as neighbors.[15] With the number of unmarried adults in California reaching a near majority of the state's adult population, the level of bias against unmarried couples may be lower than the national average. However, one could expect a significantly large minority of Californians, especially those with fundamentalist religious beliefs, to have negative attitudes toward such couples.[16]

Therefore, as a factual matter, under its present interpretation, the Unruh Act protects millions of Californians from the marital status biases of a significantly large

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[13](...continued)
remarriage can trigger the loss of marital survivor benefits. Economic disincentives or so-called "marriage penalties" prevent many disabled couples from marrying. (*Strengthening Families: A Model for Community Action*, Final Report, Los Angeles City Task Force on Family Diversity (May, 1988), p. 79); (Cf. *Donovan v. Scuderi* (Md. App. 1982) 443 A.2d 121, 128-129, [conc. opn. of Wilner, J.]; *U.S. Dept. of Agriculture v. Moreno* (1973) 413 U.S. 528, 538-540 [conc. opn. of Douglas, J.].)

[14] This national poll was conducted by CBS News/New York Times in January 1986. 1,581 adults were surveyed by telephone. The results were reported by the Roper Center at the University of Connecticut. The same percentage of respondents found such cohabitation to be wrong when asked an identical question by the same polling organizations in 1981. A national poll conducted by Yankelovich Clancy Shulman for Time Magazine in January 1987 found that 54% of the 1,014 adult respondents considered "[l]iving with someone when you're not married" to be morally wrong. The results of these polls are available on the "Dialogue" database of *Westlaw.*

[15] This national poll was conducted by the Gallup Organization January 1989. 1,001 adults were surveyed by telephone. The results were reported by the Roper Center at the University of Connecticut. The results of this poll are available on the "Dialogue" database of *Westlaw.*

[16] The results of a national poll conducted by the Los Angeles Times in 1986 highlighted the difference in opinion between persons categorized as white fundamentalists and the general population. Only 35% of those in the general population stated that homosexual relations between consenting adults in the privacy of their own home should be illegal whereas 65% of white fundamentalists thought such conduct should be illegal. (George Skelton, "U.S. Voters in No Mood to Launch Moral Crusade," *Los Angeles Times*, July 20, 1986.)

minority of business owners.

From a procedural perspective, the Unruh Act is extremely important to ensuring protection from discrimination banned by the law. Having marital status discrimination in housing prohibited by the Unruh Act as well as the FEH Act is not a redundancy. The FEH Act is enforceable only by the FEHC and the Attorney General. The Unruh Act, however, gives enforcement powers to city attorneys and district attorneys. (Civ. Code §52.) With the Fair Employment and Housing Department and FEHC struggling to operate with severe budget restraints, consumers benefit if they can also turn to local agencies to help them combat marital status discrimination. This is especially true in large urban centers such as Los Angeles, San Francisco, Sacramento, Oakland, and San Diego, where, according to census reports, the majority of adults are unmarried.[17] In Los Angeles, San Francisco, and Santa Monica, public attorneys have taken a strong position against marital status discrimination.[18]

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[17] See "Census Reports," RJN, pp. 54-62.)

[18] The strength of conviction of public attorneys in San Francisco and Santa Monica is evidenced by their participation in this case in support of Real Party in Interest. The Los Angeles City Attorney has taken other actions to protect consumers against such discrimination. He convened a Task Force on the subject and published its report in 1990. ("Unmarried Adults: a New Majority Seeks Consumer Protection," Consumer Task Force on Marital Status Discrimination, Office of the Los Angeles City Attorney (March 1990)) He also requested permission to file an amicus curiae brief in this case in support of the FEHC but was denied permission by the Court of Appeal.

III

THE STATE HAS COMPELLING REASONS TO PROHIBIT A LANDLORD FROM REFUSING TO RENT TO TWO ADULTS BECAUSE THEY ARE NOT MARRIED TO EACH OTHER

The Court of Appeal ruled that, despite the holding of the United States Supreme Court in *Employment Division v. Smith* (1990) 494 U.S. 872, "the compelling state interest analysis still applies under state constitutional law." (*Donahue, supra*, 2 Cal.Rptr.2d, at p. 39.) The Court of Appeal found in favor of the Donahues because it concluded that the state did not have a compelling interest in protecting rental applicants such as Ms. Terry and Mr. Wilder from marital status discrimination by business owners such as the Donahues who assert a private religious motivation as the basis for the discrimination. (*Donahue, supra*, 2 Cal.Rptr.2d, at pp. 44-45)[19]

The conclusion of the Court of Appeal is incorrect. There is a housing shortage in California and the problem is aggravated in metropolitan areas.[20] Therefore, especially in the context of a necessity of life such as housing, the state has a compelling interest in prohibiting all arbitrary discrimination, thereby giving all residents an equal opportunity to compete for a place to live.[21]

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[19] Various organizations have petitioned this Court to file amicus curiae briefs to address whether a compelling state interest, or some lesser standard, is required under the California Constitution in the wake of the ruling of the United States Supreme Court in *Smith, supra.* This is an interesting issue that this Court may be tempted to decide. However, it is unnecessary to do so since the state interests advanced by protecting Ms. Terry and Mr. Wilder from marital status discrimination satisfy the highest standard that might be imposed.

[20] *Housing California's Families: The End of the American Dream?*, A report by the Joint Select Task Force on the Changing Family (June 1990), an attachment to Real Party in Interest's Request for Judicial Notice of Government Reports, hereinafter cited as "Government Reports," RJN, p. 16.

[21] The opportunity to be free from marital status discrimination in housing is a *civil right.* (Gov. Code §12921) This Court has declared that the public policies furthered by the FEH Act are (continued...)

The state also has a compelling interest in protecting the constitutional privacy rights of rental applicants such as Ms. Terry and Mr. Wilder.[22] The Legislature has adopted the least restrictive alternative to protect these interests, namely, the passage of a nondiscrimination statute with exemptions to accommodate the privacy rights and religious rights of landlords under appropriate circumstances.[23]

This case does not involve a direct lawsuit by Ms. Terry to enforce her state constitutional privacy rights. In these proceedings, her privacy rights are being safeguarded by the express marital status provision of the FEH Act and the implicit marital status protection of the Unruh Act. As a result, this Court is not required to decide whether Ms. Terry has a cause of action against the Donahues under the privacy provision of Article I, §1 of the California Constitution. However, a variety of precedents, including decisions of this Court, indicate that she does.[24]

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[21](...continued)
"fundamental." (*Brown v. Superior Court* (1984) 37 Cal.3d 477, 485; *Commodore Home Systems v. Superior Court* (1982) 32 Cal.3d 211, 220.)

[22] Real Party in Interest specifically joins in the arguments of the FEHC that the state's interests in prohibiting discrimination of the type involved here are sufficiently important to compel the denial of a religious exemption to the Donahues. (AOBM, pp. 6-28) Ms. Terry also joins in the arguments of Aggrieved Party, District Attorney Arlo Smith, that the Donahues' free exercise claim under the federal Constitution would not be upheld and that, even if a compelling state interest test is required under the California Constitution, the governmental interests in this case would pass muster. (Aggrieved Party's Brief on the Merits, pp. 10-25)

[23] When it passed the FEH Act in 1980, the Legislature made a decision as to where to draw the line in accommodating privacy and religious rights of landlords. In deference to a landlord's privacy right, it exempted from the FEH Act landlords who rent a room to an individual who will live in the same house or apartment unit as the landlord. (Gov. Code §12927(c).) It created another exemption specifically protecting religiously-based constitutional rights of landlords. In this regard, the statute exempts nonprofit religious, fraternal, or charitable organizations that own and operate rental units, provided that such accommodations are being used in furtherance of the primary purposes of the organization. (Gov. Code §12927(d).) These were not unreasonable interpretations of what the state Constitution would require. There is a strong presumption in favor of legislative interpretation of a state constitutional provision and the Legislature's interpretation is controlling if it is not unreasonable. (*Methodist Hospital v. Saylor* (1971) 5 Cal.3d 685, 692-693.)

[24] In *Schmidt v. Superior Court* (1989) 48 Cal.3d 370, 389, fn. 14, this Court noted that it had not (continued...)

III(a)

The State Has a Compelling Interest in Protecting Ms. Terry's Right to Choose Mr. Wilder to be Her Living Companion

In its assessment of potential compelling state interests, the Court of Appeal overlooked one of the most central of all. The privacy provision in Article I, §1 of the California Constitution protects Ms. Terry's right to choose Mr. Wilder as her living companion in an apartment they could afford, such as the one offered for rent by the Donahues.

Refusing to allow people to live together because they are not related by blood, marriage, or adoption is a violation of the state constitutional right of privacy. (*City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 134.) In reaching that conclusion, this Court referred to this right as a "fundamental and compelling interest." (*Adamson, supra*, 27 Cal.3d, at p. 130.) The Court quoted from the ballot argument in support of the privacy amendment to the California Constitution. That argument stated that the amendment would protect our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion, and our freedom to

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[24](...continued)
yet decided under what circumstances, if any, purely private action by a landlord would violate the state constitutional privacy provision. However, as a general principle, this Court has found that the state Constitution's privacy provision limits private as well as government action. (*Rojo v. Kleiger* (1990) 52 Cal.3d 65, 90, citing with approval *Wilkerson v. Times Mirror* (1989) 215 Cal.App.3d 1034, 1040-1044 and *Luck v. So. Pacific Transport. Co.* (1990) 218 Cal.App.3d 1, 19.) Decisions of the Court of Appeal over the past 16 years also have concluded that the privacy clause of the California Constitution applies to the practices of private business because "state action" is not required by that constitutional provision. (*Semore v. Pool* (1990) 217 Cal.App.3d 1087, 1094; *Chico Feminists Women's Health Center v. Scully* (1989) 208 Cal.App.3d 230, 242; *Cutter v. Brownbridge* (1986) 183 Cal.App.3d 836, 842; *Park Redlands Covenant Control v. Simon* (1986) 181 Cal.App.3d 87, 98; *Kinsey v. Macur* (1980) 107 Cal.App.3d 265, 272; *Porten v. University of San Francisco* (1976) 64 Cal.App.3d 825, 829.) In *White v. Davis* (1975) 13 Cal.3d 757, 775, this Court held the privacy clause to be self-executing, conferring a judicial cause of action on all Californians. In that case, the Court specifically noted that various practices of "business interests" were covered by the privacy amendment.

associate with the people we choose. (Ibid.) In *Adamson, supra,* 27 Cal.3d 123, 130, fn. 3, this Court quoted with approval the following passage from Justice Marshall's dissenting opinion in *Village of Belle Terre v. Boras* (1974) 416 U.S. 1, 16:

> "The choice of household companions -- of whether a person's 'intellectual and emotional needs' are best met by living with family, friends, professional associates, or others -- involves deeply personal considerations as to the kind and quality of intimate relationships within the home. That decision surely falls within the ambit of the right to privacy protected by the Constitution."

In a subsequent case, this Court explained that in *Adamson, supra*, "the right to privacy was held to encompass the right to choose the people with whom one lives." (*Robbins v. Superior Court* (1985) 38 Cal.3d 199, 213.) Citing *Atkisson v. Kern County Housing Authority* (1976) 59 Cal.App.3d 89, this Court listed the right of unmarried persons to cohabit in its discussion of the diverse range of personal freedoms protected by the state constitutional right of privacy. (Ibid.)

On a statewide basis, nearly 8% of California households consist of unrelated adults.[25] The percentages are much higher in many metropolitan areas. For example, unrelated adults constituted 14.2% of the households in San Francisco, 8.8% in Oakland, 9.1% in Los Angeles, 8.7% in Sacramento, and 12.3% in San Diego.[26] Providing these residents, and unmarried adults in other living arrangements, with protection against housing discrimination furthers the state's interest in safeguarding their constitutional right of privacy.

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[25] See "Census Reports," RJN, p. 52.

[26] See "Census Reports," RJN, pp. 54-62.

III(b)

The State Has a Compelling Interest in Protecting Ms. Terry's Freedom of Choice With Respect to Marriage

This Court has long recognized that the right to marry is a fundamental right protected by the Constitution. (*Perez v. Lippold* (1948) 32 Cal.2d 711.) A few years before California voters adopted the privacy amendment, this Court held that freedom of choice in matters related to *marriage, family, and sex*, is a constitutional right implicitly protected by the state Constitution. (*People v. Belous* (1969) 71 Cal.2d 954, 963.)

To be more precise, however, it is not the status of marriage, but rather the *decision* regarding marriage, that is constitutionally protected. (*Turner v. Safley* (1987) 482 U.S. 78, 95; *Zablocki v. Redhail* (1978) 434 U.S. 374, 404.) As the United States Supreme Court observed in *Loving v. Virginia* (1967) 388 U.S. 1, 12, "the freedom to marry *or not marry*" rests with the individual. (Emphasis added)

The right to procreate (*Skinner v. Oklahoma* (1942) 316 U.S. 535) and the right not to procreate (*Roe v. Wade* (1973) 410 U.S. 113) are flip sides of the same constitutional right protecting an individual's *decision* whether or not to procreate. So too must the right to marry imply a right not to marry, leaving to the individual the freedom of choice with respect to this intimate and personal matter. In *Cleveland Board of Education v. LaFleur* (1974) 414 U.S. 632, 639-640, the Supreme Court recognized the constitutional importance of "that *freedom of choice* in matters of marriage and family life." (Emphasis added)

The right of privacy in the California Constitution is certainly broad enough to protect Ms. Terry's freedom of choice with respect to marriage. This would include her choice about whether or not to marry Mr. Wilder, and, if so, when she might become engaged or married to him.

A tenant's freedom of choice with respect to marriage is violated by interrogations of a landlord into the tenant's marital status, and certainly it is violated by a landlord's refusal to rent because the tenant is not married to her prospective roommate.

The interrogatories, statements and conduct of Mrs. Donahue violated this aspect of Ms. Terry's right of privacy. Mrs. Donahue asked Ms. Terry if she and Mr. Wilder were married, whether they were engaged, and whether they were planning to become engaged, more than implying that Ms. Terry's answers would have a direct bearing on Mrs. Donahue's decision to rent or withhold the apartment. Ultimately, Mrs. Donahue indicated that she would not rent to Ms. Terry and Mr. Wilder because they were not married to each other. In effect, the bottom line of this business transaction was, "If you're married you can rent the apartment, if you're not, you can't."

Assuming, arguendo, the state has a public policy to promote marriage, such a policy must be premised on an understanding that the freedom of choice of an individual regarding whether to marry, when to marry, and whom to marry is constitutionally protected.[27] Millions of people affirmatively exercise their freedom of choice not to be married.[28] The Census Bureau estimates that about 10% of the adult

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[27] When it adopted the Family Law Act more than 20 years ago, the right *not to be married* became firmly embedded in California law. (Stats.1969, ch. 1608, p. 3324, §8.) Under the so-called "no fault" divorce law, two persons who are married to each other have the right to terminate their relationship and change their marital status from "married" to "unmarried" if their marriage has in fact already failed. (Civ. Code §4506.) Years earlier, this Court declared that "Public policy is not to discourage final and permanent severance of marriages that have failed. . . . The public interest is not enhanced by refusing people the right to terminate a relationship which has already been irrevocable severed in fact." (*Hull v. Superior Court* (1960) 54 Cal.2d 139, 145.) Marital status may not be used as a device for punishment. (*In re Marriage of Gray* (1988) 204 Cal.App.3d 1239, 1254.) For nearly 14 years, the public policy of this state has virtually granted to consenting spouses the right to divorce upon demand when there are no children or major financial obligations involved. (Civ. Code §4550.)

[28] Nearly 600,000 people change their marital status each year in California. This is evidenced by the issuance of marriage licenses to nearly 150,000 couples and the filing of divorce judgments to nearly 150,000 couples in California. ("California Couples: Recognizing Diversity and Strengthening Fundamental Relationships," Report submitted by the Couples Workgroup to the Legislature's (continued...)

population will never marry in their lifetime.[29] There is a trend for many adults to delay marriage, opting to give a higher priority to their education or career, at least temporarily.[30]

Many couples decide to enter into a formal marriage after having lived together out of wedlock for a period of time.[31] For those adults who decide to marry, the Census Bureau estimates that 50% will divorce.[32] Since the median length of marriage in the United State is only slightly more than seven years, it would appear that most married adults will eventually exercise their freedom of choice not to be married.[33]

The state's interest in protecting a tenant's freedom of choice with respect to marriage is implemented by a variety of statutes prohibiting marital status discrimina-

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[28](...continued)
Joint Select Task Force Task Force on the Changing Family (October 1988); See "Government Reports," RJN, p, 30.)

[29] Saluter, "Singleness in America," U.S. Bureau of the Census, Current Population Reports, Series P-23, No. 162, *Studies in Marriage and the Family*, U.S. Government Printing Office, Washington D.C. (1989); See "Census Reports", RJN, p. 8.

[30] The median age for first marriages is rising, from 20.6 for women and 22.5 for men in 1970, to 22.8 for women and 24.6 for men in 1984. According to the Census Bureau, baby boomers are marrying later and less frequently that occurred in previous generations. (See "Census Reports," RJN, p. 8.)

[31] For example, in localities such as Los Angeles County, each year tens of thousands of unmarried adults who have been living together decide to enter into a formal marriage. Nearly 31,000 "confidential" marriage certificates were filed with the County Clerk in 1986. The number increased to 34,159 the following year. Such confidential marriages constituted over 40% of annual marriages reported in Los Angeles County. (See "Government Reports," RJN, pp. 60-61.) These unmarried couples certified that prior to their marriage they had been living together out of wedlock. (Civ. Code §4213.)

[32] See "Census Reports," RJN, p. 8. One government study estimated that in the recent past only 30% of married Californians had obtained a divorce. (*California Couples: Recognizing Diversity and Strengthening Fundamental Relationships*, California Legislatures Joint Select Task Force on the Changing Family, Preliminary Report of the Couples Workgroup (October 1988); See "Government Reports," RJN, p. 34.) However, current projections indicate that eventually 54% of first marriages by women ages 25 to 29 will end in divorce. (Ibid.)

[33] See "Government Reports," RJN, p. 32.

tion.[34] Two of these statutes directly limit the conduct of landlords. One prohibits inquiries into the marital status of a prospective tenant. (Gov. Code §12955(b)) Another prohibits a landlord from withholding housing accommodations because of an applicant's marital status. (Gov. Code §§ 12927(c); 12955(a)) Mrs. Donahue violated both statutes, and the state had important reasons for holding her accountable.

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[34] Even though marital status discrimination is illegal in many contexts, legal distinctions exist between marriage and unmarried cohabitation. The constitution does not require the state to treat unmarried couples the same as married couples across the board in all situations. The Legislature and the courts have acknowledged the rights of unmarried partners in some contexts and denied them in others. Public policy has been evaluated on context by context basis. In some contexts, the rights of the unmarried have been restricted. (*People v. Delph* (1979) 94 Cal.App.3d 411 [right not to testify against spouse]; *In re Cummings* (1982) 30 Cal.3d 870 [privilege of conjugal prison visits]; *Eldon v. Sheldon* (1988) 46 Cal.3d 267 [loss of consortium and emotional distress recovery for death or injury to spouse]; *Norman v. Unemployment Ins. Appeals Bd.* (1982) 34 Cal.3d 1 [unemployment benefits upon relocation]; *Hinman v. Employment Development Dept.* (1985) 167 Cal.App.3d 516 [medical benefits for employees and eligible family dependents]. However, in other cases, the rights of unmarried adults have been affirmed. (*MacGregor v. Unemployment Ins. Appeals Bd.* (1984) 37 Cal.3d 205 [unemployment benefits upon relocation]; *Dept. of Industrial Relations v. Worker's Comp. Appeals Bd.* (1979) 94 Cal.App.3d 72 [worker's compensation survivor benefits]; *Donovan v. Worker's Comp. Appeals Bd.* (1983) 138 Cal.App.3d 323 [same]; *Rudell v. Bd. of Adm.* (Cal.App. 1937) 66 P.2d 1203 [beneficiary of retirement fund]; *Atkisson, supra* [public housing]; *Hess, supra* [private housing]; *DFEH v. Boy Scouts, supra* [private employment]; *North Coast v. Woods* (1980) 110 Cal.App.3d 800 [welfare benefits]; *Parrish v. Civil Service Comm'n* (1967) 66 Cal.2d 260 [same]; *In re Birdsall, supra* [child visitation]; *Wellman v. Wellman, supra* [child custody]; *Marvin v. Marvin* (1976) 18 Cal.3d 660 [property rights upon separation].) Furthermore, numerous statutes prohibit marital status discrimination. (Bus. & Pro. Code §125.6 [refusal to perform licensed activity]; Civil Code §1812.30 [denial of credit]; Educ. Code §44858 [certified employees]; Educ. Code §45293 [merit system employees]; Gov. Code §19704 [state civil service]; Health & Saf. Code §1365.5 [health care service plans]; Health & Saf. Code §33050 [community redevelopment]; Ins. Code §679.71 [insurance]; Ins. Code §799.05 [same]; Ins. Code §11512.193 [nonprofit hospital service plans]; Labor Code §1735 [public works]; Pub. Util. Code §453 [public utilities]; Welf. & Inst. Code §9852 [long-term care]; Welf. & Inst. Code §18907 [food stamps].

The fact that public policy sometimes allows distinctions based on marital status in some contexts does not diminish the fact that marital status discrimination is prohibited in the context of public accommodations. The rationale for granting protection against discrimination in public accommodations is particularly compelling because it involves the basic necessities of life and because it has its legal roots in privacy, liberty, equal protection and other constitutional concepts.

III(c)

The State Has a Compelling Interest in Safeguarding Ms. Terry's Right to Keep Private the Details of Her Personal Life

Protecting the informational privacy rights of tenants is another compelling interest supporting the state's prohibition of marital status discrimination in housing.[35] The California Constitution presumptively shields private associations and activities from inquisition. (*Morales v. Superior Court* (1980) 99 Cal.App.3d 283, 289.) Inquiries into the intimacies of one's life, including the existence of nonmarital sexual relations, if any, are presumptively prohibited. (*Fults v. Superior Court* (1979) 88 Cal.App.3d 899, 903-904) Overly broad requests for such personal information are impermissible. (*Boler v. Solano Superior Court* (1987) 201 Cal.App.3d 467, 474-475.)

The Legislature has determined that inquiries into the marital status of prospective tenants are prohibited. (Gov. Code §12955(b).) By enacting this statute, the Legislature, in effect, has decided that such inquiries are overly broad and unnecessary business intrusions into the private lives of renters.[36]

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[35] The California Commission on Personal Privacy once observed that the right of privacy has three major manifestations: decisional or associational privacy, territorial privacy, and informational privacy. (*Report of the Commission on Personal Privacy*, State of California (December 1982), p. v.) "Informational" privacy shields one from unfair and unnecessary collection and dissemination of personal information. "Territorial" privacy insulates one from intrusions into specific locations, including one's home or anywhere else one has a reasonable expectation of privacy. "Decisional/associational" privacy is sometimes called "freedom of choice" and protects one from interference in one's decisions and inclinations regarding one's personality and one's relationships. The inquiries by Mrs. Donahue violated Ms. Terry's informational privacy rights and Mrs. Donahue's refusal to rent to Ms. Terry and Mr. Wilder violated Ms. Terry's right to decisional/associational privacy under Article I, §1 of the California Constitution.

[36] There is a tremendous amount of public support in California for the right of privacy. A survey done by the National Consumers League compared public opinion nationally with public opinion in California and found that Californians are more sensitive to privacy rights of the individual. For example, about 70% of Californians said employers had no right to inquire into their social activities and subsequently use that information as a basis for making employment (continued...)

By using the term "boyfriend" in passing in casual conversation, Ms. Terry did not waive her fundamental constitutional right to privacy or her statutory protection against interrogations into, or adverse decisions based on, her marital status. Furthermore, any incidental concern the word "boyfriend" may have caused Mrs. Donahue was more than offset by the compelling interest the state had in protecting Ms. Terry from further inquisition into the details of her personal life or from discrimination because she and Mr. Wilder were not married.

IV

THIS CASE IS NOT A PROPER VEHICLE FOR DECIDING WHETHER A LANDLORD MUST EVER BE GRANTED A RELIGIOUS EXEMPTION FROM FAIR HOUSING LAWS, INASMUCH AS THE DONAHUES' PRESENT A FALSE RELIGIOUS CLAIM PREMISED ON AN INVALID SECULAR PRESUMPTION

The Donahues are devout Roman Catholics. (AR II/2: 56.) Their religion teaches that sexual intercourse outside of marriage is a mortal sin, for which the sinner will go to hell unless the sin is forgiven before death. (AR II/2: 56-58) In addition to her belief that sex between two unmarried persons is a mortal sin, Mrs. Donahue also believes that sexual relations of a married couple is a mortal sin if either spouse has been previously divorced or if either spouse is not a Catholic. Mrs. Donahue firmly believes in these rules, and has a sincere religious belief that it would be a mortal sin

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[36](...continued)
decisions. About 67% of 1,200 people surveyed nationally believed that employers should not ask prospective employees probing personal questions in a job interview or in the workplace. (Christine Gonzales, "Priority on Privacy: Poll Finds Californians, More than Others, Oppose Employer Intrusions," *Los Angeles Times*, April 16, 1992, Business Section, page 1.)

for her to aid another person in the commission of a sin of this nature.[37]

At the time Mrs. Donahue refused to rent the apartment to Ms. Terry, she did not know whether or not Ms. Terry and Mr. Wilder had a sexual relationship with each other. She did not know whether Ms. Terry and Mr. Wilder were living together for purely social reasons, for economic reasons, or for that matter, whether their relationship was completely asexual. When she informed Ms. Terry that she would not rent to an unmarried couple, Mrs. Donahue did not know the religious persuasion of Ms. Terry. For that matter, Mrs. Donahue did not know the sexual orientation of Ms. Terry and Mr. Wilder; she assumed they were heterosexuals. Furthermore, she did not know whether or not Ms. Terry's religious beliefs coincided with, or were offended by, Mrs. Donahue's belief system.

Mrs. Donahue did not disclose to Ms. Terry that her refusal to rent to unmarried couples was based on her religious beliefs. Ms. Terry and Mr. Wilder filed a complaint with the Fair Employment and Housing Department.[38] On two occasions, the Department had investigators contact Mrs. Donahue. Although Mrs. Donahue told both investigators she would not rent to unmarried couples, she did not inform them

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[37] (AR II/2: 67.) This is premised on Mrs. Donahue's belief that the Catholic Church does not recognize divorce and therefore a divorced and remarried Catholic commits adultery by having sex with a new marriage partner. She also believes that Catholics may not marry outside of the Church. Therefore, in her estimation, an interfaith marriage is invalid and the sexual activity of the spouses is a mortal sin. Because of these beliefs, Mrs. Donahue claims the right not to rent to a remarried Catholic or a Catholic who married outside of the faith. (Ibid.)

[38] Their complaint was filed with the Department in March 1987. The Department received another 109 complaints of marital status discrimination in housing during the 1986-1987 fiscal year. ("Summary of Housing Cases Filed/Closed Under FEHA/Unruh Act," July 1, 1986 - June 30, 1987, State of California, Department of Fair Employment and Housing; See "Government Reports, RJN, p. 65.) Over the past several years, the Department has received an average of more than 100 cases per year involving marital status discrimination in housing. (See "Government Reports," RJN, pp. 62-66) However, many marital status cases never reach the Department because they are investigated and successfully conciliated by local Fair Housing Councils. (Final Report, *Consumer Task Force on Marital Status Discrimination*, Office of the Los Angeles City Attorney (March 1990); See "Government Reports," RJN, pp. 71, 88-91.) According to housing discrimination experts, however, most cases are not reported to any agency. The reported cases of marital status discrimination, they say, are "only the tip of the iceberg." (*Id,* at p. 71.)

that her decision was grounded in her religious beliefs. It appears that the religious nature of her objection was not disclosed until after the Department filed a formal accusation against the Donahues with the FEHC. Then the Donahues raised the religious exemption as an affirmative defense.

A close reading of the administrative record shows that there are only two operative religious beliefs involved in this case. First, Mrs. Donahue believes it is a mortal sin for two people to have sex if they are not married to each other in the eyes of the Catholic Church. Second, she believes it would be a mortal sin for her to aid and abet a person in the commission of a sin.

At no time did Mrs. Donahue claim to have a religious belief that renting to two unmarried adults would itself be a sin or that every time an unmarried man lives with an unmarried woman, the man and woman always engage in sexual mortal sins. Her refusal to rent to unmarried couples was based on a factual presumption, not a religious belief, that unmarried couples would be engaging in sexual conduct in the apartment if she rented it to them. Absent that factual assumption, Mrs. Donahue's religious beliefs would not have been offended in the slightest. Whether or not such a factual presumption exists is a secular matter, not a matter of religious doctrine. Thus, it appears that the Donahues' legal contention was, in effect, overbroad: the burden they claim was placed on their free exercise of religion burdened only the secular contention that unmarried people who live together *might* engage in sinful sexual conduct, not the religious contention that aiding and abetting a sin is itself a sin. In order to aid and abet the sin, the Donahues had to know the sin would in fact take place, and this they did not know, could not know, and could not ask; so the relied on a presumption. Again, the presumption was not dictated by religious doctrine; the presumption was thus secular.

A few analogies might help to clarify this point. Suppose a landlord believes that she would be committing a mortal sin if she rented to a woman who would have an abortion during her tenure as a tenant. During a telephone call to the applicant's previous landlord, the prospective landlord discovered that the applicant was unmarried,

was dating men, and was "pro-choice." In such a case, whether the prospective tenant had previously had an abortion or was likely to do so in the future would not be a matter of religious belief but rather would be secular speculation. Further facts would have to be established before there would be any colorable claim to a religious freedom exemption from fair housing laws. Or suppose a landlord believes it would be a mortal sin for her to rent to someone who uses cocaine or who watches pornographic movies or who drinks alcoholic beverages. Again, whether a prospective tenant is a cocaine user, watches obscene movies, or drinks alcohol, each would be a secular fact that would require proof before a religious freedom claim would be anything other than frivolous.[39]

There is no evidence in the record that, by requiring her to rent to Ms. Terry and Mr. Wilder, the state would be forcing Mrs. Donahue to aid and abet the commission of sexual sins in the apartment. In this case, the Donahues' claim to a religious exemption is premised on an invalid presumption that two unmarried adults who live with each other in a one-bedroom apartment are, of necessity, engaging in sexual intercourse with each other on the premises. There is no such presumption in California law. Allowing a landlord to utilize such a presumption in refusing to rent an apartment would be repugnant to the right of privacy contained in Article I, §1 of the California Constitution.[40]

If the presumption made by the landlords were conclusive, it would unduly affect fact situations not offending the landlord's religious beliefs and would lead to due process problems. Housing decisions may not be based on an *irrebuttable* presumption

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[39] A similar analogy can be made in connection with two of Mrs. Donahue's religious beliefs. She believes that sex between a Catholic husband and his Jewish wife is a mortal sin if the couple were married outside of the Catholic faith. Whether or not the couple were married in a Catholic church or a Jewish synagogue is a secular historical fact, not a religious belief. Similarly, whether a prospective tenant is a Catholic who obtained a civil divorce and later remarried is a matter of secular fact, not a matter of religious belief.

[40] California's privacy protection embraces sexual relations. (*Vinson v. Superior Court, supra*, 43 Cal.3d, at p. 841.)

that unmarried adults who live together are engaging in immoral activity. (*Atkisson, supra*, 59 Cal.App.3d 89, 97, cited with approval in *City of Santa Barbara v. Adamson, supra*, 27 Cal.3d 123, 133.)

On the other hand, a tenant's right to privacy would be violated by allowing a landlord to rely on a *rebuttable* presumption that two unmarried adults are having sexual relations with each other. Such a presumption would shift the burden of proof to the tenants to prove they did not have a sexual relationship. Another example shows how such a presumption would violate the informational and associational privacy rights of renters. Suppose two men applied to rent a one-bedroom apartment from Mrs. Donahue. Based on stereotypes of how homosexuals look and behave, Mrs. Donahue assumes the men are gay. Because of her religious belief that homosexual sex is a mortal sin, she decides not to rent to the men. She informs the men that she does not rent to homosexual couples. In fact, the men are not gay and do not have a sexual relationship with each other. It would be an invasion of privacy if the law allowed Mrs. Donahue to refuse to rent to the men based on an assumption that they had an ongoing homosexual relationship. The men should not be required to rebut the presumption by proving, for example, that they are dating women or by requiring them to take an oath not to have sex in the apartment.

Constitutional considerations aside for the moment, public policy does not abide a presumption of immorality merely because two unmarried adults are living together. Several statutes and judicial decisions support this conclusion.

The party claiming that a person is guilty of wrongdoing has the burden of proof on that issue. (Evid. Code §520.) A presumption of innocence is applicable in civil as well as criminal cases. (*Brill v. Brill* (1940) 38 Cal.App.2d 741, 102 P.2d 534, 537; *Niiya v. Goto* (1960) 181 Cal.App.2d 682, 5 Cal.Rptr. 642, 644.)

There is a presumption that Ms. Terry's conduct was in accordance with the rule of morality. (*Rodetsky v. Nerney* (1925) 77 Cal.App. 545, 237 P. 791, 792.) Furthermore, the law presumes that occupancy of a dwelling is not for immoral purposes. (*Lertora v. Globe* (1936) 18 Cal.App.2d 142, 63 P.2d 313, 314.) The existence of sexual relations

is not established by merely showing that a man and a woman are living together in the same house. (*People v. Breeding* (1912) 19 Cal.App. 359, 126 P. 179, 181.)

In *Marvin v. Marvin* (1976) 18 Cal.3d 660, 684, this Court overruled previous appellate decisions that had denied contract recovery on the ground that it was an immoral living arrangement for two unmarried adults to live together. The Court declined to presume that sexual services were always an integral part of such relationships. In *City of Santa Barbara v. Adamson, supra*, 27 Cal.3d 123, 133, this Court concluded that it would not be legitimate to assume that unrelated adults who live together create an immoral environment. More recently, this Court emphasized that judicial decisions should not be based on a value judgment regarding the morality of unmarried cohabitation relationships. (*Elden v. Sheldon* (1988) 46 Cal.3d 267, 279.)

The Donahues allege that the FEH Act and the Unruh Act would be unconstitutional unless the FEHC's decision is reversed. The FEHC's decision implements two statutes passed by the Legislature. A strong presumption of constitutionality supports legislative acts. (*Cal. Housing Finance Agency v. Patucci* (1978) 22 Cal.3d 171, 175.) Since they attacking these statutes, the Donahues have the burden of establishing their constitutional claim. (*Wotton v. Bush* (1953) 41 Cal.2d 460, 261 P.2d 256, 260)

Since a presumption of sexual behavior does not exist, nor would such a presumption be constitutional, the Donahues would have this Court grant them an exemption from the fair housing laws on a hypothesis that unmarried adults who live together are having sexual relations. This Court should decline to do so. A constitutional issue will not be decided on the basis of speculation. (*In re Johnson* (1965) 62 Cal.2d 325, 42 Cal.Rptr. 228, 232.)

In any event, as argued below, even if two unmarried tenants were questioned by a landlord and admitted to having an ongoing sexual relationship, the landlord would not be entitled to a constitutional exemption from the FEH Act or the Unruh Act.

V

THE LANDLORDS IN THIS CASE ARE NOT ENTITLED TO AN EXEMPTION FROM THE FAIR HOUSING LAWS ON THE BASIS OF THE FREE EXERCISE CLAUSE OF EITHER THE FEDERAL OR THE STATE CONSTITUTIONS

The initial premise underlying an examination of the Donahues' claim for a personal religious exemption from the state's nondiscrimination public accommodations laws, is that "religious liberty embraces the freedom to believe, which is absolute, and the freedom to act, which in the nature of things cannot be absolute." (*Cantwell v. Connecticut* (1940) 310 U.S. 296, 303-304; *Pines v. Tomson* (1984) 160 Cal.App.3d 370, 392.) The reasons for the distinction between belief and action are obvious: in a pluralistic, multi-faceted, highly diverse society, one's actions--as opposed to one's beliefs--always include the inherent possibility of conflict with someone else's values, beliefs, and actions, i.e., the danger of harm to others. Many religions teach a moral code that excludes those who do not believe or act in accordance with that code. As an internal socialization tool, religious teachings can be valuable. When the teachings promote action that reaches outside the religion and harms others, "freedom of religion" may come into conflict with other important societal values, such as the promotion of the dignity of the individual, equality of opportunity, freedom from arbitrary discrimination in public accommodations, and liberty to pursue happiness without having to conform one's actions or beliefs to someone else's belief system.

While, at first blush, this case appears to be a fertile battleground for these competing interests, a closer examination of the facts reveals a confluence of factors that, taken together, can lead only to the conclusion that the Donahues are not entitled to a "free exercise" exemption and that, under even the most stringent of religion-protecting standards, private landlords such as the Donahues should never have such an exemption. There may be close cases pitting "free exercise" against nondiscrimina-

tion regulations. This is not one of them.[41]

Whether or not *People v. Woody* (1964) 61 Cal.2d 716,[42] remains vibrant law in California after *Smith*, the *Woody* Court's analysis remains the more exacting of the two, requiring a reasoned factual examination. While there is some attractiveness to "bright line" rules of law such as that provided by *Smith*, making detailed factual analyses unnecessary,[43] the rightness of the result dictated by *Smith* is even more compelling in the present fact situation given the careful analytical methodology used by this Court in *Woody*.

Specifically, in *Woody*, Justice Tobriner found two questions of fact critical: first, whether the particular religious exercise affected by the government regulation was central, that is, at the "theological heart," of the religion's belief system or practice (*Id.*, at 722); and second, whether the interests of the state in the effective administration of the law, particularly the statutory regulatory scheme being applied against the religious practice, would be appreciably harmed by allowing a religious exemption (Id., at 723).

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[41] This Court does not have to decide the knotty constitutional issue of whether the U.S. Supreme Court's *Smith* test (*Employment Division v. Smith* (1990) 494 U.S. 872, 878 [under the U.S. Constitution no exemption exists from laws of general applicability designed to protect society from harmful conduct where the effect on the free exercise of religion is merely incidental]) governs the state constitutional analysis or whether a "balancing" or "strict scrutiny" or some other hybrid test should be applied. Given the facts, this Court could exercise judicial restraint by ruling that, under any standard, no exemption is mandated by the federal *or* state free exercise clauses for landlords in the Donahues' position.

[42] In *Woody*, this Court upheld the ceremonial use of peyote by the Native American Church as a valid free exercise of religion, notwithstanding state criminal sanctions against the use of the substance. In *Smith*, the U.S. Supreme Court came to the opposite result in a similar fact situation by using a far less religion-deferential standard. In fact, the standard adopted in *Smith* requires virtually no balancing of interests or weighing of burdens. Rather, it appears to be so deferential to government regulation that little, if any, analysis is necessary.

[43] Real Party in Interest has already joined in the arguments of the FEHC (AOBM, pp. 6-28) and the San Francisco District Attorney (Aggrieved Party's Brief on the Merits, pp. 10-25) in which *Smith* and *Woody* are discussed, with the conclusion that, under either analysis, the free exercise claim does not entitle the Donahues to an exemption from the fair housing laws. (*See* fn. 22, supra.)

In the present case, one must add one additional factual issue of equal importance, an issue that is missing from both *Smith* and *Woody*, as well as from most of the other cited authorities found in the briefs in this case, namely, the harm to third parties such as Verna Terry which is created by the claimed free exercise activity.[44] Verna Terry is "Real Party in Interest" in this case precisely because, as a renter, she is the third party beneficiary of the nondiscrimination law; she is the injured party when she fails to receive the benefit of the law because of a judicially created exemption for landlords of an apartment she seeks to rent.[45]

Woody, then, basically mandates an analysis of factual benefits and harms, an analysis that, once made, ends with the same result the more arbitrary *Smith* test leads to, that any free exercise claim in the present case must be subordinate to the state's regulation banning discrimination in housing.

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[44] One notable exception is *Walker v. Superior Court* (1988) 47 Cal.3d 112, *cert. den.* 491 U.S. 905 (1989), in which this Court focussed on the third party beneficiary's rights in deciding that the free exercise clause did not exempt Christian Scientist parents from providing medical care for their children. In that case, as in the present case, the harm to the party whom the regulation or law is designed to protect was and is a critical issue, and one that was ignored by the Court of Appeal in this case. The harms to third parties are related to the compelling interest of the state to prevent those harms and are discussed in section III, *supra*.

[45] The suggestion by the Court of Appeal that Verna Terry or any others discriminated against by the Donahues could simply look elsewhere for alternative housing (Slip Opinion, p. 27) sounds suspiciously and dangerously like the "separate but equal" rationale once used to justify racial segregation. (*Plessy v. Ferguson* (1896) 163 U.S. 537.) As recognized in both Justice Harlan's dissent in *Plessy* (163 U.S. at 559) and in *Brown v. Board of Education* (1954) 347 U.S. 483, the government sanctioning of exclusions and conferring of preferences adversely affect society's interest in equality of treatment and opportunity.

Such treatment has the effect of acclaiming one group "superior" to another which is "inferior," and adversely impacts the dignity interests of those excluded. As noted by Justice O'Connor in an establishment clause context, "Direct government action endorsing . . . a particular religious practice is invalid . . . [because] it sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." (*Wallace v. Jaffree* (1985) 472 U.S. 38, 67 (O'Connor, J., concurring, quoting from *Lynch v. Donnelly* (1984) 465 U.S. 668, 687 (O'Connor, J., concurring)).)

V(a)

The Donahues' Refusal to Rent to Unmarried People Is Not Central to Their Religious Beliefs or Practices

The ban on discriminatory practices in housing does not affect the Donahues' ability to believe or practice their religion. It is unrelated to the suppression of ideas. It does restrict their imposition of their religious beliefs on others, a restriction that is consistent with the use of "free exercise" protection as a *shield* from government intrusion into religious beliefs and practices but not as a *sword* to be used against those with different values. To the extent that the Donahues go to Church, worship, and practice their religious beliefs and rituals, the regulation does not affect them. To the extent the regulation prevents them from refusing to rent to people who are different from them, the regulation affects secular, not religious activity.

The question is not whether the belief that they should discriminate is sincerely held, for often such beliefs are among the most sincere. The question is whether the belief is religious and, if so, whether the religiously-based discriminatory beliefs and practices are "core" beliefs and practices.[46]

For that reason, courts pay greater deference to religious activities that are focussed inward, e.g. actions by and within religious institutions, *and* when the underlying activity engaged in is religiously motivated, as opposed to being motivated by profit. In the hierarchy of "free exercise" protection, religious institutions engaging in religious non-commercial activity are given most freedom from government regulation, religious institutions engaging in "for profit" activities are offered less, while private individuals engaging in non-religious commercial activity are subject to normal

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[46] Not every belief or practice that is religiously based is "core" or "*essential to the practice of the religion.*" (*People v. Woody*, *supra*, 61 Cal.2d 716, 725, citing *Reynolds v. United States* (1879) 98 U.S. 145, where polygamy, a basic tenet of Mormon theology, was held not to be "essential"). The U.S. Supreme Court in *Smith* was also impressed by *Reynolds* when that case expressed concern about allowing "the professed doctrines of religious belief [to be] superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Smith*, *supra*, 494 U.S. at 879.

regulation. Were it otherwise, every citizen could be exempt from the law, leading to chaos and anarchy, and society would be hampered by the constant clash of beliefs and ideologies.[47]

Thus, the Donahues' implicit claim that their discriminatory action is central to or at the theological core of their religion is colored by two critical factors: first, the Donahues are private individuals, not a religious institution; and second, their action, refusing to rent to an unmarried couple, was in a secular commercial context.

V(a)(1)

The Donahues' Status as Private Individuals, and Not a Religious Institution, Diminishes the Deference the State Should Pay to Their Free Exercise Claim

Traditionally antidiscrimination regulations have legislatively exempted religious institutions from compliance. (*See e.g.* 42 U.S.C. 2000e-1; Gov. Code §12927(d)

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[47] Government deference to personal religiously-based biases in non-religious secular commercial activities such as providing public accommodations, would have the affect of favoring the most intolerant of religions to the detriment of all others, a scenario prohibited by the establishment clauses of the state and federal constitutions. The granting of an exemption from the antidiscrimination regulations for personal religious belief would constitute an establishment clause violation under the three-prong test provided by the U.S. Supreme Court in *Lemon v. Kurtzman* (1971) 403 U.S. 602, 612-613, *reh. den.* (1971): (1) such an exemption would serve no secular legislative purpose; (2) the primary effect of such an exemption would be to advance religion, specifically those religions with the greatest degree of doctrinal intolerance of people with contrasting views, while ignoring those with the same but secularly-based beliefs; and (3) the exemption would lead to excessive government entanglement in religion in determining what actions are religiously based and sincerely held, i.e., the line must be drawn somewhere, and figuring out where would constantly lead to government entanglement with religion.

Additionally, granting an exemption from normal antidiscrimination regulations in order to allow landlords to require tenants to conform their lifestyles to the demands of the landlord's personal religious beliefs seems to put a government "imprimatur" on religion. The establishment clause does not permit such an abandonment of government's secular purposes. (*Gillette v. United States* (1971) 401 U.S. 437, 450; *Texas Monthly, Inc. v. Bullock* (1989) 489 U.S. 1, 20; *California Educational Facilities Authority v. Priest* (1974) 12 Cal.3d 593, 605 [the state constitution's establishment clause requires no less].)

[exempting religious institutions from the housing antidiscrimination regulations of the FEH Act.) The reasoning behind these "free exercise" exemptions is to prevent government interference with the "ability of religious organizations to define and carry out their religious missions." (*Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos* (1987) 483 U.S. 325, 339.) Exemptions to antidiscrimination laws are constitutionally mandated in order to avoid excessive entanglement in religion by "minimiz[ing] governmental interference with the decision making process in religions." (*Id.*, at 336.)

In essence, religious institutions are to be free from having the government pass judgment on the propriety of their decisions. For example, federal antidiscrimination laws may not be used to interfere with a church's processes in choosing a minister. The relationship between a church and minister or priest are "matters of church administration and government and thus, purely of ecclesiastical cognizance." (*E.E.O.C. v. Mississippi College* (5th Cir. 1980) 626 F.2d 477, 485; *McClure v. Salvation Army* (1972) 409 U.S. 896.) Therefore, "secular notions of 'fundamental fairness' or impermissible objectives, are . . . hardly relevant to such matters of ecclesiastical cognizance." (*Sebian Orthodox Diocese v. Milivojevich* (1976) 426 U.S. 696, 713-15.)

Further, once a court has decided that an entity is a religious institution, this fact alone may prevent further state examination into an action by that institution, thus avoiding "the conflicts that would result between the rights guaranteed by the religion clauses of the first amendment and the [federal government's] exercise of jurisdiction over religious . . . institutions." (*Mississippi College*, *supra* at 485, citing *N.L.R.B. v. Catholic Bishop of Chicago* (1979) 440 U.S. 490, 500-502. Also see *Paul v. Watchtower Bible and Tract Soc'y* (9th Cir. 1987) 819 F.2d 875, 880-883 [exemption of Jehovah Witness Church from liability for intentional infliction of emotional distress in context of lawsuit by rejected ex-member]; *United States v. Ballard* (1944) 322 U.S. 78, 86-88 [truth or falsity of church's faith healing claims could not be considered].)

The usual rationale for a constitutionally mandated free exercise exemption for activities by or within religious organizations simply does not apply when asserted by

individuals outside of the institutional context. While the institutional exemption might be extended to an individual's actions when those actions are purely religious and clearly mandated by the institutional doctrines, the danger is that an individual will elevate his or her personal biases to a "core" belief or give undue emphasis to a minor tenet. For that reason, the state should not be deferential to the Donahues' belief that they might be committing a sin by renting to someone who might commit a sin; rather, the state should actively examine the belief for its centrality to the religion. The indirect and speculative nature of the belief in this case, combined with the fact that it focuses on a secular actions (namely, renting property) and persons and activities outside the religion, lead to the conclusion that the Donahues' actions do not merit a religious exemption. Requiring the Donahues, or any other individuals acting for themselves and participating in secular commerce, to adhere to the civil rights laws of the state does not in any way interject the state into internal management or doctrine of religion, in this case Catholicism.

V(a)(2)

The Donahues' Commercial Conduct Subjects Them to Regulation by Laws Generally Applicable to All California Landlords

The Donahues own a five-unit apartment building available for rent to members of the general public. They do not contend that there is any religious basis for this secular, commercial activity. In fact, the sole basis for the activity is monetary profit. The Donahues' chosen course of conduct must subject them to valid, neutral laws which are not aimed at the suppression of the Donahues' religious beliefs. (*United States v. Lee* (1987) 455 U.S. 252, 255-257.) "When followers of a particular sect enter into commercial activity *as a matter of choice*, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." (*Id.*, at 261) [Emphasis added].

The burden placed upon the Donahues pursuant to Government Code §12955 is incident to their public commercial conduct, not their personal religious belief.

The Donahues' ability to hold state anti-discrimination laws hostage to a personal religious belief, manifest as a course of commercial conduct, is the true issue in this case. When one translates one's personal religious beliefs into secular commercial action and attempts to export those beliefs by imposing them on others in the secular world, that translation and exportation distance the commercial manifestation of the belief from the belief itself. Even if the belief were originally at the "theological heart" of the religion, that commercial manifestation may be regulated without government interference with the original belief. Regulation of the "exported" personal belief is especially appropriate and justified when the exportation manifests itself in denying basic or fundamental benefits to others, benefits which the state has a compelling interest to protect.

A virtual gamut of neutral laws whose sole aims are the regulation of commercial conduct have been upheld under circumstances which mirror the present situation in the sense that compliance with the law was tantamount to a direct or indirect violation of a sincerely held religious belief. In *United States v. Lee*,[48] a business owner and

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[48] *See also Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos* (1987) 483 U.S. 325 [application of federal antidiscrimination laws]; *Tony and Susan Alamo Found. v. Secretary of Labor* (1987) 471 U.S.290 [Fair Labor Standards Act laws apply to religious group even though compliance will violate religious beliefs]; *Bowen v. Roy* (1986) 476 U.S.693 [AFDC regulations requiring use of a social security number apply to individuals even if such application forces the individual to violate a religious tenant]; *Braunfeld v. Brown* (1961) 366 U.S. 599 [Sunday closing laws); *Prince v. Massachusetts* (1944) 321 U.S. 158 [child labor laws]; *Blalock v. Metals Trades, Inc.* (6th Cir. 1985) 775 F.2d 703 [application of federal antidiscrimination laws].

California has also impliedly distinguished claims based upon commercial conduct and personal religious belief. In *Pines v. Tomson* (1984) 160 Cal.App.3d 866, a religious group whose primary purpose was to publish a Christian Yellow Pages refused to include an advertisement by a business that would not swear a religious oath. The publishers of the Christian Yellow Pages argued that forcing them to comply with California's antidiscrimination laws violated their free exercise rights. However, the court found that there was no abridgement of the Christian Yellow Pages' free exercise rights because California's antidiscrimination laws simply required the publishers, in the course of their commercial conduct, to act in a non-discriminatory manner. (*Id.*, at 389.) Publishing the names of non-Christian advertisers did not require the publishers to

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member of the Amish sect refused to pay social security taxes because to do so was the equivalent of a sin in the Amish faith. (*Id.*, at 257.) Lee argued that forcing him to comply with the tax laws violated his right to free exercise of religion under the United States Constitution. The Supreme Court disagreed, finding that Lee's decision to enter into commercial conduct subjected him to valid, neutral laws, which served a compelling state interest and were binding upon all others engaged in that commercial activity. Similarly, Government Code §12955 serves compelling state interests,[49] is neutral on its face, and compliance is required by all who are engaged in the real property rental business.

The Court's reasoning in *Lee* is also applicable here. The Donahues' commercial activity is a matter of choice, and in making that choice, the Donahues also chose to be held accountable to the same laws as all other landlords in California. If this were not so, there would be no principled way for this Court to limit the potentially vast consequences of its ruling as applied to commercial activity. For instance, will an innkeeper be able to refuse to rent a room, a bank refuse to process a mortgage application, a mover refuse to move, a furniture company refuse to sell a bed, or a electric company refuse to provide basic service — because they would be aiding or abetting in the conduct of an unmarried couple? Or a homosexual couple? Or an interracial couple?

The public policy behind the *Lee* decision is sound: when one chooses to enter into commercial conduct, one assumes a special role and with that role special obligations toward the public. The obligations are especially significant in the realm of public accommodations. The burden on free exercise in the commercial arena is

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[48](...continued)
endorse, or aid and abet in the endorsement of contrary religious beliefs. There, as here, all the antidiscrimination law requires is that commercial entrepreneurs provide equal access to all in the course of a profit-making activity. The focus is on the commercial activity, not the religious beliefs of the individuals involved. Verna Terry does not seek to regulate the Donahues' religious beliefs, only their course of prohibited commercial conduct.

[49] *See* section III, *supra*.

outweighed by the state's compelling interest in regulations designed to ensure the public welfare. (*See Lee, supra*, 455 U.S. at 259.) Lee became a business owner by choice; however, his employees did not have a choice as to their need to the basic benefits provided by the social security system. (*Ibid.*) For this reason, Lee could not use his religious beliefs to deny his employees access to a necessary benefit.

This "access to basic benefits" reasoning can also be inferred from court decisions involving education, a public benefit not dissimilar to social security pensions. In *Bob Jones University v. United States* (1983) 461 U.S. 574, a religious private school refused to admit African-Americans on the basis that the intermixing of the races violated one of the sincerely held religious tenants of the university. As a result of the refusal to admit all races, the university was denied the tax exemption normally given to private religious schools. (*Id.,* at 602-605.) The school argued that the exclusion from tax exempt status on the basis of the religious belief that mixing of races is a sin, violated the free exercise clause. The Court disagreed because *access* to education is a compelling state interest, and such access must therefore be provided on a non-discriminatory basis.

Similarly, in *Gay Rights Coalition v. Georgetown University* (D.C. 1987) 536 A.2d 1, an en banc panel of the District of Columbia Court of Appeals held that Georgetown University must comply with state antidiscrimination laws. In that case, two gay student groups at Georgetown brought suit under an antidiscrimination law seeking to compel Georgetown to grant them official recognition and campus benefits. (*Id.*, at 8.) The benefits the student groups sought were the same as those given to all other student groups. (*Ibid.)* Georgetown, which is affiliated with the Catholic Church, defended on the grounds that the antidiscrimination law did not apply to it and that, if it did, the law violated the University's free exercise rights. The Court of Appeal ruled that the antidiscrimination law did not oblige Georgetown to endorse the gay group, but it did require that Georgetown afford the groups equal access to the University's facilities and services (*Id.*, at 16-17), notwithstanding the fact that the Catholic Church clearly regards homosexuality to be a sin, and providing basic services to a group facilitating interaction

among lesbian and gay people would arguably aid and abet in this "sin" (*Ibid.*). Thus, significantly, even religious institutions may be subject to state regulation when they enter the secular commercial realm.

All of these cases involve commercial conduct and access to the basic human needs in a complex, diverse society. The choice to become a public accommodations supplier is voluntary; access to or denial of basic public accommodations benefits is imposed involuntarily upon members of the consuming public. In the present case, the Donahues entered into the commercial housing market by choice. Rental housing is a basic human need of all Californians.[50] Verna Terry and other Californians who may not have the financial ability to be homeowners have fundamental housing needs that may be problematic enough without diminishing their choices by allowing all who want to discriminate to do so. Ms. Terry does not ask this Court to invalidate the Donahues' personal beliefs. The core of the Donahues' belief should remain intact. Ms. Terry merely asks that the Court regulate their chosen commercial conduct so as to protect her and others from further uncertainty in the housing market as the Legislature has found necessary to ensure the public welfare.

V(b)

The State's Abiding and Unwavering Commitment to Non-Discrimination in Housing and to the Welfare of Its Citizens Would Be Substantially Burdened By an Exemption

California commitment to the eradication of "invidious discrimination" is clear. (*Pines v. Tomson*, *supra*, 160 Cal.App.3d 370.) As early as 1893 and 1897, the California Legislature began to prohibit discrimination in certain "public accommodations."[51] Over 30 years ago, in 1959, the Legislature enacted the Unruh Act, Civil Code §§ 51-52,

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[50] See section II, supra, for a discussion of the housing problem in California.

[51] Stats.1893, ch. 185, p. 220; Stats.1897, ch. 108, p. 137. These enactments were eventually codified as Civ. Code §§ 51-54.

which prohibits discrimination in business establishments *of any kind*. At the same time, the Legislature passed the Hawkins Act, which prohibited discrimination in public housing.[52] The Legislature broadened protections against discriminatory housing with the 1961 enactment of Civil Code §§ 53 and 782.[53] Finally, in 1963, the Legislature passed the Rumford Fair Housing Act,[54] which superseded the Hawkins Act.

Moreover, this Court has consistently supported legislative efforts to eliminate housing discrimination. In the landmark case of *Mulkey v. Reitman* (1966) 64 Cal.2d 529, *aff'd* 387 U.S. 369 (1967), the Court struck down as violative of equal protection Art. I, § 26 of the California Constitution, an amendment which would have allowed property owners "absolute discretion" in the sale or rental of their property. Although grounded in federal law, the *Mulkey* decision may be read as an affirmation of the compelling importance of the principle of anti-discrimination in California's legislation and jurisprudence. (*See Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, *cert. den.* 459 U.S. 858 (1982); *In re Cox* (1970) 3 Cal.3d 205; *Thomas v. Goulis* (1966) 64 Cal.2d 884; *Hubert v. Williams* (1982) 133 Cal.App.3d Supp. 1; *Winchell v. English* (1976) 62 Cal.App.3d 125.)

Unequivocally, California's legal and legislative histories reflect the state's unyielding commitment to antidiscrimination as an essential element of the public welfare. The California Constitution itself expressly allows limitations on the free exercise religion when such limitations are in the interests of the public welfare.[55] This

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[52] Formerly Health & Saf. Code §§ 35700-35741.

[53] These sections prohibit discriminatory restrictive covenants affecting real property interests and racially restrictive conditions in real property deeds, respectively.

[54] Formerly Health & Saf. Code §§ 35700-35744.

[55] Article I, §4 of the California Constitution provides, in pertinent part:

> 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.

promotion of the safety of the State's inhabitants is an important function of government, recognized under the police power. (*Bowker v. Baker* (1946) 73 Cal.App.2d 653.) The FEH Act itself equates the need for antidiscrimination with the public welfare: "[T]he practice of discrimination because of race, color, religion, sex, marital status, national origin, or ancestry in housing is declared to be against public policy. . . . This part 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 the State." (FEH Act, §§ 12920.2)

Both California and federal case law reflect the courts' recognition that legislative acts premised on the protection of the public welfare may withstand even a free exercise challenge. This proposition is well-illustrated in cases involving child welfare. In *Citizens for Parental Rights, et al. v. San Mateo County Bd. of Ed., et al.* (1975) 61 Cal.App.3d 1, for example, plaintiffs brought an action for declaratory and injunctive relief against the teaching of sex education in public schools. Plaintiffs alleged a violation of their free exercise rights. (*Id.*, at 11.) The court began its analysis by surveying relevant state and U.S. Supreme Court case law where similar state provisions had been upheld. (*Id.*, at 12-14.) The general principle which animated the various court decisions was that "the State's interest in the health of its children outweigh claims based upon religious freedom and the right of parental control." (*Ibid.*, quoting *Prince v. Massachusetts* (1944) 321 U.S. 158.) Ultimately, the *San Mateo* court held that absent harm to the children or to the public welfare, "a mere personal difference of opinion" did not constitute a violation of the parents' free exercise rights. (*Ibid.*, at 1.)

In *In re Edward C. v. Santa Clara Cty. Dept. of Social Services* (1981) 126 Cal.App.3d 193, the court reached a similar conclusion. In that case, plaintiffs, the parents, appealed a lower court ruling which had declared their children to be wards of the juvenile court. The parents argued that the First Amendment limited the power of the state to interfere with their parental rights. (*Id.*, at 201.) In its analysis, the *Santa Clara* court framed the issue as weighing "the parental right doctrine in light of the emerging primacy of another consideration--the child's well being." (*Ibid.*, citing *In*

re Angelina P. (1981) 28 Cal.3d 908.) Because the trial court had adduced evidence of physical and psychological harm to the children, the appellate court upheld the trial court's ruling. (*Id.*, at 193.)

If free exercise exemptions were given for actions based upon personal religious belief in contexts in which the state has manifested a compelling interest based on the public peace and welfare, the exemptions would swallow the state's entire statutory scheme of civil rights and public welfare legislation. The very existence of public accommodations laws is an acknowledgement of the diversity of belief systems and the extent to which they may clash or result in harm to those who believe differently. Protection of this diversity is ultimately the only way to protect individual religious beliefs; this is the balance that was struck in California's free exercise clause with its built-in limitation.[56] Ironically but logically, the limitation is itself the greatest protection for free exercise in a pluralistic society.

SUMMARY AND CONCLUSION

In a sense, the conflict in this case appears to present the age old tension between liberty and equality, here liberty of action based upon religious belief and the state's interest in providing equality of opportunity to obtain life's necessities without discrimination. But the conflict in this case is illusory; equality legislation is the vehicle to ensure the greatest measure of liberty of belief and action to every individual. Equality legislation recognizes that liberty is possible for everyone only if it is limited to the extent it significantly harms the liberty of others.

Given the special confluence of facts in this case, no new legal ground need be broken, and no broad brushstroke approach is necessary. The Donahues' free exercise claim is not one that should be cognizable; the burden of the public accommodations anti-discrimination housing laws on the Donahues' free exercise of their religion, if any

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[56] See fn. 55, *supra*.

at all, is of little weight, while the detriment of the exemption to members of the public as well as to the state in its ability to administer its anti-discrimination laws, is gigantic. In summary, the critical facts include:

(a) The Donahues are individuals, not a religious institution. Therefore the traditional concerns about government regulations intruding into the decision-making processes of religious organizations is not applicable here.

(b) The Donahues' activity of renting an apartment was purely voluntary, secular, and commercial, i.e., for profit and with no religious purpose. Therefore, any burden from the antidiscrimination regulation was on their secular, not religious activity.

(c) Any burden on the Donahues' "free exercise" rights did not affect the central core--the "theological heart"--of their religious belief or practice, but was merely incidental to the exercise of their faith.

(d) The religious beliefs and practices of the Donahues were not actually burdened, since the alleged burden was based on an impermissible secular presumption.[57]

(e) The exemption the Donahues are seeking would have a more-than-incidental impact on the liberty, equality, privacy, and religion interests of other people, hindering their ability to obtain a necessity of life.

(f) The exemption would have an overwhelming impact on the state's ability to administer its civil rights laws and on its ability to ensure the welfare of its inhabitants.

(g) Finally, by exempting the Donahues from compliance with the FEH Act and the Unruh Act in this case, the state would be "aiding and abetting" the deprivation of Verna Terry's fundamental rights, including

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[57] See section IV, *supra*.

the right to freedom of choice in whether to marry and the right to live and associate with whomever she chooses without that choice having an impact on her ability to obtain housing. In other words, the state would be furthering either a personal religious value--that only married people should live together because they might have sex--or a particular institutional religious value--that only married people should have sex--at the expense of fundamental countervailing values the state has a compelling interest to protect, thus entangling itself in religion and promoting a particular religious point of view in an impermissible way.

For all of the above reasons, this Court should uphold the decision of the Court of Appeal insofar as that decision ruled that the FEH Act prohibits marital status discrimination, including that engaged in by the Donahues. The actions of the Donahues should also be held to constitute a violation of the Unruh Act. This Court should reverse the decision of the Court of Appeal insofar as it held that the Donahues are entitled to a religious exemption from the FEH Act and the Unruh Act based upon their personal religious belief and actions in this case.

Dated: April 29, 1992

Respectfully submitted,

THOMAS F. COLEMAN
Attorney for Verna Terry
Real Party in Interest

Real Party in Interest, Verna Terry, and her counsel, appreciate the assistance provided by attorney David Link, law students Leigh Kirmsse and Evelyn Baran, and others, in the preparation of this brief.

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 April 30, 1992, I served the within REAL PARTY IN INTEREST'S OPENING BRIEF ON THE MERITS 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:

[SEE FOLLOWING PAGE FOR LIST OF PARTIES AND OTHERS SERVED]

I declare under penalty of perjury that the foregoing is true and correct. Executed at Los Angeles, CA, on April 30, 1992.

THOMAS F. COLEMAN

LIST OF PARTIES AND OTHERS SERVED

Kathleen W. Mikkelson
Deputy Attorney General
455 Golden Gate Ave. / #6200
San Francisco, CA 94102

Steve Owyang
F.E.H.C.
1390 Market St., Suite 410
San Francisco, CA 94102

Thomas F. Donahue
350 N. Van Ness, Suite A
Fresno, CA 93701

Hon. David P. Yaffe
Superior Court
111 N. Hill St.
Los Angeles, CA 90012

Verna Terry
9510 Mayne St., Unit B
Bellflower, CA 90706

David Moon
Deputy District Attorney
732 Brannon St.
San Francisco, CA 94103

Kimery Shelton
Deputy City Attorney
Santa Monica City Hall
1685 Main St.
Santa Monica, CA 90401

Janice Eggleston
Bay Area Lawyers for
Individual Freedom
114 Sansome St., Ste. 1103
San Francisco, CA 94104

Roger Funk
Greenberg, Glushker
Westside Fair Housing
1900 Avenue of the Stars
Suite 2000
Los Angeles, CA 90067

Donald T. Ramsey
Carroll, Burdick
44 Montgomery Street
Suite 400
San Francisco, CA 94104

Jon Davidson
ACLU of Southern California
1616 Beverly Blvd.
Los Angeles, CA 90026