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Religious Landlady Loses Case

State court rules for unmarried couple

By Harriet Chiang
Chronicle Legal Affairs Writer

The California Supreme Court issued a landmark civil rights decision yesterday, ruling that a Chico landlady cannot refuse to rent to an unmarried couple for religious reasons.

In a case pitting religious freedoms against civil rights, the court said the landlady, Evelyn Smith, was not entitled to an exemption from California's ban on discrimination because of her Christian beliefs.

Because of its far-reaching implications, the case has drawn national attention from conservative religious groups and from fair-housing organizations and gay rights advocates.

Civil rights groups had warned that a religious exemption would have allowed landlords and employers to discriminate freely by citing their individual religious beliefs. Some religious organizations had countered that forcing the woman to rent to the couple was an infringement of her fundamental rights.

By a vote of 4 to 3, the court found that the state ban on discrimination did not impose a "substantial burden" on Smith's religious beliefs.

"Smith's religion does not require her to rent apartments," said Justice Kathryn Werdegar in the majority opinion. "Nor is investment in rental units the only available income-producing use of her capital."

Werdegar said Smith's actions unfairly injured the unmarried couple. By refusing to rent to them, the landlady denied them "the full choice of available housing accommodations enjoyed by others in the rental market," Werdegar said.

But in a dissenting opinion, Justice Marvin Baxter said Smith derives her main source of income from the rental units. The court's decision, he concluded, imposes upon her "the very substantial burden of finding a new livelihood and means of support."

The California case arose in 1987, when the unmarried couple, Gail Randall and Ken Phillips, paid a deposit on one of four rental units owned by Smith in a quiet residential area of Chico.

Smith, a member of the Bidwell Presbyterian Church in Chico, informed them that she did not rent to unmarried couples because she believes that sex outside marriage is a sin.

They told her that they were married, but just before they moved in, they admitted that they were not. Smith promptly canceled the rental agreement and returned their deposit.

Randall and Phillips filed a claim with the Fair Employment and Housing Commission, charging that Smith was illegally discriminating against them.

The state civil rights agency agreed and ordered Smith to rent to the couple. But a state appeals court in Sacramento reversed that decision, finding that Smith was protected by her religious views.

Randall and Phillips, who no longer live together, both reacted with delight when the decision came down, hugging their attorney and beaming at reporters.

"It's been an aggravation," said Phillips, 36, who owns a landscape business in Chico. But because of the importance of the case, he said, the decision was definitely worth the nine-year legal battle.

Creating an exemption "would have been impractical," said Randall, 33, who works in a real estate office in Davis. "There are so many different religions."

Sacramento attorney Marian Johnston, who represented the Fair Employment and Housing Commission in defending the state's anti-discrimination laws, called the opinion "a landmark decision in California."

"It's important in reinforcing the state power to address discrimination," said Johnston, the former head of the state attorney general's civil rights unit. "We're not precluding her from exercising her religion. We're just saying she can't bring it with her into the business world."

Smith's attorney, Jordan Lorence of Virginia, said he plans to ask the U.S. Supreme Court to hear the case.

"It's a major blow to religious rights," he said.

Because there are few landlords who agree with Smith's beliefs, he said, the state does not have a compelling interest in forcing her to comply with the nondiscrimination law. "To make this sound like there's this important government interest is to make a mockery of civil rights laws," he said.

The case drew "friend of the court" briefs from a number of organizations, including the LAMBDA legal defense fund, an advocacy group for gay and lesbian rights.

The group's attorney, Clyde Wadsworth of San Francisco, said similar religious freedom claims have been raised in other parts of the country in an effort to discriminate against gays and lesbians.

The issue has arisen in a handful of other states, but only one other state Supreme Court has ruled on the issue. The Alaska court also ruled in favor of tenants.

In its decision yesterday, the California Supreme Court said Smith's attorneys failed to point to any U.S. Supreme Court decision in which it has granted a religious exemption if it would hurt the rights of a third party.

LANDLADY: Top State Court Rules Against Her

BY LEA SUZUKI/THE CHRONICLE

Kenneth Phillips (left), attorney Thomas F. Coleman and Gail Randall reacted happily in San Francisco to the state Supreme Court ruling in their favor

The Sacramento Bee

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Court: Landlady can't bar unwed

Religious freedom claim rejected

By Claire Cooper
Bee Legal Affairs Writer

SAN FRANCISCO – Ruling in a key conflict between civil rights and religious liberty, the California Supreme Court said Tuesday that a Chico landlady could not turn away an unmarried couple, even though she believed that renting to them would bar her from heaven.

In a case that has been watched nationally, the court ruled that the federal Religious Freedom Restoration Act of 1993 did not give Evelyn Smith, 63, an exemption from the state Fair Employment and Housing Act of 1980 that would let her discriminate against Gail Randall, 33, and Kenneth C. Phillips, 36.

The federal law says that a person's exercise of religion may not be "substantially burdened" without proof of a "compelling governmental interest."

The case also has been seen as an important test of the scope of legal protection against housing bias in California. By interpreting the 1980 law to cover unwed couples, the court affirmed the rights of an estimated 7 percent of state residents.

Justice Kathryn Mickle Werdegar, writing for a three-justice plurality, said that in a commercial enterprise, freedom of religion does not override "freedom from discrimination based on personal characteristics."

Smith "does not claim that her religious beliefs require her to rent apartments; the religious injunction is simply that she not rent to unmarried couples," Werdegar wrote. "No religious exercise is burdened if she follows the alternative course of placing her capital in another investment."

Justice Ronald George and now-retired Justice Armand Arabian signed Werdegar's opinion.

Justice Stanley Mosk went further, saying he would declare the federal religious-protection act to be in violation of the U.S. Constitution because it requires the courts to probe into religious conduct.

But three dissenters sharply disagreed.

Justice Joyce Kennard said the federal law protects Smith and requires the state to carve out an exemption from the fair-housing law for her "and others with sincerely held religious objections."

Justice Marvin Baxter, writing for himself and Chief Justice Malcolm Lucas, also filed an opinion strongly supportive of Smith. But he said more hearings were needed to weigh both state and federal laws in the context of this particular case.

In 1987, Randall and Phillips claimed to be married when they put down a $150 cash deposit on one of Smith's four duplex apartments.

Smith returned the deposit when they phoned her later and admitted otherwise.

A devout Presbyterian, she believes that renting to unwed couples would keep her from joining her late husband in heaven.

The state Fair Employment and Housing Commission ruled in favor of the former couple in 1989 and ordered Smith to pay them $454 in compensation and $500 for "emotional distress."

Smith took that ruling to the state Court of Appeal in Sacramento and won there.

The 1994 opinion said the state had no "compelling interest" in protecting the housing rights of unwed couples.

The state Supreme Court, acting in an appeal by the commission, upheld the 1989 ruling except for the emotional-distress damages.

Marian Johnston, the Sacramento lawyer who represented the commission in the last round, applauded the decision, saying a decision in favor of Smith would have opened the door to bias against racial minorities or mixed-race couples by anyone claiming to have a religious objection.

Phillips, a Chico landscaper, called the decision "fantastic," and Randall, now an administrative assistant in a Sacramento real estate business, said, "It was worth it." They are no longer together.

Phillips' lawyer, Thomas F. Coleman of Los Angeles, said, "It's refreshing to know that the Constitution protects consumers from forced conformity to the religious beliefs of a business owner."

But Smith said she'll appeal now to the U.S. Supreme Court.

Jordan Lorence, a lawyer from Virginia who has represented Smith, conceded the high court refused to review a similar case from Alaska but said the California case could be more attractive because it is a clear-cut test of the federal religious-protection statute.

"Whether they'll take the case or not, I just pray that they do," he said.

Religious Landlady Can't Discriminate Against Unmarried Couple—S.C.

By Bob Egelko

SAN FRANCISCO (AP)—A religious landlady who objected to sex outside of marriage had no constitutional right to refuse to rent to an unmarried couple, the state Supreme Court ruled yesterday.

In a case that has drawn national attention, the court ruled 4-3 that enforcement of the state's ban on housing discrimination based on marital status did not create a "substantial burden" on a property owner's freedom of religion.

Landlady Evelyn Smith of Chico was not religiously compelled to stay in the rental business and could avoid the conflict by investing her money elsewhere, said the lead opinion by Justice Kathryn Mickle Werdegar. She also said Smith could have enforced her rights "only by completely sacrificing the rights of the prospective tenants."

"Business owners who enter the commercial marketplace may not hide behind 'religion' to justify illegal discrimination," said Thomas F. Coleman, lawyer for Kenneth Phillips, one of the would-be tenants. "They must obey the civil rights laws just like everybody else."

'Religious Hoops'

If Smith had won the case, "people would have to jump through religious hoops" to rent an apartment, said Phillips, now 36 and a landscaper in Chico. He no longer lives with Gail Randall, 33, a real estate employee in Sacramento who joined him to celebrate the ruling.

But Smith's lawyer, Jordan Lorence, said he would ask the U.S. Supreme Court to review the issue, which has divided state courts around the country. The high court refused in 1994 to review a similar ruling from Alaska.

"This is Mrs. Smith's main source of income, and they're basically saying, 'Either you play by our rules or you get out of the marketplace,' " said Lorence, whose case was financed by the Phoenix-based Alliance Defense Fund, a conservative religious organization.

Smith said she would "never rent to fornicators," regardless of the ruling.

"I'm going to do it my way because it's the Lord's way," she said in a telephone interview. She said she'd get out of the business only if the state paid her capital-gains taxes.

Presbyterian Beliefs

Phillips and Randall tried to rent one of Smith's two duplexes in 1987 but were turned down when she learned they were unmarried. Smith said her Presbyterian beliefs forbade her to rent to a cohabiting couple.

The state Fair Employment and Housing Commission ordered her to pay the couple $454 for the higher rental costs they incurred elsewhere, and to post a sign saying it was illegal to discriminate on the basis of marital status.

But a Butte County judge and a state appeals court ruled that enforcement of the law violated Smith's freedom of religion, a conclusion endorsed yesterday by dissenting Justice Joyce Kennard.

"In requiring that Smith comply with state statutory law by renting to unmarried heterosexual couples, the state substantially burdens Smith's religious beliefs by compelling her to do that which her beliefs forbid," Kennard wrote.

She said the case might be different for homosexuals, who have no option to marry and who have been the victims of longstanding discrimination.

But the state has not shown an overwhelming need to ban discrimination against unmarried couples, allows married student housing, and could provide a religious exemption for Smith without weakening civil rights laws, Kennard said.

Justice Marvin Baxter, joined by Chief Justice Malcolm Lucas, wrote a separate dissent, saying the case should be re-examined under a 1993 federal law requiring the government to show a compelling justification for religious discrimination.

But Werdegar, in the lead opinion, said the federal law protects only those whose religious beliefs would be substantially burdened. That is not true for Smith, who by investing her money elsewhere "can avoid the burden on her religious exercise without violating her beliefs or threatening her livelihood," Werdegar said.

The economic loss Smith may suffer does not violate her constitutional rights, Werdegar said. She said the case was different from U.S. Supreme Court rulings that allowed employees to refuse to work on their Sabbath day without being fired; those cases involved a loss of livelihood and did not affect the rights of others such as Smith's would-be tenants, Werdegar said.

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Landlords Can't Deny Housing to Unwed Couples

■ **Courts:** In a 4-3 decision, state justices rule against woman who refused to rent to a pair on religious grounds. She plans an appeal.

By HENRY WEINSTEIN
TIMES LEGAL AFFAIRS WRITER

SAN FRANCISCO—A sharply divided California Supreme Court ruled Tuesday that a landlord cannot refuse to rent to an unmarried couple on the grounds that it would violate religious beliefs.

By a 4-3 vote, the Supreme Court reversed a lower ruling and upheld the decision of the California Fair Employment and Housing Commission that Evelyn Smith of Chico violated state anti-discrimination laws. She declined to rent to Kenneth Phillips and Gail Randall after they told her they were not married, saying it would be a sin for her to rent to people having sex out of wedlock.

Four justices, led by Kathryn Mickle Werdegar, rejected Smith's argument that her rights to religious freedom under the U.S. and California constitutions had been violated. Three of the justices in the majority also rejected Smith's contention that her rights under the 1993 Religious Freedom Restoration Act had been violated.

Stanley Mosk, the fourth justice who voted against Smith, wrote a separate concurring opinion, saying that although he generally agreed with most of Werdegar's opinion, he considered the 1993 statute unconstitutional and therefore did not need to even assess the merits of her claims under it.

California law specifically makes it unlawful for the owner of any housing unit to discriminate against any person because of that person's marital status or to make any inquiry—written or oral—concerning marital status when renting a unit.

But Smith contended that those bans did not apply to unmarried couples who live together. Werdegar's majority opinion specifically rejected that contention.

"In effect, the Supreme Court has ruled that a landlord may not impose a religious test as a condition of renting an apartment," said Thomas F. Coleman, an attorney for the couple. "After today, landlords may no longer refuse to rent to tenants who do not conform their conduct to the religious beliefs of the landlords."

Phillips and Randall said they were pleased that they had prevailed in a nine-year legal battle that began when Smith refused to rent them a tree-shaded duplex in Chico. "Fantastic," proclaimed Smith, who runs a landscape supply business in Chico.

"It's definitely been worth it because this has far-reaching implications for other people, too," said Randall, an administrative assistant at a real estate office in Davis.

Smith said she was "very disappointed" but that she felt she had a good chance of prevailing at the U.S. Supreme Court. Her attorney, Jordan Lorence of the conservative Alliance Defense Fund, based in Phoenix, said he would immediately seek Supreme Court review.

In its ruling, the California high court majority noted that the state law originally had been enacted in 1963 as the Rumford Fair Housing Act and amended in 1975 to specifically prohibit housing discrimination because of marital status. Moreover, the court stressed that a few months before the statute was amended, the California Legislature had repealed the laws criminalizing private sexual conduct between consenting adults.

Werdegar's opinion cited earlier California Supreme Court rulings, including a 1982 case upholding a decision that the owners of a duplex had violated state law when they rescinded a rental agreement after learning that a couple were not married. "In the ensuing 13 years, no court has suggested the statute should be interpreted differently," she wrote.

The majority also spurned Smith's contention that requiring her to rent to Smith and Randall violated her rights under the federal Religious Freedom Restoration Act of 1993. That law provides that government "shall not substantially burden a person's exercise of religion" unless it can be demonstrated that there is a compelling state interest and there is no less restrictive means of furthering that interest.

The majority said there was no serious question that Smith's Christian beliefs are religious and that she holds them sincerely. But it added that "Smith's religion does not require her to rent apartments, nor is investment in rental units the only available income-producing use of her capital."

In her dissent, Justice Joyce Kennard said the majority was placing an undue burden on Smith's free exercise of her religious beliefs. Kennard also suggested that California officials had failed to carry their burden of "showing that eliminating housing discrimination against unmarried heterosexual couples is a compelling interest of the same high order as, for instance, eliminating racial housing discrimination."

Justice Marvin Baxter, joined by Chief Justice Malcolm Lucas, wrote in a separate dissent that the case should be reexamined under the 1993 Religious Freedom Act.

Smith's attorney said he was particularly disturbed by the majority's suggestion that she could make money another way.

"For the majority to suggest that she can sell her townhouses and just reinvest the money and live off the investment income is like Marie Antoinette telling French peasants they can 'eat cake,' " Lorence said.

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Cohabiting Tenants Win In High Court

Landlady May Not Exclude Couple on Religious Grounds

4-3 Decision

By Philip Carrizosa
Daily Journal Senior Writer

SAN FRANCISCO — In a groundbreaking decision pitting religious rights against fair housing laws, the California Supreme Court ruled Tuesday that a devout Presbyterian landlady may not rely on her religious beliefs to refuse to rent an apartment to an unmarried couple.

In a sharply divided 4-3 decision, the state high court said Evelyn Smith of Chico had violated California's Fair Employment and Housing Act in 1987 when she refused to rent one of her duplex units to Kenneth C. Phillips, a landscaper, and Gail Randall, a student at nearby Cal State-Chico.

'Obligation to Comply'

"Her religion may not permit her to rent to unmarried cohabitants," wrote Justice Kathryn Mickle Werdegar, "but the right to free exercise [of religion] does not relieve an individual of the obligation to comply with valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that [her] religion prescribes (or proscribes)."

Werdegar, writing a plurality opinion, was joined in the widely awaited case by Justice Ronald M. George, who is set to become chief justice next month, and Justice Armand Arabian, who retired on Feb. 29, but cast his vote because he heard oral arguments in the case in January. Justice Stanley Mosk concurred separately.

Three justices dissented, but they, too, were divided. Justice Joyce L. Kennard concluded that the state had not shown sufficient grounds to prevail over Smith's religious rights. In a separate opinion, Justice Marvin R. Baxter, joined by Chief Justice Malcolm M. Lucas, agreed the state had not yet shown a "compelling interest" in forcing the landlord to rent — but said the state should get another opportunity to do so in further proceedings.

The ruling thrilled Los Angeles attorney Thomas F. Coleman, who traveled to the court's San Francisco headquarters for the decision and slapped hands in "high-five" style with his client, Phillips, upon discovering they had prevailed.

Nine-Year Fight

"After nine years, we've won," shouted Coleman. Given all of the diverse beliefs in American society, "the only rule of law that can work is one where discrimination on the basis of religion is prohibited.

"If the court had ruled otherwise, basically there would have been a green light: Go ahead and violate civil rights laws as long as you can say God told me to do it. ... I think it would have thrown a monkey wrench into the machinery of civil rights enforcement," Coleman said.

Phillips, 36, who is still a Chico landscaper, and Randall, 33, who is now an administrative assistant in a Sacramento realty office, no longer live together.

The ruling also pleased Sacramento attorney Marian M. Johnston of Eisen & Johnston, who represented the Fair Employment and Housing Commission in the case.

"It's very important for maintaining a business world in which discrimination is not permitted," said Johnston.

But Smith's lawyer decried the ruling and pledged to appeal to the U.S. Supreme Court. Jordan W. Lorence of Fairfax, Va., said Werdegar erred by minimizing the burden on Smith if she has to get out of the rental business and lose her rental income.

"There's just a very flippant, 'let them eat cake' feel to that," Lorence said.

The ruling in *Smith v. Fair Employment and Housing Commission*, S040653, puts California in line with the state Supreme Court of Alaska, which rejected a landlord's bid for an exemption from fair housing laws in *Swanner v. Anchorage Equal Rights Commission*, 874 P.2d 274 (1994). The state Supreme Court of Minnesota has interpreted its state's laws as allowing discrimination against unmarried couple while the high court of Massachusetts said the issue could not be decided on summary judgment and should be sent to trial. Nearly identical issues are pending in state appellate courts in Illinois and Michigan, Coleman said.

The U.S. Supreme Court has thus far refused to consider the issue, although Justice Clarence Thomas dissented in 1994 when the court declined to review the Alaska decision in *Swanner*.

In her 42-page lead opinion, Werdegar said Smith's refusal to rent to Phillips and Randall violated the FEHA's ban on discrimination on the basis of marital status, rejecting her claim that the statute protects only single individuals, not unmarried couples. The Legislature not only understood that the term "marital status" would protect unmarried couples, but the Fair Employment and Housing Commission has interpreted it that way since the FEHA was enacted in 1980, Werdegar said.

Ultimately, however, the case turned on the federal Religious Freedom Restoration Act of 1993. Known as RFRA, the act was passed by Congress in 1993 to restore the burden on government of showing a compelling state interest for laws that infringe religious rights. The action came after the U.S. Supreme Court ruled in 1990 that the Free Exercise of Religion Clause in the First Amendment does not apply to neutral laws of general application unless some other fundamental right, such as freedom of speech, is violated.

But Werdegar wrote that even under RFRA, Smith loses because the fair housing law does not "substantially burden" the exercise of religion which RFRA itself makes a prerequisite.

"Smith's religion does not require her to rent apartments, nor is investment in rental units the only available income-producing use of her capital," Werdegar reasoned. Thus, the justice said, the court did not need to reach the question of whether California's fair housing law furthers a compelling state interest.

In his concurring opinion, Mosk said he agreed generally with Werdegar's opinion, but said he believes RFRA itself violates the U.S. Constitution and shouldn't be considered at all.

"In my view, the principle of separation of powers is violated here," Mosk wrote. "Through RFRA, Congress has, in effect, unconstitutionally attempted to empower the courts, state as well as federal, to pass on religious questions."

In a 38-page concurring and dissenting opinion, Kennard said the state had substantially burdened Smith's exercise of her religion. She also said it is "questionable" whether the state had shown a compelling state interest for its law, so the state should be precluded from forcing Smith to rent to unmarried couples.

Justice Baxter, joined by Lucas, wrote an even longer — 49 pages — concurring and dissenting opinion, arguing the state had substantially burdened Smith's religious rights. But, unlike Kennard, Baxter and Lucas said the case should be remanded to the FEHC to see if the agency can show that its blanket ban on discrimination against unmarried couples is the least restrictive means of implementing its compelling state interest.

Landlady May Not Exclude Couple

Baxter also emphasized that because Mosk's rationale was so different from Werdegar's, there is no majority view in this case. "As a result, its analysis lacks authority as precedent and hence cannot bind," Baxter wrote. "Therefore, its mischief is limited to this case and to this case alone."

Smith, who regularly attends Bidwell Presbyterian Church, had said she considers unmarried couples to be "fornicators" and once testified to an administrative law judge that she feared she would not be able to join her late husband in heaven if she assisted in committing sin.

But attorneys for Phillips and Randall argued that Smith had no right to impose her religious beliefs on renters and contended Smith never asked if they were having sex.

Finding that Smith had discriminated on the basis of marital status, the state Fair Employment and Housing Commission awarded $454 to Phillips and Randall for their out-of-pocket costs and $500 for emotional distress and ordered Smith to post a notice about the FEHC ruling for 90 days.

Smith then appealed directly to the Court of Appeal in Sacramento in 1989, invoking that court's original jurisdiction to hear writs of mandate. After the state Supreme Court failed to decide a similar case, the appeal court ruled in May 1994 that California's ban on discrimination in housing is unconstitutional under both the state and federal constitutions as applied to landlords whose religious beliefs prohibit them from renting to unmarried couples.

"We were getting into a situation where, if this [appeal court] opinion was not reversed, people would have to jump through religious hoops," Phillips told reporters minutes after the ruling was issued. "This decision extends into employment and other areas of commerce."

Noting that the U.S. Supreme Court refused to review a similar ruling from the Alaska Supreme Court, Johnston said, "I would argue for the same reason that this case doesn't present a substantial federal question."

But Lorence said Werdegar's opinion "evades the clear intent of Congress" by its "opaque" analysis of the substantial burden issue. He said Kennard "nailed the issue squarely" and presented the proper resolution of the case.

He disagreed with Baxter and Lucas' call for a remand, saying the issue was already tried before an administrative law judge under the compelling state interest standard.

Case Had a Tangled History

SAN FRANCISCO — Tuesday's decision prohibiting landlords from refusing to rent to unmarried couples on religious grounds did not come easily for the California Supreme Court.

The issue was before the court once before in 1992 when the justices agreed to hear another unmarried couples case from the Los Angeles-area community of Downey, *Donahue v. Fair Employment and Housing Commission*, S024538. But, after the case was fully briefed and awaiting oral arguments, the justices surprised the litigants by dismissing *Donahue* on Sept. 30, 1993, with no explanation other than it was "improvidently granted."

Over the "no" votes of Justices Joyce L. Kennard and Ronald M. George, the rest of the court — Chief Justice Malcolm M. Lucas and Justices Stanley Mosk, Armand Arabian, Edward A. Panelli and Marvin R. Baxter — voted to drop the case.

The action forced the Court of Appeal in Sacramento, which had been waiting for a ruling in *Donahue*, to move to a decision in the Chico case decided Tuesday, *Smith v. FEHC*, S040653. The appeal court eventually ruled in favor of the landlady on May 26, 1994, saying the state's interest in barring housing discrimination was outweighed by Smith's First Amendment religious rights.

At that point, state Attorney General Daniel Lungren said in July 1994 he wouldn't represent the FEHC in the case anymore because he thought the landlady's position was correct as a matter of law.

The commission proceeded with the appeal using its own staff attorneys, then retained former Deputy Attorney General Marian Johnston on a pro bono basis to handle the case. The issue was no stranger to Johnston, who had defended the FEHC in *Donahue*.

Ironically, several other attorneys who had participated in *Donahue* also participated in *Smith*, such as Thomas F. Coleman of Los Angeles, who represented tenants in both cases, and Jordan W. Lorence of Virginia, who represented a religious group, Concerned Women for America, in *Donahue* and then represented landlady Smith in the current case.

On Sept. 8, 1994, the high court voted to review the Smith decision with every justice voting to hear the case but Baxter. Justice Kathryn Mickle Werdegar, who had replaced Panelli after his retirement, joined with the majority and, as it turned out, wrote the plurality opinion in Tuesday's decision.

Smith became fully briefed on Jan. 10, 1995, but arguments were not held until exactly a year later in Los Angeles as the justices worked on a tentative opinion.

Even then, the justices took the full 90 days after arguments to file their opinion, just meeting the court's own 90-day deadline for deciding cases.

However, Tuesday's ruling is not the end of the matter. The losing side has 15 days to petition for a rehearing and, assuming custom is followed, Lucas and Arabian (who are retiring or have retired already) will be replaced for the vote by the court's new members, Justice Ming W. Chin and nominee Janice Rogers Brown of the Court of Appeal in Sacramento, who faces a confirmation hearing May 2.

Lucas and Arabian voted in the minority Tuesday, and so even if their replacements, Chin and Brown, held the same views, they would not provide enough votes to rehear the case. A critical fourth vote for rehearing would have to come from one of those who voted in the majority Tuesday.

Nonetheless, the issue may not be finally resolved. Since the ruling Tuesday involves so much federal law, the U.S. Supreme Court just might decide to review the case.

— *Philip Carrizosa*