SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

October 31, 1994

Mr. Thomas F. Coleman
PO Box 65756
Los Angeles, CA 90065

Re: Tom Swanner, dba Whitehall Properties
v. Anchorage Equal Rights Commission, et al.
No. 94-169

Dear Mr. Coleman:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied. Dissenting opinion by Justice Thomas.

Very truly yours,

William K. Suter, Clerk

Law Office of Thomas F. Coleman

Post Office Box 65756, Los Angeles, CA 90065
(213) 258-5831 / Fax 258-8099

October 22, 1994

Mr. Joseph Bowles
5302 104th St. S.W.
Mukilteo, WA 98275

Re: *Swanner v. Anchorage Equal Rights Commission*
U.S. Supreme Court Docket No. 94-169

Dear Mr. Bowles:

I am sending this letter to you pursuant to my conversation today with you and your wife Cynthia. As I mentioned, the Supreme Court will soon announce whether it will review the decision of the Alaska Supreme Court in the Swanner case. If the case is taken up, you have indicated that you would like me to represent you before the high court. I would file a brief and make any necessary appearances on your behalf. I would not charge you any fees for my services. I would bear the costs of photocopying, mailing, and travel. You would not need to appear in person in court at any time.

I checked the case records that I have and it appears that you filed the complaint against Whitehall Properties. Therefore, you are the sole named party in regard to the discrimination against you and Cynthia. However, just in case my records are wrong, I have put a spot at the bottom of this letter for Cynthia to sign also.

Your formal participation will add an important dimension to the case. It is vital that the Supreme Court consider not only the views of a government civil rights agency and a business entity, but also the perspective of an actual victim of housing discrimination.

I will keep you posted on any developments. Thank you.

Very truly yours,

Thomas F. Coleman

I hereby authorize Thomas F. Coleman to represent me in the above-entitled case before the United States Supreme Court on the terms described above.

Dated: 10/25/94

Joseph Bowles

Cynthia Bowles

10 pages

TO: JUDY BEALS

FROM: TOM COLEMAN

I wanted to give you an update on on the Swanner case. It has been on two previous conferences of the justices without a decision. Today is the third conference. I suspect that we will get an announcement on Monday.

I am representing one of the tenants in the case now and have made an appearance on his behalf in the Supreme Court.

I am actually hoping that they take the case. My position changed after I read the administrative transcript in the case. After you review the attached summary, I think that you may agree that it could be the best case we could ever hope for.

If the court grants cert., I hope that you will do an amicus brief on behalf of the Mass Atty. Gen., especially since your office has more experience on this issue than any other Atty Gen office in the nation. I would hope that we could get 10 or more other Atty Gen's to sign onto your brief if you do one.

By the way, what has transpired in your case?

Tom

Law Office of Thomas F. Coleman

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October 24, 1994

Mr. Steve Holtz
Anchorage Equal Rights Commission
Fax Transmission / (907) 276-4630

Re: Copy of Record on Appeal
Swanner v. Anchorage Equal Rights Commission

Dear Steve:

As I mentioned on the phone today, I am representing Joseph Bowles in the United States Supreme Court on the Swaner case.

I do not have a copy of the record on appeal. All I have are the briefs filed in the Alaska Supreme Court, the opinion of the Supreme Court, and the briefs filed so far in the United States Supreme Court.

I need a copy of:

(1) Transcripts of the administrative hearing.
(2) Decision of the administrative law judge;
(3) Final decision and order of the Commission;
(4) Decision of the Superior Court.

I would very much appreciate receiving these materials as soon as possible. If you could send them overnight mail or federal express I would appreciate it. My street address is 4017 Division St., Los Angeles, CA 90065. I will share the materials with attorney David Link who will be representing Dee Moose. Thanks for your help.

Yours truly,

THOMAS F. COLEMAN

Municipality of Anchorage

P.O. Box 196650
Anchorage, Alaska 99519-6650
Telephone: (907) 343-4342
FAX: (907) 276-4630
TTY: (907) 343-4894

Rick Mystrom, Mayor

EQUAL RIGHTS COMMISSION
620 East 10th Avenue, Suite 204
Anchorage, Alaska 99501

October 26, 1994

Mr. Thomas F. Coleman
Law Office of Thomas F. Coleman
P. O. Box 65756
Los Angeles, CA 90065

Re: Copy of Record on Appeal
Swanner v. Anchorage Equal Rights Commission

Dear Tom:

Per your request, copies of the following items are enclosed:

1) Transcripts of the administrative hearing;
2) Decision of the administrative law judge;
3) Final decision and order of the Commission;
4) Decision of the Superior Court.

If you have any questions, feel free to call me.

Sincerely,

Steven S. Holt
Executive Director

SSH:jc

Enclosures

F:\ULC\102694.M02

Law Office of Thomas F. Coleman

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October 20, 1994

Ms. Constance Livsey
550 W. 7th Ave.
Suite 1000
Anchorage, AK 99501

Re: Offer to Represent Victims of Housing Discrimination
(Joseph Bowles, William F. Harper, and/or Dee Moose)
before United States Supreme Court if Cert. is Granted
~~2798720~~ ~~333-7814~~ NO

Dear Conni:

I thought I would follow up our last conversation with this note.

It is beginning to look as if the Supreme Court may grant the landlord's petition for certiorari in the Swanner case. We may know for sure in the next 10 days.

As I mentioned to you, I am willing to represent one or more of the tenant-victims if the Supreme Court takes the case. There would be no fees or costs to them.

The thrust of my brief would be similar to the positions I have advanced in the California Supreme Court in the Smith case. The Free Exercise Clause was intended to be used as a shield from government oppression and not as a sword to cause harm to others. Exemptions from general laws, pursuant to the Free Exercise Clause, should not be granted if doing so would injure the rights of identifiable third parties. The Religious Freedom Restoration Act does not alter this principle. Furthermore, the Establishment Clause precludes an exemption under such circumstances.

I would like to speak with the tenant-victims as soon as possible. Possibly you (or the staff at the Commission) could call me with their addresses and/or phone numbers so that I can contact them in the next few days.

Yours truly,

Tom Coleman

Thomas F. Coleman

Law Office of Thomas F. Coleman

Post Office Box 65756, Los Angeles, CA 90065
(213) 258-5831 / Fax 258-8099

September 22, 1994

Ms. Constance Livsey
550 W. 7th Ave.
Suite 1000
Anchorage, AK 99501

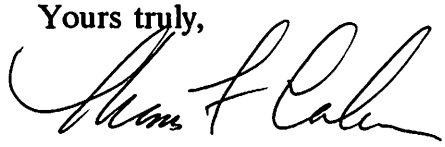
Dear Ms. Livsey:

I wanted to let you know that the California Supreme Court accepted the Smith case for review. I will send you a copy of my brief when I file it, which I expect will be before October 8.

I called the U.S. Supreme Court and was told that the court will announce whether it will grant or deny cert in the Swanner case on Oct 3. Apparently, the case is on their conference list for September 26. I was also told that Swanner filed a reply brief on September 7.

Could you please send me a copy of your answer and their reply? I am trying to keep abreast of developments in these cases and would appreciate getting a copy of those briefs.

Yours truly,



Thomas F. Coleman

SUPREME COURT OF THE UNITED STATES

TOM SWANNER, DBA WHITEHALL PROPERTIES *v.* ANCHORAGE EQUAL RIGHTS COMMISSION ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

No. 94–169. Decided October 31, 1994

The petition for a writ of certiorari is denied.

JUSTICE THOMAS, dissenting.

Petitioner owns residential rental property in Anchorage, Alaska. He maintained a consistent policy of refusing to rent to any unmarried couple who intended to live together on his property, based on his sincere religious belief that such cohabitation is a sin and that he would be facilitating the sin by renting to cohabitants. At the instigation of several people to whom petitioner applied his policy, respondent ruled that petitioner had violated state and local ordinances that prohibit landlords from basing rental decisions on prospective tenants' "marital status." Petitioner appealed to the Alaska Superior Court, which upheld respondent's ruling. The Alaska Supreme Court affirmed, concluding that the application of the ordinances to petitioner's conduct did not violate his right to the free exercise of religion under either the United States Constitution or the Alaska Constitution. 874 P. 2d 274, 279–284 (1994) *(per curiam)*.

The Alaska Supreme Court also ruled that petitioner had no defense to the state and local ordinances under the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U. S. C. §2000bb *et seq.* (1988 ed., Supp. V), enacted during the pendency of the proceedings below. RFRA provides that a governmental entity "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general

applicability," unless the entity "demonstrates that application of the burden to the person . . . is in furtherance of a compelling governmental interest." §2000bb–1(a), (b)(1).[1] In a footnote, the opinion below dismissed petitioner's invocation of this Act of Congress: "Assuming that the Act is constitutional and applies to this case, it does not affect the outcome, because we hold in the next section that compelling state interests support the prohibitions on marital status discrimination." 874 P. 2d, at 280, n. 9. Petitioner seeks review of this latter ruling. I would grant certiorari to resolve whether, under RFRA, an interest in preventing discrimination based on marital status is sufficiently "compelling" that respondent may substantially burden petitioner's exercise of religion.

RFRA explicitly adopted "the compelling interest test as set forth in Sherbert v. Verner . . . and Wisconsin v. Yoder." 42 U. S. C. §2000bb(b)(1) (1988 ed., Supp. V). In *Sherbert* v. *Verner,* 374 U. S. 398 (1963), we stated: "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, 'only the gravest abuses [by religious adherents], endangering paramount interests, give occasion for permissible limitation [on the exercise of religion].'" *Id.*, at 406 (quoting *Thomas* v. *Collins,* 323 U. S. 516, 530 (1945)). And in *Wisconsin* v. *Yoder,* 406 U. S. 205 (1972), we emphasized that the government's asserted interest must be truly paramount: "The essence of all that has been said and written on the subject is that only those interests *of*

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[1] RFRA was Congress' response to our decision in *Employment Div., Dept. of Human Resources of Ore.* v. *Smith,* 494 U. S. 872 (1990), which supplanted the compelling interest test in Free Exercise Clause jurisprudence with the inquiry into whether a governmental burden on religiously motivated action is both "neutral" and "generally applicable." Thus, as a substitute for constitutional protection, RFRA grants a *statutory* "claim or defense to persons whose religious exercise is substantially burdened by government." 42 U. S. C. §2000bb(b)(2) (1988 ed., Supp. V).

the highest order . . . can overbalance legitimate claims to the free exercise of religion." *Id.*, at 215 (emphasis added).

I am quite skeptical that Alaska's asserted interest in preventing discrimination on the basis of marital status is "compelling" enough to satisfy these stringent standards. Our decision in *Bob Jones University* v. *United States,* 461 U. S. 574 (1983), is instructive in the context of asserted governmental interests in preventing private "discrimination." In that case, we held that "the Government has a fundamental, overriding interest in eradicating racial discrimination in education." *Id.*, at 604. We found such an interest fundamental and overriding—in a word, "compelling," see *ibid.*—only because we had found that "[o]ver the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education." *Id.*, at 593 (discussing, *inter alia, Brown* v. *Board of Education,* 347 U. S. 483 (1954); *Cooper* v. *Aaron,* 358 U. S. 1 (1958); and Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), 42 U. S. C. §3601 *et seq.* (1976 ed. and Supp. V)).

By contrast, there is surely no "firm national policy" against marital status discrimination in housing decisions. Chief Justice Moore, dissenting in the case below, correctly observed that "marital status classifications have never been accorded any heightened scrutiny under the Equal Protection Clause of either the federal or the Alaska Constitutions." 874 P. 2d, at 289. Accord, *Smith* v. *Shalala,* 5 F. 3d 235, 239 (CA7 1993) ("Because [a] classification based on marital status does not involve a suspect class . . . , we must examine it under the rational basis test"), cert. denied, 510 U. S. ___ (1994). Moreover, the federal Fair Housing Act does not prohibit people from making housing decisions based on marital status. See 42 U. S. C. §3604 (outlawing housing discrimination on the basis of race, color, religion, sex, handicap, familial status, or national origin). Cf.

§3602(k) (defining "familial status" to mean the domicile of children with adults).

Nor does Alaska law, apart from the statutes at issue in this case, attest to any firm *state* policy against marital status discrimination. Indeed, as the dissent below pointed out:

> "Alaska law explicitly sanctions such discrimination. *See, e.g.,* AS 13.11.015 (intestate succession does not benefit unmarried partner of decedent); AS 23.30.215(a) (workers' compensation death benefits only for surviving spouse, child, parent, grandchild, or sibling); Alaska R. Evid. 505 (no marital communication privilege between unmarried couples); *Serradell* v. *Hartford Accident & Indemn. Co.,* 843 P. 2d 639, 641 (Alaska 1992) (no insurance coverage for unmarried partner under family accident insurance policy)." 874 P. 2d, at 289.

The majority admitted that these were "areas in which the state itself discriminates based on marital status." *Id.*, at 283.

If, despite affirmative discrimination by Alaska on the basis of marital status and a complete absence of any national policy against such discrimination, the State's asserted interest in this case is allowed to qualify as a "compelling" interest—that is, a "paramount" interest, an interest "of the highest order"—then I am at a loss to know what asserted governmental interests are not compelling. The decision of the Alaska Supreme Court drains the word *compelling* of any meaning and seriously undermines the protection for exercise of religion that Congress so emphatically mandated in RFRA.

Although RFRA itself is a relatively new statute, the state courts have already exhibited considerable confusion in applying the *Sherbert-Yoder* test to the specific issue presented by this case. Apart from this case, the highest courts of Massachusetts and Minnesota are each deeply split on the question whether preventing "marital status" discrimination is a "compelling" interest under

our precedents, and the California Court of Appeal has twice applied the compelling interest test adopted by RFRA in reaching decisions that are directly contrary to the decision below. See *Attorney General* v. *Desilets*, 418 Mass. 316, 636 N. E. 2d 233 (1994); *State ex rel. Cooper* v. *French*, 460 N. W. 2d 2 (Minn. 1990); *Smith* v. *Fair Employment and Housing Commission*, 30 Cal. Rptr. 2d 395 (Cal. App.), review granted, ___ P. 2d ___ (Cal. 1994); *Donahue* v. *Fair Employment and Housing Commission*, 2 Cal. Rptr. 2d 32 (Cal. App. 1991), review granted, 825 P. 2d 766 (Cal. 1992), review dism'd, cause remanded, 859 P. 2d 671 (Cal. 1993).[2] By itself, this confusion on an important and recurring question of federal law provides sufficient reason to grant certiorari in this case.

I respectfully dissent.

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[2]There is no doubt that these decisions applied the *Sherbert-Yoder* test adopted by RFRA. See *Desilets*, 418 Mass., at 321–322, and n. 5, 636 N. E. 2d, at 236, and n. 5 (plurality opinion); *id.*, at 334–335, 636 N. E. 2d, at 243 (Liacos, C. J., concurring); *id.*, at 341, 636 N. E. 2d, at 246 (O'Connor, J., dissenting); *French*, 460 N. W. 2d, at 13–14 (Popovich, C. J., dissenting); *Smith*, 30 Cal. Rptr. 2d, at 403, 406, 409, 410; *Donahue*, 2 Cal. Rptr. 2d, at 41, 44.

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October 24, 1994

William K. Suter, Clerk
United States Supreme Court
1 - 1st St., N.E.
Washington, D.C. 20543

Re: *Swanner v. Anchorage Equal Rights Commission et al.* / No. 94-169
Entry of Appearance on Behalf of Joseph Bowles, Respondent

Dear Mr. Suter:

Please take notice that I am entering an appearance in the above-entitled case on behalf of Joseph Bowles, respondent and real party in interest.

Copies of this letter have been sent to counsel for petitioner and counsel for respondent Anchorage Equal Rights Commission.

Very truly yours,

THOMAS F. COLEMAN

cc:

Kevin Gilbert Clarkson
Perkins Coie
1029 West Third Ave., Suite 300
Anchorage, AK 99510

James E. Hutchins, Constance E.
Livsey and Jane E. Steiner
Faulkner, Banfield, Doogan & Holmes
550 West Seventh Ave., Suite 1000
Anchorage, AK 99501