Supreme Court Case No. _____
Court of Appeal Case No. C007654

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

EVELYN SMITH,

Petitioner,

vs.

COMMISSION ON FAIR EMPLOYMENT AND HOUSING,

Respondent,

KENNETH C. PHILLIPS AND GAIL RANDALL,

Real Parties in Interest.

On Original Petition From a Decision
by the Commission on Fair Employment and Housing

PETITION FOR REVIEW
OF KENNETH C. PHILLIPS

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CONTENTS

AUTHORITIES

Cases:

Statutes:

GROUNDS FOR REVIEW

Kenneth Phillips, real party in interest, hereby petitions this Court to grant review of an opinion of the Court of Appeal. (A copy of that opinion is attached hereto as Exhibit A.)

Review should be granted under Rule 29(a)(1) to settle an important question of law, i.e., whether landlord who rents duplex apartments as a business venture and who does not live on the premises must be granted an exemption from laws prohibiting housing discrimination if the landlord's discriminatory and illegal conduct is motivated by her sincerely held religious beliefs.

The issues presented in this case are substantially similar to those in *Donahue v. Fair Employment and Housing Commission* (1991) 1 Cal.App.4th 387, 2 Cal.Rptr.2d 32, review granted, 7 Cal.App.4th 1498, review dismissed as improvidently granted, 13 Cal.App.4th 350.

The importance of the legal issues involved in this case is underscored by the fact that, in similar cases, the Minnesota Supreme Court split 3 to 3 on the constitutional issues (*State ex rel. Cooper v. French* (Minn. 1990) 460 N.W.2d 2), the Alaska Supreme Court ruled 4 to 1 against a landlord (*Swanner v. Anchorage Equal Rights Commission* (May 13, 1994) __ P.2d __), and the Massachusetts Supreme Court recently heard oral argument, took the matter under submission, and will soon render an opinion. (*Attorney General v. Desilets*, Docket No. SJC 06284.)

ISSUES PRESENTED FOR REVIEW

1. **Is There Presumption of Sexual Activity Between Unmarried Adults?**

Is there a rebuttable presumption under California law that an unmarried man and woman who live together have an ongoing sexual relationship? If such a presumption exists under statutory or case law, would the state or federal constitutional right of privacy be violated if an administrative or judicial tribunal relies on this presumption and shifts the burden of proof to prospective tenants, thus requiring them to present evidence that they do not have a sexual relationship and therefore will not commit sexual sins on the premises they seek to rent.

2. **Do Fair Housing Laws Substantially Burden the Free Exercise of Religion?**

If a presumption of ongoing sexual activity does not exist or is constitutionally invalid, may a landlord rely on speculation or personal assumptions about the future sexual activity of two unmarried tenants in order to satisfy her burden of proving that her free exercise of religion will be substantially burdened by a statute prohibiting marital status discrimination?

3. **Do the Fair Housing Laws Promote Compelling State Interests?**

Does the state have one or more compelling interests to justify laws prohibiting marital status and other types of arbitrary discrimination in housing? If the primary purpose of fair housing laws is to protect applicants and tenants from arbitrary discrimination, can this purpose be served by any less restrictive means than that already used by the Legislature, namely, the prohibition of such discrimination in the general housing stock by an absentee landlord engaged in a for-profit business, with a limited exemption for landlords who rent out rooms in an owner-occupied residence.

4. **What Are the Consequences of Granting Religious Exemptions to Landlords?**

What are the likely administrative and legal consequences to state agencies, courts, and victims of discrimination if business owners who violate state civil rights laws are granted exemptions from such laws when their admittedly unlawful conduct is motivated by sincerely held religious beliefs?

STATEMENT OF THE CASE

As the opinion of the Court of Appeal states, the facts of this case are not in dispute.[1] Evelyn Smith is engaged in the business of renting apartments. She owns two duplexes and derives part of her income from the net profits of this enterprise.

Kenneth Phillips and Gail Randall sought to rent an apartment in one of the duplexes from Mrs. Smith. Smith did not live on the premises in question. When Smith informed the prospective tenants that she preferred to rent the apartment to a married couple, Phillips and Randall informed her that they were married. Within a matter of days, a rental contract was signed. However, before they moved in, the tenants informed Smith that they were not married. Smith rescinded the agreement and refused to rent to them. Smith would have allowed Phillips and Randall to move into the apartment had they been married.

Smith's decision not to rent to Phillips and Randall was based on two religious convictions. First, she believed that sexual activity between unmarried adults is sinful. Also, she believed that she would be committing a sin if she rented to people who would engage in nonmarital sex.

Smith did not know whether Phillips and Randall had an ongoing sexual relationship. The tenants did not tell Smith whether or not they had a sexual

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[1] However, the opinion omits material facts and misstates others. (See Petitions for Rehearing filed by Kenneth C. Phillips and by the Commission on Fair Employment and Housing.)

relationship, nor did Smith inquire. Smith's religious beliefs did not require her to ask prospective tenants about their sexual proclivities. Smith merely assumed they had a sexual relationship and therefore that they would be fornicating in the apartment.

Phillips and Randall filed a complaint with the Fair Employment and Housing Department. The department, in turn, filed an accusation against Smith with the Commission on Fair Employment and Housing, charging her with a violation of the Fair Employment and Housing Act and the Unruh Civil Rights Act. Smith claimed she was entitled to an exemption from state fair housing laws, arguing that her constitutional right to free exercise of religion superseded these statutes. After a hearing before an administrative law judge, the Commission found that Smith committed marital status discrimination in violation of both statutes. The Commission lacked authority to rule on her constitutional claim. It ordered her to pay damages to Phillips and Randall in the amount of $954, to cease and desist marital status discrimination, and to post various notices on her rental property.

Smith filed a petition for writ of mandate in the Court of Appeal, seeking to overturn the Commission's orders. The Commission filed a return in which it resisted Smith's attempt to gain a judicial exemption from the fair housing laws. However, the Commission withdrew its order that she post notices on her property. The Court of Appeal issued a writ of mandate, directing the Commission to vacate its decision and to dismiss the accusation against Smith, with prejudice.

SUMMARY OF ARGUMENT

The precedent created by the opinion of the Court of Appeal will not just affect the parties to this case as the opinion suggests. The opinion contains virtually no principles that would limit this precedent to landlords who have religious objections to nonmarital sex. Since the opinion grants an exemption to a business owner from the requirements of the Fair Employment and Housing Act and the Unruh Civil Rights Act, there is nothing to suggest that exemptions soon will not be available from anti-discrimination provisions protecting employees and consumers.

The opinion should be reversed for several reasons. First, it relieves a landlord of her burden of proving that the fair housing statutes substantially interfere with her free exercise of religion. The constitutional clash the opinion purports to resolve does not even exist in this case since there is no evidence that the prospective tenants would have fornicated in the apartment. It is only by implicitly relying on a presumption of sexual activity -- a presumption that does not exist and which would violate the right of privacy in any event -- that the opinion creates a false conflict with the landlord's religious beliefs. Furthermore, the opinion fails to explain how the business of renting apartments is the exercise of religion. Also, this precedent essentially requires tenants to conform their behavior to the religious beliefs of landlords in order to gain protection from secular nondiscrimination statutes.

Finally, contrary to the opinion, the state does have compelling reasons to prohibit arbitrary discrimination, including marital status discrimination, in housing.

ARGUMENT

I

THE OPINION OF THE COURT OF APPEAL UNDERMINES INFORMATIONAL PRIVACY RIGHTS OF TENANTS UNDER THE STATE AND FEDERAL CONSTITUTIONS

By allowing Smith to rely on a presumption that Phillips and Randall would fornicate on the rental property if she rented to them, thereby shifting the burden of proof to the prospective tenants to show otherwise, the court's opinion creates a rebuttable presumption that is not only unauthorized by existing statutory and case law, but which also violates the tenants' right of informational privacy under the state and federal constitutions.

Smith does not inquire into the sexual activities of tenants, regardless of whether they are two people of the same sex or of the opposite sex. (RT 87)[2] She does not ask prospective tenants to disclose their sexual orientation, whether they have boyfriends or girlfriends, whether they have overnight guests, or whether they ever sleep with someone else away from the rental property. (RT 87) However, if she learned that a tenant committed a single act of fornication, even if the sexual activity occurred in a motel, she would evict him. (RT 87-88)

Smith did not ask Phillips and Randall if they had a sexual relationship, nor

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[2] "RT" refers to the reporter's transcript of the hearing conducted before the administrative law judge on April 26, 1988, which is a part of the record on appeal.

did the tenants inform her about their sex lives. Knowing that her religious freedom claim would evaporate without a direct conflict with her beliefs about nonmarital sex, Smith relied on a so-called presumption that an unmarried man and woman who live together engage in sexual intercourse. (Petitioner's Response Memorandum in the Court of Appeal, p. 3.) She argued that "[t]he complainants and the State have the burden to rebut the legal presumption of sexual activity." (Ibid.)

Since Smith does not have a religious need to inquire into the sexual activities of prospective tenants, and since there was no evidence as to whether Phillips and Randall had an ongoing sexual relationship, the existence or not of a legal presumption of sexual activity is central to the outcome of this case. Her religious beliefs could in no way be substantially burdened if Mrs. Smith were required to rent to prospective tenants about whose sexual activities she had no information or knowledge. If she does not ask and if the tenants do not tell, then the future sexual activity of the tenants would be a matter of supposition, and constitutional issues are not decided on the basis of speculation.[3] (*In re Johnson* (1965) 62 Cal.2d 325, 332.)

Mrs. Smith relied entirely on *Sharon v. Sharon* (1888) 75 Cal. 1 as the legal basis of the so-called presumption of sexual activity of unmarried adults. However, that case does not authorize such a presumption. Furthermore, subsequent statutes

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[3] A "don't ask, don't tell" policy where the landlord does not inquire into the sexual practices of tenants and where the tenants do not push such information on the landlord not only respects the privacy rights of consumers but it avoids any real confrontation with the religious beliefs of business owners.

and judicial decisions establish contrary legal principles. (Evidence Code section 520 [burden of proof to show wrongdoing]; *Brill v. Brill* (1940) 38 Cal.App.2d 741, 745 [presumption of innocence applicable in civil cases]; *Rodetsky v. Nemy* (1925) 77 Cal.App. 525, 526 [presumption of moral conduct]; *Lertora v. Globe* (1936) 18 Cal.App.2d 142, 144-145 [presumption that occupancy of a dwelling is not for immoral purposes]; *Marvin v. Marvin* (1976) 18 Cal.3d 660, 684 [no presumption that sexual activity is an integral part of a nonmarital relationship].)

Furthermore, such a presumption would shift the burden to unmarried tenants to disclose the details of their sex lives in order to show they did not have a sexual relationship. Any law that placed such a burden on victims of housing discrimination would surely contravene the right of informational privacy protected by the state and federal constitutions. (*Fults v. Superior Court* (1979) 88 Cal.App.3d 899, 904 [personal sexual information is protected by the right of privacy]; *Vinson v. Superior Court* (1987) 43 Cal.3d 833, 841 [privacy protection embraces sexual relations]; *Whalen v. Roe* (1977) 429 U.S. 589, 599 [personal information protected by right of privacy]; *Thorne v. City of El Segundo* (9th Cir. 1983) 726 F.2d 459, 468-469 [adverse inference from refusal to disclose personal information violates right of privacy].)

This Court should grant review, and reverse the decision of the Court of Appeal, because the court's opinion requires religious freedom exemptions to be granted to business owners on the basis of unsubstantiated personal assumptions, thereby improperly and unconstitutionally placing a burden on victims of discrimina-

tion to disclose intimate details of their personal lives. If this opinion stands, in order to rebut a landlord's presumption, victims will be required to share intimate details of their sex lives with government officials -- first with investigators of the Department of Fair Employment and Housing, then with an administrative law judge, and then have such personal information disclosed in public court documents if the case is petitioned to Superior Court. If the constitutional right of privacy means anything at all, it surely does not countenance such a result.

II

THE OPINION IMPROPERLY EXEMPTS A LANDLORD FROM FAIR HOUSING LAWS ON THE BASIS OF UNSUBSTANTIATED PERSONAL ASSUMPTIONS ABOUT THE FUTURE CONDUCT OF TENANTS, IN DIRECT CONTRAVENTION OF PRECEDENTS THAT PLACE ON HER A BURDEN TO PROVE THAT SUCH LAWS SUBSTANTIALLY INTERFERE WITH HER RIGHT TO FREE EXERCISE OF RELIGION

To establish a constitutionally valid free exercise claim, Smith has the initial burden of proving two things. Not only must she must prove that the conduct in question is motivated by sincerely held religious beliefs, but she must prove that the challenged regulation restrains the free exercise of those beliefs. (*Blount v. Department of Educational and Cultural Services* (Me. 1988) 551 A.2d 1377, 1379.) Only then does the burden of proof shift to the state to justify the regulation. (Ibid.)

Smith met the first burden. No one doubts that her religious beliefs about nonmarital sexual activity and about aiding and abetting such activity are sincerely held. However, she has not met her burden of proving that the fair housing statutes burden her religious rights.

Showing only a slight interference with religious beliefs is not sufficient to gain an exemption from statutory requirements. A religious adherent must show that the proposed governmental action would seriously interfere with or impair her religious practices. (*Northwest Indian Cemetery Protective Association v. Peterson* (9th Cir. 1985) 764 F.2d 581, 585.) This burden of proof must be met before an exemption may be granted from an otherwise valid law. (*Forest Hills Early Learning Center v. Lukhard* (Fourth Cir. 1984) 728 F.2d 230, 242, 246.)

Only by implicitly allowing Smith to rely on a presumption that Phillips and Randall would engage in sexual activity on the rental property does the court's opinion conclude that statutory prohibitions against marital status discrimination burden Smith's religious beliefs. Absent that presumption, Smith would have failed to meet her burden of proving <u>any</u> interference with her right to free exercise of religion. Since existing law does not countenance such a presumption, the court's opinion should be reversed because Smith is therefore not entitled to an exemption.[4]

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[4] Even if we assume that Smith's beliefs about nonmarital sex and aiding and abetting sin are tenets of her religion, and even if we concede that they are sincerely held, she has not shown that the government is coercing her to violate these tenets since no evidence has been presented that the prospective tenants would have engaged in sexual activity on the premises (continued...)

Furthermore, the court's opinion fails to acknowledge that the business of renting apartments is strictly a secular activity. Those engaged in secular business activities are not entitled to a religious freedom exemption from statutory regulations merely because the business owners hold sincerely held religious objections to such regulations.[5]

As the United States Supreme Court has held: (*United States v. Lee* (1982) 455 U.S. 252, 261.)

> "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."

As is now stands, the opinion avoids application of this principle, simply because of the court's apparent aversion to legal protections for unmarried couples.

'(...continued)
or anywhere else for that matter. (Cf. *State v. Motherwell* (Wash. 1990) 788 P.2d 1066, 1070 [counselors failed to meet burden of proving that mandatory child abuse reporting requirement coerced counselors to violate their religious beliefs].)

[5] For example, many courts have upheld state licensing requirements despite sincere religious objections to the procurement of a license for religiously-affiliated preschools. These courts have concluded that no burden on religion expression resulted from state licensure and regulation since the operation of a preschool is a predominantly secular activity. (*Department of Social Services v. Emmanuel Baptist Pre-School* (Mich. App. 1986) 388 N.W.2d 326; *Kansas ex rel. Pringle v. Heritage Baptist Temple, Inc.* (Kan. 1985) 693 P.2d 1163; *Texas v. Corpus Christi People's Baptist Church, Inc.* (Tex. 1984) 683 S.W.2d 692; *North Carolina v. Fayetteville Street Christian School* (N.C. App. 1979) 258 S.E.2d 459, vacated and remanded on other grounds, 299 N.C. 351, 261 S.E.2d 908, vacated and remanded on other grounds following reh'g, 299 N.C. 731, 265 S.E.2d 387, appeal dismissed, 449 U.S. 807, 101 S.Ct. 55, 66 L.Ed.2d 11 (1980).) A similar analysis applies to the business of renting apartments. It is hard to see how a purely commercial venture such as this can be considered the exercise of religion, for if it is considered as such, there is no longer a commercial world bound by secular rules.

III

THE OPINION ERRONEOUSLY CONCLUDES THAT THE STATE DOES NOT HAVE COMPELLING REASONS TO PROHIBIT MARITAL STATUS DISCRIMINATION IN HOUSING TRANSACTIONS

The court's opinion acknowledges that "California has a significant interest in eradicating discrimination in employment and housing." (*Smith v. Commission on Fair Employment and Housing*, 94 Daily Jounral D.A.R. 7246, 7251, attached hereto as "Exhibit A" and hereinafter cited as "DAR".) It also holds that when it added "marital status" to a list of prohibited bases of discrimination, the Legislature intended to prohibit housing discrimination against unmarried couples. (Ibid.) Having made those observations, the opinion narrows its focus to "whether California's interest in eradicating discrimination in housing against unmarried couples reaches the level of an overriding governmental interest." (Ibid.) The opinion concludes: (DAR 7752-7753)

> "[T]he 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.' 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."[6]

The analysis that precedes this conclusion is seriously flawed. Although this

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[6] The opinion also concludes that the same result is warranted under a state constitutional analysis. (DAR 7255)

case involves housing discrimination, and although the relevant inquiry is whether the state had a compelling interest to prohibit marital status discrimination in housing transactions, the opinion fails to scrutinize the state interests involved in protecting a tenant's right to equal access to housing. (DAR 7251-7254) Instead, the opinion improperly broadens the inquiry to whether the state has a compelling interest to treat married and unmarried couples alike in all aspects of life. Naturally, this shotgun approach preordains the result.

The opinion unnecessarily compares the state's interest in eliminating racial discrimination with that of marital status discrimination. (DAR 7252) None of the parties in this case argued that marital status discrimination merits the same legal protection as racial discrimination or that the state interests in each type of discrimination is always of the same constitutional order. Rather, respondent and real parties in interest argued that the state has a compelling interest in eradicating all arbitrary forms of discrimination in rental housing. The fact that racial discrimination may be more pervasive than marital status discrimination and therefore the need for protection against such bias may be more compelling, does not preclude a finding that the elimination of marital status discrimination serves a compelling state interest in the context of housing transactions.

Citing numerous cases upholing legislative decisions not to treat married and unmarried couples equally, the opinion concludes that the failure of the Legislature to override these precedents is evidence that the need to eliminate marital status

discrimination is not compelling. (DAR 7252) Not only is this an illogical analysis,[7] but the cases and legislative actions cited by the court do not involve the context of housing and therefore shed no light on the issue at hand.

In none of the contexts mentioned in the opinion (emotional distress damages, prison visitation, spousal support, insurance, employee benefits, wrongful death, privileged communications) had the Legislature enacted a law to eliminate discrimination against unmarried couples. In each those cases, litigants were asking the courts to override the Legislature's judgments. Here, on the other hand, the Legislature has determined that equality of opportunity in employment and housing are different from other contexts, probably because having a job and a decent place to live are necessities of life.

The opinion concludes that there is "no evidence the Legislature considers the extension to unmarried couples of all rights enjoyed by married couples a compelling state interest." (DAR 7252) By broadening its scope to all aspects of life, this conclusion, as well as the preceding analysis, misses the point entirely. Simply put, the question is whether the statutory prohibitions against marital status discrimination in housing further one or more compelling state interests, not whether married and unmarried couples must be treated identically in all contexts.

The answer is often in the question. By mischaracterizing an issue, the

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[7] The Legislature certainly should not be expected to reverse court decisions that simply upheld a legislative decision in various contexts not to treat married and unmarried couples the same.

outcome of a case can be drastically altered. For example, the nature of the state interest in eradicating marital status discrimination was at the heart of the dispute between the majority and the dissent in *Swanner v. Anchorage Equal Rights Commission* (May 13, 1994) __ P.2d __. The majority looked solely to the state's interest in eliminating marital status discrimination in housing transactions. The dissent broadened the scope to look at all aspects of life, much like the court's opinion in this case has done. Since *Swanner* was brought to the attention of the Court of Appeal, and since the analysis of the state's interest is central to the outcome of this case, it is surprising that the opinion of the court below fails to even mention that *Swanner* dealt with the same issues involved here.[8]

Being rejected as a tenant because of arbitrary discrimination creates an affront to the personal dignity and self worth of a tenant. The protection of personal dignity lies at the heart of anti-discrimination legislation. Equal access to the basic necessities of life, without impediment due to arbitrary discrimination, also is a primary goal of the Fair Employment and Housing Act. Such objectives -- protection of personal dignity and equality of opportunity -- certainly must constitute compelling state interests, especially in the context of the general housing marketplace.

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[8] *Swanner* is cited only briefly in a footnote of the opinion of the Court of Appeal. (DAR 7258, fn. 14) From reading the court's original opinion in the instant case, a reader would have had no idea that the Alaska Supreme Court had grappled with issues virtually identical to those in *Smith*. It would have been more than appropriate for the court to have discussed *Swanner* at some length, considering that it is the only other published appellate decision in the nation involving similar issues in which a definitive constitutional conclusion was reached. At least the opinion below was belatedly modified to note its conflict with the holding in *Swanner*.

However, there are other compelling interests served by statutes prohibiting marital status discrimination in rental housing. The state has compelling reasons to remove barriers that impede two adults from sharing a home or apartment, including an important interest in protecting their freedom of choice to share for reasons of economic necessity, or for reasons of security and safety.[9] The statutory prohibition against marital status discrimination in housing also advances the state's compelling interest in protecting various aspects of a tenant's right of privacy. (SB 26-36)

By ignoring the state's interests in eliminating housing discrimination, and instead broadening the focus to whether the state has a compelling interest in treating married and unmarried couples the same in all aspects of life, the opinion of the Court of Appeal has totally missed the mark. Review should be granted and the opinion should be reversed because the court below failed to acknowledge several compelling interests that are promoted by the state's fair housing laws.

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[9] These interests were discussed at length in Phillips' "Supplemental (Post Oral Argument) Brief" (hereinafter "SB") which was filed with permission in the Court of Appeal. (SB 21-25)

IV

UNLESS THE OPINION IS REVERSED, THE EFFECTIVENESS OF AGENCIES CHARGED WITH CIVIL RIGHTS ENFORCEMENT, THE JUDICIAL PROCESS, AND THE RIGHTS OF VICTIMS OF DISCRIMINATION ALL WILL BE ADVERSELY AFFECTED

The court's opinion purports to create a narrow exemption that will only affect one landlord and two tenants. (DAR 7253) Not only is this judicial perception politically and socially naive, it also ignores statistical information that was brought to the court's attention, in addition to overlooking the practical impact created by the lack of limiting legal principles in the opinion.

The legal battle between the landlord and prospective tenants in the instant case is only the tip of an emerging iceberg. Test cases are surfacing in many states in which landlords invoking a rallying cry of religious freedom are seeking judicial permission to discriminate against tenants they consider sexually immoral.[10] Today, unmarried opposite-sex tenants are the targets. Next, it will be tenants assumed to be homosexual. Soon, claims for exemptions will move beyond so-called sexual sins to tenants committing other acts viewed by landlords as immoral or sinful.

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[10] Legal battles have been fought in southern California, Wisconsin, Minnesota, Illinois, and Massachusetts. (Jerry DeMuth, "Courts Tackle Housing Bias Against Unmarried Couples," *Washington Post*, Saturday, March 5, 1994, p. E-6.) Only a few weeks ago, an infomercial broadcast on cable television by the American Center for Law and Justice urged Christian landlords throughout the nation to rise up in resistance and to refuse to rent to unmarried couples.

Ultimately, exemptions will be sought by employers who, for religious reasons, disapprove of the lifestyle of job applicants or employees, and by other business owners who do not want to sell goods or provide services to allegedly immoral consumers. The continuous extension of exemptions will be an outgrowth of an opinion that contains virtually no limiting principles, except for a meager observation that racial and gender discrimination might not be granted a religious exemption.

Most directly, the court's opinion affects the rights of the nearly 10 million unmarried adults who live in California." Their choice to live with a roommate, or to have an overnight or weekend guest is undermined by the opinion.

Furthermore, sociological data suggests that thousands of landlords may take advantage of a religious freedom exemption that allows them to discriminate against tenants who may commit sins on the rental property. In a 1987 national survey conducted by the Los Angeles Times, 2,040 adults were asked: "Do you think it is a sin, or not, for unmarried people to have sexual relations?" Some 39% of respondents said that it was always a sin while another 10% said it was often a sin. In a national survey of 1,014 adults conducted the same year by Yankelovich Clancy Shulman for Time magazine, 54% of respondents stated that "living with someone when you're not married" was "morally wrong." A third national poll of 857 adults conducted the same year by ABC News and the Washington Post reported that 41%

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

of respondents agreed with the statement that "Sex between unmarried couples is wrong."[12]

How religion has shaped these opinions is illustrated by a "Family in America" survey conducted in 1992 by the Barna Research Group, Ltd.[13] Respondents were asked "How much have your religious beliefs influenced your view of sexual behavior?" Some 40% said "a lot" and another 28% said "some."[14]

The court below was invited to take judicial notice of these surveys but silently declined to do so. (SB 4-5)[15] The results of these polls indicate that statutory protections against marital status and sexual orientation discrimination in housing may become an illusory legislative promise of equal opportunity. Since most of the would-be perpetrators of discrimination against unmarried couples or against gays and lesbians do so in the name of religion, if these folks are entitled to religious exemptions, then who will be bound by the fair housing statutes? In other words, religious exemptions will swallow up the legislative mandate of nondiscrimination.

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[12] These three surveys were reported on the *Dialog* data base of Westlaw, a computerized research service of West Publishing Company.

[13] Begun in 1984, Barna Research Group, Ltd. is "the nation's largest full-service marketing research company dedicated to the needs of the Christian community." (Unmarried America, aBarnaReport (sic), published by the Barna Research Group, Ltd., 647 W. Broadway, Glendale, CA 91204, p. 110.)

[14] Source: George Barna, *The Future of the American Family* (Moody Press: Chicago, 1993), p. 193.

[15] Courts sometimes refer to reputable public opinion surveys about religious beliefs (*Sands v. Morongo* (1991) 53 Cal.3d 863, 892, fn. 5 (Lucas, C.J, concurring)) or concerning other issues relevant to an appeal. (*Hovey v. Superior Court* (1980) 28 Cal.3d 1, 36, fn. 74.)

Administrative agencies that enforce civil rights laws will also be adversely affected if the court's opinion is allowed to stand. With ever-dwindling budgets, they will lack the resources to investigate and adjudicate cases in which religious exemptions are claimed. This will probably result in few, if any, accusations being filed against landlords by the Fair Employment and Housing Department in cases involving marital status or sexual orientation discrimination. When a religious exemption is claimed, the department will probably issue a right to sue letter, thus placing the financial burden on the victims of discrimination to litigate the issue in court. Of course, being renters who presumably lack financial assets, they will probably drop their complaints because they cannot afford the costs and legal fees involved in such litigation.[16]

Finally, the judicial system will become entangled with a myriad of cases in which judges will have to weigh the religious claims of business owners against the counterclaims of consumers who totally reject religious beliefs or who hold contrary religious beliefs.[17]

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[16] Unmarried couples or gay and lesbian consumers also will waste precious time and resources hunting for apartments. Unless a landlord who advertises indicates up front that for religious reasons "fornicators and sodomites" are not acceptable as tenants, would-be renters will have no way of knowing if they are wasting their time applying for a particular apartment. Furthermore, if they are rejected without a reason being given, how will they know or how will a non-profit fair housing agency test if the rejection is religiously motivated? Nothing in the opinion of the court below requires landlords to disclose the basis for their actions until the department files a formal accusation against them.

[17] The counter-claim filed by Verna Panzo against the Donahues is an example of this type of a clash of beliefs. (Hallye Jordan, "Religious Rental Case Appealed to High Court," *Los*

(continued...)

CONCLUSION

For the foregoing reasons, respondent Phillips requests this Court to grant review of the opinion of the Court of Appeal.

Dated: June 27, 1994

Respectfully submitted:

THOMAS F. COLEMAN
Attorney for Kenneth C. Phillips
Real Party in Interest

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[17](...continued)
Angeles Daily Journal, Wednesday, March 2, 1994, p. 3.) Panzo argued that granting an exemption to the Donahues violated Panzo's right to free exercise of religion as well as her rights under the Establishment Clause since Panzo had formed her own religious beliefs which contradicted those of the Donahues. She argued that it was impermissible for the state to take sides in a religious dispute and that the only proper course of action was for the state to enforce its laws against discrimination which serve secular purposes.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, County of Los Angeles:

I am a resident of the county aforesaid; I am over the age of 18 years and am not a party to the within action; my business address is: P.O. Box 65756, Los Angeles, CA 90065.

On May 31, 1994, I served the within PETITION FOR REHEARING on the following persons and/or agencies by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, in the U.S. mail, at Los Angeles, addressed as follows:

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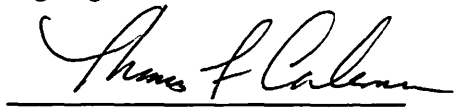
I declare under penalty of perjury that the foregoing is true and correct. Executed at Los Angeles, CA, on June 27, 1994.



THOMAS F. COLEMAN