CONSTITUTIONAL LAW

State Interest In Barring Housing Discrimination Based On Marital Status Doesn't Outweigh First Amendment Rights

Cite as 94 Daily Journal D.A.R. 7246

EVELYN SMITH,
Petitioner,
v.
COMMISSION OF FAIR EMPLOYMENT AND HOUSING,
Respondent,

and

KENNETH C. PHILLIPS et al.,
Real Parties in Interest.

No. C007654
California Court of Appeal
Third Appellate District
Filed May 26, 1994

ORIGINAL PROCEEDING: Petition for Writ of Mandate.

Writ issued.

Jordan W. Lorence, Cimron Campbell, Mark N. Troobnick, Wendell R. Bird, Law Office of Wendell R. Bird, for Petitioner.

Daniel E. Lungren and John K. Van De Kamp, Attorneys General, Carole R. Kornblub, Andrea Sheridan Ordin,

Assistant Attorneys General, Marian M. Johnston, Manual M. Medeiros, Kathleen W. Mikkelson, Louis Verdugo, Deputy Attorneys General, for Respondent.

Thomas F. Coleman and David Link for Real Parties in Interest.

I

The California Fair Employment and Housing Act ("FEHA"; Gov. Code, § 12900 et seq.) prohibits a landlord from discriminating against any individual on the basis of marital status (Gov. Code, § 12955, subds. (a), (d)). Real parties in interest Kenneth Phillips and Gail Randall (complainants), an unmarried couple, filed a complaint with the Department of Fair Employment and Housing (Department) alleging petitioner Evelyn Smith (plaintiff) refused to rent housing to them because of their marital status. The Department issued an accusation charging plaintiff with unlawful discrimination. Relying on

her religious convictions and beliefs and the constitutional protection of their free exercise, plaintiff sought exemption from the law prohibiting housing discrimination on the basis of marital status.

Following an administrative hearing, respondent Fair Employment and Housing Commission (Commission) issued its decision finding plaintiff had unlawfully discriminated against complainants because of their marital status. The Commission awarded complainants damages and imposed certain affirmative obli gations on plaintiff to effectuate the purpose of FEHA. (Gov. Code, § 12987; Stats. 1981, ch. 899, p. 3424, § 3.) The Commission declined to rule on plaintiff's constitutional claim.

Alleging the controversy presents exclusively issues of law, plaintiff petitioned this court in the first instance for a writ of mandate to compel the Commission to set aside its decision. We issued an alternative writ to address an issue of first impression: whether the statute prohibiting discrimination in housing on the basis of marital status is unconstitutional as applied to persons such as plaintiff whose religious convictions and beliefs forbid them to rent to mixed gender couples who are not married to each other (unmarried couples). We shall hold that the Commission order applying FEHA to penalize plaintiff for marital status discrimination in housing violates plaintiff's rights as protected by both the federal and state Constitutions. (U.S. Const., Amend. I; Cal. Const., art. I, § 4.) Accordingly, we shall order a writ of mandate to issue as prayed.

II

The facts are not in dispute. Plaintiff, a widow, is a member of the Bidwell Presbyterian Church in Chico. She owns two duplexes in Chico the rents from which provide her primary source of income. Because of her religious conviction that fornication is a sin, plaintiff refuses to rent to unmarried couples. She informs couples interested in renting that she prefers to rent to married couples, although she rents to single, divorced and widowed individuals as well.

Complainants are an unmarried couple. When complainants expressed an interest in renting one of plaintiff's duplex units, plaintiff informed them, as was her custom, that she preferred renting to married couples. Complainants falsely represented to plaintiff they were married. Plaintiff agreed to rent one of the duplex units to them and complainants gave plaintiff a deposit.

Before moving into the duplex, complainants informed plaintiff they were not married. Plaintiff canceled the agreement, refused to rent to complainants and returned complainants' deposit. Plaintiff would have rented the unit to complainants had they been married.

Plaintiff refused to rent to complainants because of her religious conviction that sex outside of marriage is sinful; plaintiff believes she would be committing a sin if she rented to people who engage in nonmarital sex. Plaintiff explained: "I believe it's a sin to have sex out of marriage, and if I rent to [complainants] I'm also contributing to their sin and it's a sin for me. I believe that I have to answer [for] that as long as I know it's a sin and if I am assisting them in committing the sin, then I'm guilty, also."

The Commission found plaintiff violated Government Code section 12955, subdivisions (a) and (d).1/ The Commission awarded complainants out of pocket and emotional distress damages totalling $954.2/ Plaintiff was ordered to "cease and desist" marital status discrimination. Plaintiff was also ordered to post in her rental units for a period of 90 days notice announcing she had been adjudicated in violation of FEHA for refusing to rent to prospective tenants because they were an unmarried couple. She was ordered to post permanently in her rental units a notice to rental applicants of their rights and remedies under FEHA generally and specifically with regard to discrimination against unmarried couples. Plaintiff was ordered to sign both notices and to provide copies to each person thereafter who expressed interest in renting from plaintiff.3/

III

Religious freedom is among the highest values of our society. (See *Murdock v. Pennsylvania* (1943) 319 U.S. 105, 115-117 [87 L.Ed. 1292, 1299-1301]; *Jones v. Opelika* (1943) 319 U.S. 103, 104 [87 L.Ed. 1290, 1292]; *Martin v. Struthers* (1943) 319 U.S. 141, 149-150 [87 L.Ed 1313, 1320-1321], conc. opn. of Murphy, J.) However, even the highest values must sometimes give way to the greater public good. (See e.g., *United States v. Lee* (1982) 455 U.S. 252, 257 [71 L.Ed.2d 127, 132] ["Not all burdens on religion are unconstitutional."]; *Sherbert v. Verner* (1963) 374 U.S. 398, 403 [10 L.Ed.2d 965, 970].) The question here presented is whether plaintiff is constitutionally entitled to exemption from the operation of a statute designed to eliminate housing discrimination against unmarried couples where the enforcement of the statute would interfere with plaintiff's free exercise of religion.

The Commission entertained "no doubt" as to "the depth and sincerity of [plaintiff's] religious convictions . . . ." The Commission believed, however, it lacked authority to decide plaintiff's constitutional claim and deferred the issue "to the consideration of the courts." We accept as

established by the Commission's finding to that effect that plaintiff is sincere in her expressed religious conviction and belief that fornication is a sin in the commission of which she will be complicit if forced to rent to an unmarried couple. "It is not within 'the judicial function and judicial competence' . . . to determine whether [plaintiff] or the Government has the proper interpretation of [her] faith; '[c]ourts are not the arbiters of scriptural interpretation.'" (*United States v. Lee, supra*, 455 U.S. at p. 257 [71 L.Ed.2d at p. 132].) "The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task . . . . However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit [free exercise] protection." (*Thomas v. Review Bd., Ind. Empl. Sec. Div.* (1981) 450 U.S. 707, 714 [67 L.Ed.2d 624, 631].)

More importantly, the constitutional protection accorded free exercise of religion is not limited to beliefs which are shared by all members of a religious sect. (*Thomas, supra*, at pp. 715-716 [67 L.Ed.2d at p. 632].) "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." (*West Virginia State Bd. of Edu. v. Barnette* (1942) 319 U.S. 624, 642 [87 L.Ed. 1628, 1639].) We thus accept on faith, as it were, the sincerity of plaintiff's assertion her religious convictions and beliefs preclude her from renting to an unmarried couple on penalty of herself committing a sin.4/

Compelling plaintiff to rent her properties to unmarried couples, to pay damages to the unmarried complainants for refusing out of conscience to rent to them, to post notices informing prospective tenants of their rights and remedies under FEHA and specifically as it pertains to unmarried couples, and to post announcements, signed by her, that she has been adjudicated in violation of FEHA for refusing to rent to an unmarried couple interferes with and substantially burdens plaintiff's free exercise rights. Plaintiff cannot remain faithful to her religious convictions and beliefs and yet rent to unmarried couples. If faced with that choice, plaintiff testified her rental units will "stay vacant." The Commission's order penalizes plaintiff for her religious belief that fornication and its knowing facilitation are sinful.

IV

The conclusion that there is a conflict between plaintiff's religious convictions and beliefs and the command of the statute as imposed upon her is only the beginning of our inquiry.

The First Amendment to the United States Constitution provides in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, . . ."

Article I, section 4 of the California Constitution guarantees the "free exercise and enjoyment of religion."

Until 1990 when the United States Supreme Court decided *Employment Division* v. *Smith* (1990) 494 U.S. 872 [108 L.Ed.2d 876], it had been generally assumed that free exercise infringement claims were to be subjected to strict scrutiny: Government regulation is not unconstitutional either if it does not infringe on constitutional rights of free exercise or, where it does, if the burden on free exercise is justified by a compelling state interest in the regulation of a matter within the state's power to regulate. (See *Sherbert*, supra, 374 U.S. at pp. 402-403 [10 L.Ed.2d at pp. 969-970]; *Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1112-1113; *People v. Woody* (1964) 61 Cal.2d 716, 718-719; see also *First Covenant Church v. Seattle* (Wash. 1992) 120 Wash.2d 203, 840 P.2d 174, 183.) The party who alleges government interference with free exercise of religion has the burden of showing "the coercive effect of the enactment as it operates against him in the practice of his religion." (*Abington School District* v. *Schempp* (1963) 374 U.S. 203, 223 [10 L.Ed.2d 844, 858]; *People* v. *Woody, supra*, 61 Cal.2d at pp. 718-719.) If the party is able to establish the infringement on his right to free exercise, the court subjects the infringement to strict scrutiny. (*Hobbie* v. *Unemployment Appeals Commission* (1987) 480 U.S. 136, 141 [94 L.Ed.2d 190, 197-198]; *Sherbert*, supra, 374 U.S. at pp. 406-407 [10 L.Ed.2d at p. 972]; *First Covenant Church v. Seattle, supra*, 840 P.2d at p. 183.) The state then must establish the infringement is justified by a compelling state interest and the enactment is the least restrictive means to achieve the state's end. (See *Sherbert*, supra, 374 U.S. at pp. 406-409 [10 L.Ed.2d at pp. 972-973]; *Molko v. Holy Spirit Assn., supra*, 46 Cal.3d at pp. 1112-1113, 1117-1119; *People v. Woody, supra*, 61 Cal.2d at pp. 718-719; *Mullaney v. Woods* (1979) 97 Cal.App.3d 710, 724-727; *Montgomery v. Board of Retirement* (1973) 33 Cal.App.3d 447, 451-452.)

In *Smith*, the United States Supreme Court enlarged upon the proper analytical approach to free exercise infringement claims under the First Amendment. *Smith* held "as a textual matter" that the First Amendment's proscription against laws "prohibiting the free exercise [of religion]" is not

implicated merely by the state "requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires)." (*Smith*, 494 U.S. 872 at p. 878 [108 L.Ed.2d 876 at p. 885].) Rather, "it is a permissible reading of the text . . . to say that if prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." (At p. 878 [108 L.Ed.2d at p. 885].)

In *Smith* respondents, two drug rehabilitation counselors, had been fired from their jobs because they used peyote for sacramental purposes in a religious ceremony. Respondents' applications for unemployment compensation were denied because they had been dismissed for "work-related" misconduct and thus were ineligible under Oregon's unemployment compensation law. The Oregon Supreme Court ruled in favor of the respondents, holding they could not be denied benefits based on conduct which is protected by the free exercise clause of the federal Constitution.

The United States Supreme Court held respondents were not entitled to place their free exercise claims above the state's unemployment compensation scheme. Noting the First Amendment absolutely prohibits the regulation of beliefs "as such" and that government may not compel or punish the expression of religious belief, the *Smith* court concluded the First Amendment prohibits laws that ban conduct only when the conduct is engaged in for religious purposes or because of the religious belief it displays. (494 U.S. at pp. 876-877 [108 L.Ed.2d at pp. 884-885].) Religious motivation does not place conduct "beyond the reach of a criminal law that is not specifically directed at [the] religious practice. . . ." (*Id.*, at p. 878 [108 L.Ed.2d at p. 885].)

Thus the application of general criminal laws to religiously motivated conduct is no different than the application of general tax laws to persons who believe support of organized government is sinful. In either case, free exercise as protected by the First Amendment does not exempt an individual from complying with a "'neutral law of general applicability [simply because] the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (*Smith*, *supra*, at p. 879 [108 L.Ed.2d at p. 886], citing *United States* v. *Lee*, *supra*, 455 U.S. 252.)5/

The *Smith* majority decision purports to be a logical extension of the established free exercise jurisprudence of the court: "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, . . ." (*Smith*, *supra*, 494 U.S. at 881 [108 L.Ed.2d 887].)

Since the facts before it did not present such a "hybrid situation" (at 494 U.S. 882 [108 L.Ed.2d at p. 888]), the *Smith* court declined to subject respondents' claims for religious exemption from the Oregon law to the balancing test applied in cases such as *Sherbert* v. *Verner*, supra, 374 U.S. 398 [10 L.Ed.2d 965], i.e., that "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest." (*Smith*, *supra*, 494 U.S. 883, 885 [108 L.Ed.2d 888, 889].) The court observed: "The 'compelling governmental interest' requirement seems benign, because it is familiar from other fields. But using it as the standard that must be met before the government may accord different treatment on the basis of race, see, e.g., *Palmore* v. *Sidoti*, 466 U.S. 429, 432, 80 L.Ed.2d 421, 104 S.Ct. 1879 (1984), or before the government may regulate the content of speech, see, e.g., *Sable Communications of California* v. *FCC*, 492 U.S. 115, 126, 106 L.Ed.2d 93, 109 S.Ct. 2829 (1989), is not remotely comparable to using it for the purpose asserted here. What it produces in those other fields -- equality of treatment and an unrestricted flow of contending speech -- are constitutional norms; what it would produce here -- a private right to ignore generally applicable laws -- is a constitutional anomaly." (*Smith*, *supra*, 494 U.S. at p. 885-886 [108 L.Ed.2d 890].)

The *Smith* court cited examples of hybrid cases involving free exercise claims that touch on other constitutional protections ranging from freedom of speech and press to parental rights. (*Smith*, *supra*, 494 U.S. at p. 881 [108 L.Ed.2d at p. 887].)6/

Among the examples noted by the court were "cases prohibiting compelled expression, decided exclusively upon free speech grounds [that] also involved freedom of religion, cf. *Wooley* v. *Maynard*, 430 U.S. 705, 51 L.Ed.2d 752, 97 S.Ct. 1428 (1977) (invalidating compelled display of a license plate slogan that offended individual religious beliefs); *West Virginia Bd. of Education* v. *Barnette*, 319 U.S. 624, 87 L.Ed. 1628, 63 S.Ct. 1178, 147 ALR 674 (1943) (invalidating compulsory flag salute statute challenged by religious objectors)." (*Smith*, *supra*, 494 U.S. at p. 882 [108 L.Ed.2d at p. 887].)

In such cases where a statute infringes on rights of free speech as well as free exercise of religion, the measure of constitutionality remains the compelling state interest test. (*Smith*, *supra*, 494 U.S. at pp. 881, 884-885 [108 L.Ed.2d at p. 887, 889-890].)

This is such a case. Plaintiff's free speech rights are implicated here as well as her free exercise rights. As a penalty for violation of FEHA plaintiff was ordered to post in her rental units for 90 days a notice that she had been adjudicated guilty of discrimination in housing on the basis of marital status. The notice states in relevant part: "After a full hearing, the . . . Commission has found that Evelyn Smith, the owner of rental property at 675-685 Eastwood Avenue, Chico, California, violated the California Fair Employment and Housing Act by refusing to rent to two applicants because they were an unmarried couple." Plaintiff was ordered to sign this notice. Additionally, plaintiff was ordered permanently to post in her rental units a notice summarizing certain provisions of FEHA which states, inter alia, that "it is illegal for [a landlord] to . . .deny [prospective tenants] housing . . . because of [their] marital status, . . . ask [prospective tenants] about [their] marital status, . . . or state to prospective tenants any preference to rent based on marital status." This notice further states "Discrimination because of marital status includes taking any of the [illegal] actions described against an unmarried couple." Plaintiff was also ordered to sign this notice.

Applying the rationale of *Smith*, it is clear that free exercise of religion as protected by the First Amendment is not actionably infringed by applying to plaintiff a facially neutral statute which merely proscribes marital status discrimination, notwithstanding plaintiff's religious scruples against renting to unmarried couples. (See *Smith, supra*, 494 U.S. at pp. 876-879 [108 L.Ed.2d at pp. 884-886].) But plaintiff does not complain only of infringement of her free exercise rights. She contends her First Amendment right to freedom of speech is abridged by forcing her to post notices on her property proclaiming concepts and rules which are antithetical to her religious beliefs and signing them as if to make them her own. We have no doubt the coerced posting of these notices implicates plaintiff's First Amendment right to freedom of speech. (U.S. Const., Amend. I.)7/

"[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. [Citation.] . . . The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.' [Citation.]" (*Wooley* v. *Maynard* (1977) 430 U.S. 705, 714 [51 L.Ed.2d 752, 762].)

In *Wooley* a three judge federal District Court enjoined New Hampshire from prosecuting respondents under a criminal statute that would penalize respondents for covering that portion of their New Hampshire vehicle license plates that contains the state motto, "Live Free or Die." Respondents, Jehovahs' Witnesses, sought injunctive relief to prohibit the state from coercing them "into advertising a slogan which [they found] morally, ethically, religiously and politically abhorrent." (430 U.S. at 713 [51 L.Ed.2d at 761].) The Supreme Court characterized the New Hampshire statue as a "measure which forces an individual, . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." (*Wooley, supra*, 430 U.S. at 715 [51 L.Ed.2d at 762].) The statute, said the court, "in effect requires that [respondents] use their private property as a 'mobile billboard' for the State's ideological message -- or suffer a penalty . . . The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable." (*Wooley, supra*, 430 U.S. at pp. 715 [51 L.Ed.2d at 763].)

Affirming the District Court, the Supreme Court concluded New Hampshire had not shown a sufficiently compelling state interest to justify requiring respondents to display the state motto on their license plates since the purpose of the requirement, "'even though . . . legitimate and substantial, . . . cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. [Citation.]" (*Wooley, supra*, 430 U.S. at pp. 716 [51 L.Ed.2d at 763-764].)

Thus the fact that plaintiff is compelled to make, rather than prohibited from making, statements which offend her religious beliefs "works no less an infringement of [her] constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and conscience rather than coerced by the State." (Fn. omitted; *Abood v. Detroit Board of Education* (1977) 431 U.S. 209, 234-235 [52 L.Ed.2d 261, 284].)

In *Abood* the court held a school board could not require teachers, as a condition of public school employment, to contribute to a union for the support of political and ideological causes which they opposed and which were unrelated to collective bargaining. (*Id.*, at pp. 235-236 [52 L.Ed.2d at pp. 284-285].) The Court noted the admonition of Thomas Jefferson that "'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.'" (*Id.*, at p. 234, fn. 31 [52 L.Ed.2d at p. 284, fn. 31], citing I. Brant, James Madison: The Nationalist 354 (1948).)

It is no less tyrannical to require plaintiff to post on her property notices which proclaim

notions and ideas which are offensive to her moral and religious beliefs. (See *West Virginia State Bd. of Edu.* v. *Barnette, supra,* 319 U.S. at p. 646 [87 L.Ed. at p. 1641, conc. opn. of Murphy, J ["Official compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship . . . ."].) The Commission's order forces plaintiff as part of her daily life, "to be an instrument for fostering public adherence" to a rule prohibiting discrimination against unmarried couples, a rule which plaintiff finds morally and religiously unacceptable. (*Wooley, supra,* 430 U.S. at pp. 714-716 [51 L.Ed.2d at pp. 762-763].) "In doing so, the State 'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.'" (*Wooley, supra*; see also *Torcaso v. Watkins* (1961) 367 U.S. 488, 495-496 [6 L.Ed.2d 982, 987-988].)8/

The instant case is a paradigm of the "hybrid" genus described in *Smith.* (Cf. *Society of Separationists, Inc.* v. *Herman* (5th Cir. 1991) 939 F.2d 1207, 1216.) Accordingly, the state may deny plaintiff her First Amendment rights only upon showing it has an interest in protecting unmarried couples from discrimination in housing that is so compelling as to outweigh plaintiff's right, unburdened, to free exercise and free speech. (*Smith, supra,* 494 U.S. at pp. 881-882 [108 L.Ed.2d at pp. 887-888]; *Wooley* v. *Maynard, supra,* 430 U.S. at pp. 715-716 [51 L.Ed.2d at p. 763].)

For the state to prevail it must show the exercise by plaintiff of her First Amendment rights constitutes a grave and immediate danger to the state or to a compelling interest the state seeks to promote. (*West Virginia State Bd. of Edu.* v. *Barnette, supra,* 319 U.S. at p. 639 [87 L.Ed. at p. 1638].) To be compelling, "'[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" (*Sherbert, supra,* 374 U.S. at p. 406 [10 L.Ed.2d at p. 972].) Plaintiff must prevail unless the state can show enforcement of the statutory scheme "is essential to accomplish an overriding governmental interest." (*United States v. Lee, supra,* 455 U.S. at pp. 257-258 [71 L.Ed.2d at p. 132]; see also *Thomas, supra,* 450 U.S. at p. 716 [67 L.Ed.2d at p. 632].) The burden on government is a heavy one. "'[T]he essence of all that has been said and written on the subject is that only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion.' [Citation.]" (*Thomas, supra,* 450 U.S. at p. 718 [67 L.Ed.2d at p. 634].)9/

As we shall explain California has no compelling interest in promoting the housing rights of unmarried couples such as would outweigh plaintiff's First Amendment free exercise rights.

V

California has a significant interest in eradicating discrimination in employment and housing. In 1975, provisions prohibiting sex and marital status discrimination in housing were added to the statute which previously forbade discrimination on the basis of race, creed or color. (Stats. 1975, ch. 1189, pp. 2942-2948; see also [in same volume] Summary Digest, ch. 1189, p. 322.) Appellate decisions hold that "marital status" includes unmarried couples. (*Hess v. Fair Employment & Housing Com.* (1982) 138 Cal.App.3d 232, 235; *Atkisson v. Kern County Housing Authority* (1976) 59 Cal.App.3d 89, 99.)

The inquiry narrows to whether California's interest in eradicating discrimination in housing against unmarried couples reaches the level of an overriding governmental interest. (See *United States v. Lee, supra,* 455 U.S. at p. 259 [71 L.Ed.2d at p. 133].) It is self-evident the Legislature cannot by statute establish that a governmental interest is so compelling as to override conflicting constitutional rights. When legislative abridgment of constitutional rights is asserted, the courts must be astute to examine the effect of the challenged legislation. (*Schneider v. Irvington* (1939) 308 U.S. 147, 161 [84 L.Ed. 155, 165].) "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." (*Id.* at p. 165.) "In the end, the judiciary must complete the task of determining whether a particular governmental policy is sufficiently compelling to override a claimed constitutional right." (*Gay Rights Coalition v. Georgetown Univ.* (D.C. App. 1987) 536 A.2d 1, 73, conc. and dis. opn. of Belson, J.; see *Cleburne v. Cleburne Living Center* (1985) 473 U.S. 432, 440-441 [87 L.Ed.2d 313, 320-321].)

While the Legislature has proscribed discrimination on a number of grounds -- race, color, religion, sex, marital status, national origin, ancestry, familial and disability status -- neither the statutory language nor legislative history indicates the Legislature intended the several proscribed grounds of discrimination be arrayed in any particular hierarchy of priorities, or that within each classification legitimate distinctions might be made. It is reasonable, however, to postulate that the Legislature did not intend all such classifications to be equal. (See *Gay Rights Coalition v. Georgetown Univ., supra,* 536 A.2d at

p. 72, conc. and dis. opn. of Belson, J.) Several factors point to this conclusion.

First, it cannot be said the goal of eliminating discrimination on the basis of unmarried status enjoys equal priority with the state public policy of eliminating racial discrimination. Racial classifications leading to different treatment always demand strict scrutiny. (*Cleburne v. Cleburne Living Center, supra*, 473 U.S. at p. 440 [87 L.Ed.2d at p. 320].) No similar level of scrutiny is demanded where discrimination is on the basis of marital status and certainly not for discrimination against unmarried couples (see *Hinman v. Department of Personnel Admin.* (1985) 167 Cal.App.3d 516, 526; *Garcia v. Douglas Aircraft Co.* (1982) 133 Cal.App.3d 890, 894).

Second, the Legislature has not extended to unmarried couples numerous rights which married couples enjoy. Citing typically the lack of legislative approval, the courts have consistently refused to treat unmarried couples as the legal equivalent of married couples. (E.g., *Elden v. Sheldon* (1988) 46 Cal.3d 267, 274-279 [unmarried person does not have cause of action either for negligent infliction of emotional distress or for loss of consortium]; (*In re Cummings* (1982) 30 Cal.3d 870 [prison regulations may properly allow conjugal visitation rights to married couples but deny them to unmarried couples]; *Marvin v. Marvin* (1976) 18 Cal.3d 660 [unmarried couples do not have a right to spousal support absent a written agreement]; *Beaty v. Truck Insurance Exchange* (1992) 6 Cal.App.4th 1455, 1461 [insurer's refusal to issue joint umbrella policy, reserved for married couples, to unmarried couple is not unlawfully discriminatory]; *Hinman v. Department of Personnel Admin., supra*, 167 Cal.App.3d at p. 530 [unmarried cohabitant is not entitled to dental benefits available to family members of state employees]; *Garcia v. Douglas Aircraft Co., supra*, 133 Cal.App.3d at p. 894 [unmarried person does not have a right to bring wrongful death action on behalf of cohabiting partner]; *Harrod v. Pacific Southwest Airlines* (1981) 118 Cal.App.3d 155 [same]; *People v. Delph* (1979) 94 Cal.App.3d 411 [unmarried couples do not have marital communication privilege under the rules of evidence].) If the need to eradicate discrimination against unmarried couples is so compelling as complainants and the Commission contend, the Legislature would have responded to these judicial decisions to extend equal rights to all cohabiting Californians. (See *Garcia v. Douglas Aircraft Co., supra*, 133 Cal.App.3d at p. 894.)

We deem the Legislature's lack of response to reflect the state's strong interest in the marriage relationship. "[T]he state's interest in promoting the marriage relationship is not based on anachronistic notions of morality. The policy favoring marriage is 'rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society.' [Citation.]" (*Elden v. Sheldon, supra*, 46 Cal.3d at p. 275.)

Moreover, the legislative history suggests the Legislature's purpose in adding "marital status" to the list of proscribed bases for discrimination primarily was to protect single men and women, students, widows and widowers, divorced persons, and unmarried persons with children. Even assuming as we do (see *Hess v. Fair Employment & Housing Com., supra*, 138 Cal.App.3d at p. 235; *Atkisson v. Kern County Housing Authority, supra*, 59 Cal.App.3d at p. 99) that "marital status" in its broadest, generic sense includes unmarried couples, a hierarchy still emerges from within the classification because the state's interest in prohibiting discrimination in housing against, for example, a widower or an unmarried woman with children is more compelling than is its interest in prohibiting discrimination against unmarried couples. To conclude otherwise would defeat the state's strong interest in promoting marriage. (*Elden v. Sheldon, supra*, 46 Cal.3d at p. 274; see *Norman v. Unemployment Ins. Appeals Bd.* (1983) 34 Cal.3d 1, 9 ["We reaffirm our recognition of a strong public policy favoring marriage. [Citation.] No similar public policy favors the maintenance of nonmarital relationships."].) In short, we find no evidence the Legislature considers the extension to unmarried couples of all rights enjoyed by married couples a compelling state interest. Whatever level such interest might occupy, it must give way to plaintiff's First Amendment right to the free exercise of religion.10/

Finally, we note that simultaneously with the additions of "sex" and "marital status" as proscribed grounds of discrimination, the Legislature added provisions which allow public and private postsecondary educational institutions to provide accommodations limited on the basis of sex or marital status but not on the basis of race, religion, or national origin. (Stats. 1975, ch. 1189, pp. 2942-2948; see also [in the same volume] Summary Digest, ch. 1189, p. 322.)11/ The Legislature has reiterated that discrimination on the basis of race or creed is intolerable, but has recognized that in certain instances discrimination on the basis, for example, of marital status is permissible given what it perceives to be the greater public benefit. Plaintiff's constitutional claims are entitled to no less deference and respect.12/

We hold the state's proscription against discrimination in housing on the basis of a couple's unmarried status does not rank as a state interest "of the highest order." (*Wisconsin* v. *Yoder*

(1972) 406 U.S. 205, 215 [32 L.Ed.2d 15, 25].) Given this conclusion, the state's interest must give way to plaintiff's free exercise and free speech rights as protected by the federal Constitution.

Plaintiff has been forced to choose between fidelity to her religious beliefs and renting to complainants. Choosing to follow her conscience, plaintiff has further suffered abridgement of her free speech rights. The coercive impact is real and the conflict is irreconcilable. While the compulsion may be indirect, the infringement upon fundamental rights is nonetheless substantial. Given our conclusion the policy of protecting unmarried couples against housing discrimination does not rise to the level of a compelling state interest, the application of the statute implementing that policy to plaintiff must give way to plaintiff's exercise of her fundamental rights.13/

In so holding, we are cognizant of those decisions which have concluded that in certain instances free exercise rights must give way to the greater public good. "To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good." (*United States v. Lee, supra*, 455 U.S. at p. 259 [71 L.Ed.2d at p. 133]; see e.g., *Braunfeld v. Brown* (1961) 366 U.S. 599, 603 [6 L.Ed.2d 563, 567] [state's interest in "improving the health, safety, morals and general well-being of . . . citizens" permitted enforcement of Sunday closing laws against merchants who observed a Saturday Sabbath]; *Prince v. Commonwealth of Massachusetts* (1944) 321 U.S. 158, 165 [88 L.Ed. 645, 652] [the "interests of society to protect the welfare of children" permitted the state to apply its child labor law to bar a Jehovah's Witness from distributing religious literature on the streets].)

Of particular interest is *United States v. Lee, supra*. In *Lee*, a member of the Amish religious faith contended the payment of social security taxes for his employees would violate his religious beliefs. The Supreme Court accepted Lee's interpretation of his own Amish religious tenets, and acknowledged that compulsory participation in the social security system interfered with the free exercise rights of the Amish. (455 U.S. at p. 257 [71 L.Ed.2d at p. 134].) The court held, however, that given the government's strong interest in insuring the fiscal vitality of the social security system, the burden imposed on those Amish who employ others (as opposed to the self-employed Amish, who are exempt from participation in the social security system) is not unconstitutional. (*Id.* at pp. 258-259 [71 L.Ed.2d at pp. 134-135].)

Lee is distinguishable. It is perhaps enough to say that *Lee* was not of the hybrid variety of cases described in *Smith*. In any event, neither *Lee* nor any other case holds a person loses the First Amendment right to the free exercise of religion simply because the conflict between religious duty and governmental regulation occurs in a commercial context. To the contrary, the *Lee* court acknowledged that even in a commercial context, the state must justify a governmental regulation or "limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest. [Citations.]" (*Id.*, at pp. 257-258 [71 L.Ed.2d at p. 132].)

Moreover, in *Lee* the court addressed a challenge to participation in the social security system, a system that is "nationwide," where the government interest is "apparent" and mandatory participation "indispensable" to fiscal soundness. The court concluded the "Government's interest in assuring mandatory and continuous participation in and contribution to the social security system . . . is very high." (*Id.*, at pp. 258-259 [71 L.Ed.2d at p. 133], fn. omitted.) As we have noted, California's interest in elevating the housing rights of unmarried couples to parity with those of married couples does not amount to a compelling state interest.

Finally, the *Lee* court noted the practical consequences of allowing Lee to exclude his employees from the social security system. In essence, the court was faced with what it perceived would be the difficulty in imposing on the comprehensive social security system a myriad of exceptions flowing from a wide variety of religious beliefs. The court stated: "[T]here is no principled way, however, for purposes of this case, to distinguish between general taxes and those imposed under the Social Security Act. If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates a religious belief. [Citations.] Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax." (455 U.S. at p. 260 [71 L.Ed.2d at p. 134].)

The instant case does not raise the spectre of floodgates opened to a myriad of exemptions from the state anti-discrimination law. To the contrary, we are confronted with a single landlord with two duplexes whose religious convictions will be violated if she is forced to rent her premises to unmarried couples. There is nothing in the record to indicate the number of landlords similarly cir-

cumstanced is so great as to cause a serious shortage of housing for unmarried couples. There likewise is no evidence in the record to indicate landlords all over the state will suddenly experience religious conversions in order to obtain exemption from the statutory proscription of discrimination on the basis of marital status. In fact, the economic interests of landlords as a class would counsel otherwise.

Moreover, while the discrimination practiced against complainants is real, it is hardly burdensome. Complainants lived together for five years prior to the time they sought to rent from plaintiff and there is nothing in the record to suggest that during that time they suffered housing discrimination as a result of their unmarried status or that they were ever unable to obtain adequate housing. There likewise is no evidence that in securing housing following plaintiff's refusal to rent to them, complainants were frustrated by marital status discrimination. Indeed, in light of dominant community mores, it is entirely likely complainants could live together unmarried for the rest of their lives and never again confront discrimination because of their unmarried status. (See generally, *Elden v. Sheldon, supra,* 46 Cal.3d at p.273 and fn. 3; *Marvin v. Marvin, supra,* 18 Cal.3d 665, 684 and fn. 1.)

VI

Article I, section 4 of the California Constitution provides the "[f]ree 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. The Legislature shall make no law respecting an establishment of religion. . . ."

"[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." (Brennan, *State Constitutions and the Protection of Individual Rights* (1977) 90 Harv.L.Rev. 489, 491.) "[A] state court is entirely free . . . to reject the mode of analysis used by [the United States Supreme Court] in favor of a different analysis of its corresponding constitutional guarantee." (*City of Mesquite v. Aladdin's Castle, Inc.* (1982) 455 U.S. 283, 293 [71 L.Ed.2d 152, 162]; see also *Gabrielli* v. *Knickerbocker* (1938) 12 Cal.2d 85, 89-92 [free exercise claims must be considered under both the state and federal Constitutions].)

We may interpret our state Constitution to offer *greater* protection of individual rights than does the federal Constitution. (*Pruneyard Shopping Center* v. *Robins* (1980) 447 U.S. 74, 81 [64 L.Ed.2d 741, 752]; *Oregon* v. *Hass* (1975) 420 U.S. 714, 719 [43 L.Ed.2d 570, 575]; *People* v. *Brisendine* (1975) 13 Cal.3d 528, 550-551.) The courts of this state are "independently responsible for safeguarding the rights of [our] citizens." (*People* v. *Brisendine, supra,* 13 Cal.3d 528, 551.) "State courts are, and should be, the first line of defense for individual liberties in the federal system." (*Sands* v. *Morongo Unified School Dist.* (1991) 53 Cal.3d 863, 906, conc. opn. of Mosk, J. (hereafter cited as *Sands.*); cf. *State of Oregon* v. *Kennedy* (Or. 1983) 666 P.2d 1316, 1323 [State constitutional guarantees were "meant to be and remain genuine guarantees against misuse of the state's governmental powers, truly independent of the rising and falling tides of federal case law both in method and in specifics."].)

"The California Constitution is the supreme law of our state--a seminal document of independent force that establishes governmental powers and safeguards individual rights and liberties. [Citations.]" (*Sands, supra,* 53 Cal.3d 863, 902-903, conc. opn. of Lucas, C.J.) It is for the courts of this state to determine the meaning of state constitutional provisions, with the state Supreme Court being the "final arbiter[] [thereof]." (*Sands, supra,* at p. 903.) This responsibility devolves from "the basic structure of California government; it cannot be delegated to the United States Supreme Court or any other person or body." (*Sands, supra,* at p. 903.) When the courts of this state construe provisions of the California Constitution, they do so "in light of their unique language, purpose and histories, in accordance with general principles of constitutional interpretation established in our case law. Nor do [the courts] act differently when the state constitutional provision in issue contains the same language as a federal constitutional provision. In such a case, [the courts] are not bound by a decision of the United States Supreme Court or any other court. [They] must consider and decide the matter independently." (*Sands, supra,* 53 Cal.3d at pp. 903, 907, conc. opn. of Mosk, J. ["It is undisputed that provisions of the California Constitution are not dependent for their meaning on the federal Constitution." (Citing Cal. Const., art. I, § 24.) California Constitution Article I, section 4, is broader than its federal counterpart. (See 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 371, p. 539.) "[O]ur state Constitution contains an express guaranty of freedom of religion . . . [while] [t]he federal Constitution does not contain a similar express provision. . . ." (*Gabrielli* v. *Knickerbocker, supra,* 12 Cal.2d at p. 89.) The First Amendment bars government action prohibiting free exercise of religion. The California Constitution guarantees

both freedom of exercise and enjoyment of religion. Any action that is neither "licentious [nor] inconsistent with the peace or safety of the State" is "guaranteed" protection. (Cal. Const., art. I, § 4; cf. *First Covenant Church* v. *Seattle*, *supra*, 840 P.2d at p. 186; *State* v. *Hershberger* (Minn. 1990) 462 N.W.2d 393, 397.)

The framers of our state Constitution placed a high value on religious liberty. Article I, section 4 as originally adopted in 1849, stated in pertinent part: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this State . . . ." The 1879 Constitutional Convention strengthened the original provision by substituting the word "guaranteed" for "allowed." Explaining the change, Mr. O'Sullivan, a delegate to the convention, commented: "I propose this amendment, because it is quite evident that the word 'allowed' conveys the idea that the right to disallow or deny exists. Now, sir, I deny that any Government or any power on earth has a right to grant or deny freedom of religious belief. . . . Our Government, being republican, should guarantee full liberty to the citizen in his actions. 'Guarantee,' therefore, is the proper word . . . ." (Debates and Proceedings, Cal. Const. Convention 1878-1879, p. 1171.)

By guaranteeing not only the free exercise but also the enjoyment of religion, our state Constitution affords Californians greater protection for religious liberties against governmental action than does the First Amendment of the federal Constitution. (Cf. *State v. Hershberger, supra*, 462 N.W.2d at p. 397; *State of Minn. by Cooper v. French* (Minn. 1990) 460 N.W.2d 2, 9.) As our state high court has noted, "the right to free religious expression embodies a precious heritage of our history." (*People v. Woody, supra*, 61 Cal.2d at p. 727.) It is thus the duty of the courts of this state to ensure that only the most compelling of state interests be allowed to narrow or restrict the free exercise right. (*Woody, supra*, at pp. 722-725; see *State of Minn. by Cooper v. French, supra*, 460 N.W.2d at p. 9.)

Because of its broader scope, we interpret the state constitutional guarantee of free exercise and enjoyment as placing a heavier burden on the state to justify its infringement than does the First Amendment to the federal Constitution as interpreted in *Smith*. Accordingly, a claim of infringement of free exercise and enjoyment as guaranteed by the state Constitution, regardless of whether that claim implicates other constitutional rights as well, must be considered under the strict scrutiny/compelling state interest analysis of *Sherbert*, *supra*, and *Woody*, *supra*. (See *Walker* v. *Superior Court* (1988) 47 Cal.3d 112, 139-141; *Molko v. Holy Spirit Assn.*, *supra*, 46 Cal.3d at p. 1113; and see *Auto Equity Sales* v. *Superior Court* (1962) 57 Cal.2d 450, 455.)14/

As we outlined in our discussion of plaintiff's hybrid free exercise claim under the First Amendment, California has no compelling interest in prohibiting housing discrimination against unmarried couples such as would outweigh plaintiff's state constitutional free exercise claim. Thus, under either the hybrid scenario posited in *Smith*, or the traditional analysis used to examine claims arising under the state free exercise constitutional guaranty, the same result obtains: plaintiff may not be forced to violate her religious beliefs in order to advance the state's interest in eradicating discrimination in housing against unmarried couples.

VII

Plaintiff relies on the Religious Freedom Restoration Act of 1993 (RFRA) (42 U.S.C. § 2000bb, et seq; see Pub. Law 103-141 [H.R. 1308], effective Nov. 16, 1993), enacted by Congress to restore the level of protection for religious freedom that existed prior to the United States' Supreme Court decision in *Smith*.15/ RFRA, which applies retroactively to all cases pending at the time of its enactment (42 U.S.C. § 2000bb-3, subd. (a)), was clearly intended to reverse the impact of *Smith* by creating a statutory right requiring the compelling state interest test to be applied in all cases in which the free exercise of religion has been burdened by a law of general applicability.16/

As we have noted, plaintiff's free exercise claims, whether analyzed under *Smith* as a hybrid claim under the First Amendment or under the broader free exercise clause of the California Constitution, must be subjected to the compelling state interest test. Thus, RFRA affords plaintiff no greater protection than that to which she is already entitled.

VIII

We address complainants' contention that inquiry into their marital status violated their state constitutional right to privacy. Article I, section 1 of the California Constitution provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." This constitutional provision creates a right of action against private as well as government entities. (*Hill* v. *National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 20, hereafter cited as *Hill*.)17/

The complainants' privacy claim fails for numerous reasons. Indeed, to the extent it is interposed to defeat plaintiff's First Amendment rights, it necessarily fails. A federal right, created by statute or by the federal Constitution, is not trumped by a state constitutional provision. (*Northwest Pipeline* v. *Kan. Corp. Com.* (1989) 489 U.S. 493, 509 [103 L.Ed.2d 509, 526-527]; *Garnett* v. *Renton School Dist. No. 403* (9th Cir. 1993) 987 F.2d 642, 646.) If, as we have determined, plaintiff's hybrid First Amendment rights permit her to refuse to rent to unmarried couples, it follows inexorably therefrom that plaintiff may lawfully inquire of prospective tenants as to their marital status.

Complainants' privacy claim fails even when considered as against plaintiff's state constitutional guarantee of the free exercise and enjoyment of religion. In *Hill, supra*, the California Supreme Court held that one who alleges an invasion of privacy in violation of the state constitutional provision must establish each of the following: "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy. . . ." (7 Cal.4th at pp. 39-40) Complainants assert the state constitutional right to privacy permits them to choose the living companion of their choice. (See *City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 130.) They also assert a legally protected privacy interest in their marital status. (See generally *Atkisson v. Kern County Housing Authority, supra*, 59 Cal.App.3d at pp. 98-100.) Both claims are well-taken. However, under the facts herein, neither privacy right was breached.

Plaintiff did no more than inform complainants, as prospective tenants, that because of her religious beliefs she preferred to rent to married couples and in fact would not rent to an unmarried couple. Plaintiff did not inquire of complainants' marital status, nor did she seek confirmation of that status when complainants falsely represented they were married. When complainants later volunteered to plaintiff that they were in fact not married, plaintiff thanked them for their honesty and returned their deposit.18/

"No community could function if every intrusion into the realm of private action, no matter how slight or trivial, gave rise to a cause of action for invasion of privacy. . . . Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right. Thus, the extent and gravity of the invasion is an indispensable consideration in assessing an alleged invasion of privacy." (*Hill, supra*, 7 Cal.4th at p. 37.)

Plaintiff's announcement of her rental policy can be characterized in many ways: polite, respectful, considerate, tactful. It cannot reasonably be characterized as an infringement on or an invasion of complainants' right to privacy.

Finally, even if complainants could somehow demonstrate plaintiff's conduct constituted an invasion of privacy, their privacy claim would still fail. As the *Hill* court held, even a substantial invasion of privacy may be justified where the invasion "substantively furthers one or more countervailing interests." (7 Cal.4th at p. 40.) "Invasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest. . . . Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests." (*Id.*, at p. 38.)

We need not repeat our discussion concerning the scope of the free exercise right plaintiff enjoys under both the federal and state Constitutions. Suffice it to say, such free exercise right is of the highest order. (*Thomas, supra*, 450 U.S. at p. 718 [67 L.Ed.2d at p. 634].) Complainants' privacy right, which under these facts is de minimis, is outweighed by plaintiff's protected and guaranteed rights to the free exercise and enjoyment of her religion.

"No provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority." (*The Writings of Thomas Jefferson*: Replies to Public Addresses: To the Society of the Methodist Episcopal Church at New London, Connecticut, on February 4, 1809 (Monticello ed. 1904) vol. XVI, 331, 332.) Our decision today simply recognizes that the interests here advanced by the state do not justify the burden they would entail on plaintiff's freedom of religion. While California may have a significant interest in eradicating discrimination in housing based on marital status, that interest is not so compelling as to justify the burden it would impose on plaintiff's free exercise of her religious liberty.19/ Nor has the state sustained its burden of proving the accommodation of plaintiff's free exercise rights constitutes a grave or immediate danger to any interest which it has an overriding need to protect.20/

Let a writ of mandate issue directing the Commission to vacate its decision and to dismiss the accusation and complaint against plaintiff with prejudice. Plaintiff is to recover her costs on appeal.

Puglia , P.J.

I concur:

Scotland , J.

1. Government Code section 12955 states in relevant part: "It shall be unlawful: [¶] (a) For the owner of any housing accommodation to discriminate against any person because of the race, color, religion, sex, marital status, national origin, ancestry, familial status, or disability of that person. [¶] (d) For any person subject to the provisions of Section 51 of the Civil Code, as that section applies to housing accommodations, to discriminate against any person because of sex, color, race, religion, ancestry, national origin, familial status, marital status, blindness or other physical disability, or on any other basis prohibited by that section."

2. A component of the emotional distress damages found by the Commission was that plaintiff's refusal to rent to complainants "revived for complainant Randall the pain of her parents' disapproval of her living with complainant Phillips." Randall was awarded $300 for her emotional trauma. Phillips was awarded $200. The Commission refrained from criticising Randall's parents for their disapproval of their daughter's marital status despite its obvious discriminatory effect on her.

In any event, the award of damages for emotional distress cannot stand. On appeal, the Commission concedes it is without the power to award such damages. (See *Walnut Creek Manor* v. *Fair Employment & Housing Com.* (1991) 54 Cal.3d 245, 251, 267.)

3. The Commission also concluded plaintiff's conduct constituted a form of arbitrary discrimination by a business establishment in violation of Civil Code section 51 and Government Code section 12948.

At the time of these events Civil Code section 51 provided: "This section shall be known, and may be cited, as the Unruh Civil Rights Act.

"All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

"This section shall not be construed to confer any right or privilege on a person which is conditioned or limited by law or which is applicable alike to persons of every sex, color, race, religion, ancestry, or national origin." (Stats. 1974, ch. 1193, p. 2568,, § 1.)

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

4. We do not mean to suggest that every claim of religious belief warrants free exercise protection. One can easily imagine "an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to [free exercise] protection . . . ." (*Thomas*, *supra*, 450 U.S. at p. 715 [67 L.Ed.2d at p. 632].) That is manifestly not the case here.

5. Lower courts have not limited the holding of Smith to instances where free exercise is infringed by criminal sanctions. (See e.g., *Vandiver* v. *Hardin County. Bd. of Educ.* (6th Cir. 1991) 925 F.2d 927, 932 [state may require student in religiously oriented course of home-study to pass equivalency examination]; *Salvation Army* v. *N. J. Dept. of Community Affairs* (3rd Cir. 1990) 919 F.2d 183, 194-196 [a statute regulating rooming and boarding houses applies to facility operated by religious group]; *St. Bartholomew's Church* v. *City of New York* (2nd Cir. 1990) 914 F.2d 348, 354 [City landmark preservation ordinance applies to church property]; *Health Services* v. *Temple Baptist Church* (N.M.App. 1991) 814 P.2d 130, 134.)

6. For example, in *Wisconsin* v. *Yoder* (1972) 406 U.S. 205 [32 L.Ed.2d 15], the Court ruled Wisconsin's compulsory school attendance law could not withstand strict scrutiny because "'the interests of parenthood [were] combined with a free exercise claim[.]'" (*Smith*, *supra*, 494 U.S. at p. 881, fn. 1 [108 L.Ed.2d at p. 887, fn. 1], quoting *Wisconsin* v. *Yoder*, 406 U.S. at p. 233 [32 L.Ed.2d at p. 35].)

7. Totalitarian governments also attempt to enforce conformity by forcing apostates to become instruments of their own abasement. For example, during the so-called "Cultural Revolution" in Communist China, non-conformists who did not subscribe to the orthodoxy of the ruling elite were subjected to obloquy and humiliation by being forced to parade on public streets while wearing ludicrous dunce caps.

8. In its Return, the Commission offered to modify its order to eliminate the requirement plaintiff post in her rental units the described notices. In its supplemental brief, the Commission argues such partial remission of the penalty will eliminate any free speech issues from the case and thus any need to review the case under the more stringent standard reserved for hybrid cases as set forth in *Smith*. We disagree. We issued an alternative writ to review the decision of the Commission, which encompasses both the Commission's findings and its order. It is now too late in the day for the Commission partially to remit the penalty imposed simply to avoid review.

In its decision, the Commission first noted it was entitled to take whatever action it deemed necessary to effectuate the purposes of FEHA. The decision then stated, "[W]e will order [plaintiff] to post and distribute the standard notices informing potential tenants of the outcome of this case and of their rights and remedies under [FEHA]." In response to plaintiff's claim the forced display of the notices was an unconstitutional infringement of her rights, the Commission stated: "While we are sensitive to [plaintiff's] concern, we have no . . . authority to decide this constitutional issue . . . and we therefore adhere to our usual remedial practice." Given the uncompromising position taken by the Commission in its decision, we find it strange if not disingenuous that the Commission would now offer, "in view of the unusual circumstances of this case, and for the sake of judicial economy . . . ." to eliminate the notice requirements which plaintiff deemed constitutionally offensive. The Commission's post-argument brief suggests the offer to modify was extended less to promote judicial economy and more to foreclose review of its "usual remedial practice" under the heightened standard applicable to "hybrid" cases as explained in *Smith*.

9. The necessity for a compelling state interest resonates in Justice Jackson's statement in *West Virginia State Bd. of Edu.* v. *Barnette, supra*, to wit: "The right of a State to regulate, for example, a public utility may well include . . . power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. *They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.*" (Italics added; 319 U.S. at p. 639 [87 L.Ed. at p. 1638].)

10. We do not suggest that a policy in support of marriage requires a concomitant policy of hostility towards other chosen lifestyles. We simply hold the extension to unmarried couples of rights which inhere in the marriage relationship is not a state interest of the highest order.

11. Government Code section 12995 states in relevant part: "Nothing contained in this part relating to discrimination in housing shall be construed to: [¶] (b) Prohibit any postsecondary educational institution, whether private or public, from providing housing accommodations reserved for either male or female students so long as no individual person is denied equal access to housing accommodations, or from providing separate housing accommodations reserved primarily for married students or for students with minor dependents who reside with them. [¶] (c) Prohibit selection based upon factors other than race, color, religion, sex, marital status, national origin, or ancestry."

12. The exemption of Government Code section 12995 for postsecondary educational institutions, if applied to these complainants, would render an anomolous result. Complainant Randall was at the time of this action a student at California State University at Chico. University officials could legally have denied complainants accommodations to live together in married student housing because of their unmarried status. Yet, plaintiff's refusal to rent to complainants because of her religious beliefs has brought down on her the wrath of the state for doing the very thing the state, as landlord, could do with impunity. Thus, the state is, hypocritically, coercing plaintiff to "do as it says, not as it does."

13. The Commission's claim that accommodating plaintiff's religious beliefs runs afoul of the Establishment Clause is patently without merit. (See *Thomas, supra*, 450 U.S. at pp. 719-720 [67 L.Ed.2d at p. 635].) Complainants are free to adhere to whatever, if any, religious tenets they desire. In turn, plaintiff does not require any of her tenants to adhere to any particular religious beliefs. She simply does not rent to unmarried couples because to do so would compromise her own religious beliefs. Accordingly, plaintiff's asserted religious exemption does not involve an imposition of beliefs upon others, but rather her own attempt to refrain from, as she sees it, a sinful facilitation of immoral behavior.

14. This conclusion is consistent with decisions of our sister state courts. (See e.g., *State* v. *Hershberger, supra*, 462 N.W.2d 393, 397-399 [Because of the high value placed on religious liberty in the Minnesota constitution, free exercise claims arising thereunder can be overridden only by a compelling state interest]; *State of Minn. by Cooper* v. *French, supra*, 460 N.W.2d 2 [same]; *First Covenant Church* v. *Seattle, supra*, 840 P.2d at pp. 191-193 [The free exercise clause of the Washington state constitution reflects the state's long history of extending strong protection to the free exercise of religion; thus, free exercise may be infringed only by a compelling state interest]; *contra, Swanner v. Anchorage Equal Rights Com.* (May 13, 1994) __ P.2d __.)

15. As the court noted in *Hunafa* v. *Murphy* (7th Cir. 1990) 907 F.2d 46, 48, "*Smith* cut back, possibly to minute dimensions, the doctrine that requires government to accommodate . . . minority religious preferences[.]" (See also *Yang* v. *Sturner* (D.R.I. 1990) 750 F.Supp. 558, 560 ["One must wonder . . . what is left of Free Exercise jurisprudence when one can attack only laws explicitly aimed at a religious group."]; see also *Smith, supra*, 494 U.S. at p. 908 [108 L.Ed.2d at p. 905] dis. opn. of Blackmun, J. [*Smith* "effectuates a wholesale overturning of settled law concerning the Religion Clauses of our Constitution."]; and see *Church of Lukumi* v. *Hialeah* (1993) 508 U.S. ___ [124 L.Ed.2d 472, 512, conc. opn. of Souter, J [describing the hybrid distinction posited in *Smith* as unworkable and "ultimately untenable"].)

16. 42 U.S.C. § 2000bb-1 states:

"(a) IN GENERAL.--Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

"(b) EXCEPTION.--Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

"(1) is in furtherance of a compelling governmental interest; and

"(2) is the least restrictive means of furthering that compelling governmental interest.

"(c) JUDICIAL RELIEF.--A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution."

That Congress intended the RFRA to restore pre-*Smith* analysis is apparent from a report of the House Judiciary Committee: "For many years and with very few exceptions, the Supreme Court employed the compelling governmental interest test [in deciding free exercise claims]. The Smith majority[']s abandonment of strict scrutiny represented an abrupt, unexpected rejection of longstanding Supreme Court precedent. . . . [¶] The effect of the *Smith* decision has been to subject religious practices forbidden by laws of general applicability to the lowest level of scrutiny employed by the courts. Because the 'rational relationship test' only requires that a law must be rationally related to a legitimate state interest, the *Smith* decision has created a climate in which the free exercise of religion is continually in jeopardy . . . . [¶] It is the Committee[']s expectation that the courts will look to free exercise of religion cases decided prior to *Smith* for guidance in determining whether or not religious exercise has been burdened and the least restrictive means have

been employed in furthering a compelling governmental interest. . . . Therefore, the compelling governmental interest test should be applied to all cases where the exercise of religion is substantially burdened; however, the test generally should not be construed more stringently or more leniently than it was prior to *Smith*. (Italics added; Report 103-88, 103rd Congress, 1st Session, House of Representatives' Judiciary Committee, pp. 3, 6, 7, and see p. 15 ["[T]he purpose of the statute is to 'turn the clock back' to the day before *Smith* was decided."]

17. For good reason, complainants do not raise a claim of violation of their federal constitutional right to privacy. (See *Griswold* v. *Connecticut* (1965) 381 U.S. 479 [14 L.Ed.2d 510].) The federal right to privacy protects individuals from unconstitutional *governmental* action. (See *Eisenstadt* v. *Baird* (1972) 405 U.S. 438, 453 [31 L.Ed.2d 349, 362].)

18. Plaintiff did inquire about the duration of complainants' marriage, but did so only after complainants had volunteered they were in fact married. Such an inquiry could hardly be labeled a serious invasion into an aspect of their lives that complainants, under the circumstances, could reasonably have expected to remain beyond the bounds of legitimate inquiry. (See *Hill*, supra, 7 Cal.4th at pp. 39-40.)

19. California regularly exempts religious objectors from laws of general applicability. (See e.g., *People* v. *Woody*, *supra*, 61 Cal.2d at pp. 723-727 [Indians who ingest peyote for religious purposes are exempt from California criminal drug laws]; Health & Saf. Code, § 25955, subd. (a) [exempting doctors and nurses from performing abortions if opposed on religious grounds]; Health & Saf. Code, § 3385 [public school students exempted from immunization requirements if opposed on religious grounds]; Ed. Code, § 51550 [public school students cannot be forced to attend sex education classes]; Code Admin. Regs., tit. 22, § 1256-6 [workers who cease employment due to personal religious beliefs are entitled to unemployment compensation.].)

20. In light of our determination, the finding that plaintiff's conduct constituted a form of arbitrary discrimination by a business establishment in violation of Civil Code section 51 and Government Code section 12948 must yield to plaintiff's paramount right to free exercise and enjoyment of religion. (See footnote 2, *ante*, p. 4.)

I concur in the majority's conclusion that application of the Fair Employment and Housing Act under the specific facts of this case violates petitioner's rights under the California Constitution. Unlike victims of race or sex discrimination, complainants cannot assert a countervailing constitutional right and have failed to establish the statutory protections afforded unmarried couples reflect a compelling state interest.

I disagree, however, with the majority's effort to create a "hybrid situation" within the meaning of *Employment Division v. Smith*, *supra*, 494 U.S. 872 by linking petitioner's free exercise claim with a first amendment free speech claim which only arises by virtue of the remedy imposed by the Commission. Assuming an order directing petitioner to post a notice describing provisions of a statute violates petitioner's free speech rights, the violation is clearly severable from the purported free exercise claim; we could simply strike that portion of the order. In any event, the federal constitutional analysis is unnecessary given the application of California's constitutional provisions on the free exercise and enjoyment of religion.

RAYE, J.

CERTIFIED FOR PUBLICATION

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

EVELYN SMITH, Petitioner, v. COMMISSION OF FAIR EMPLOYMENT AND HOUSING, Respondent, and KENNETH C. PHILLIPS et al., Real Parties in Interest.	C007654 FILED JUN 2 3 1994 COURT OF APPEAL-THIRD DISTRICT ROBERT L. LISTON, Clerk BY _____ Deputy ORDER MODIFYING OPINION AND DENYING REHEARING [No Change in Judgment]

THE COURT:

It is ordered that the opinion filed herein on May 26, 1994, be modified in the following particulars:

1. On page 5, footnote 2, delete the last sentence of paragraph 1 commencing with "The Commission," and add in its place after "$200.": "On appeal, the Commission concedes it was without

the power to award such damages. (See *Walnut Creek Manor* v. *Fair Employment & Housing Com.* (1991) 54 Cal.3d 245, 251, 267.)"
Delete paragraph 2 of footnote 2 on page 5.

2. On page 36, footnote 14, last sentence, modify the footnote to delete "; contra, *Swanner v. Anchorage Equal Rights Com'n. (May 13, 1994)* __ P.2d __". Add a period after "interest".

3. On page 36, line twelve from the top, add a new footnote at the end of the paragraph immediately preceding section "VII" after "couples." to read as follows:

"In *Swanner v. Anchorage Equal Rights Com'n* (Alaska 1994) 868 P.2d 301, the Alaska Supreme Court held a landlord's free exercise claim premised on the Alaska Constitution was outweighed by the state's compelling interest in eradicating discrimination in housing against unmarried couples. (868 P.2d at pp. 307-310.) We agree with the dissent in *Swanner*, which would have upheld the landlord's free exercise claim. (See *id.*, at pp. 312-317, dissenting opn. of Moore, C.J.)"

This modification will require renumbering of the footnotes.

4. On page 39 delete current text of footnote 17 and replace it with the following:

"Complainants also claim a violation of their federal constitutional right to privacy. (See *Griswold v. Connecticut* (1965) 381 U.S. 479 [14 L.Ed.2d 510].) There is no merit in this

claim. The federal right to privacy protects individuals only from unconstitutional *governmental* action. (See *Eisenstadt v. Baird* (1972) 405 U.S. 438, 453 [31 L.Ed.2d 349, 362].)

These modifications do not change the judgment. The petition for rehearing is denied.

BY THE COURT:

Puglia, P.J.

Scotland, J.

Raye, J.