STATE OF MICHIGAN

IN THE SUPREME COURT 1998

Rose Biaz and Peter Perusse,

Plaintiffs and Appellants,

vs

John Hoffius and Terry Hoffius,

Defendants and Appellees

Docket No. 108996
Ct. Apps. No. 185314
Cir. Ct. No. 94-69473-CH

Kristal McCready and Keith Kerr,

Plaintiffs and Appellants

v.

John Hoffius and Terry Hoffius

Defendants and Appellees

Docket No. 108995
Ct. Apps. No. 18152
Cir. Ct. No. 94-69472-CH

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STATEMENT OF QUESTIONS INVOLVED

I

Where defendants refused to rent to plaintiffs because they were unmarried, but would have rented to them if they had been married, did defendants discriminate against plaintiffs on the basis of marital status?

The lower courts answered: "No."

Plaintiffs-Appellants' answer: "Yes."

Amici Curiae's answer: "Yes."

II

Where defendants did little more than voluntarily decide to rent property for profit, does society's need to provide equal access to such a fundamental need as housing outweigh a landlord's religious beliefs that he should not rent to an unmarried couple?

The lower courts did not answer.

Plaintiffs-Appellants' answer: "Yes."

Amici Curiae's answer: "This issue is not ripe for decision, since it was not decided below, and since material facts may be in dispute on this issue."

III

Should the lower courts have given plaintiffs an opportunity to amend their complaints before granting summary disposition and dismissing the cases with prejudice, and should this Court itself grant plaintiffs permission to amend the complaints to allege discrimination on the basis of religion in violation of state and federal statutes, and unjust discrimination in violation of common law?

The lower courts did not answer.

Plaintiffs-Appellants' answer is unknown.

Amici Curiae's answer: "Yes."

TABLE OF AUTHORITIES

Cases:

1963 Michigan Constitution:

Michigan Statutes:

Federal Statutes:

International Treaties and Authorities

Rules of Court:

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PROCEDURAL AND SUBSTANTIVE FACTS

John and Terry Hoffius own rental units in three separate locations in the City of Jackson. In July, 1993, they ran an advertisement in a local newspaper, giving notice to the public and soliciting applications to fill a vacancy in a residential unit on Lansing Avenue.

Kristal McCready responded to the ad. She told Mr. Hoffius that she was not married and that she wanted to share the rental unit with her friend, Keith Kerr. Rose Baiz also responded to the ad. She told Hoffius that she and her fiancee wanted to rent the unit. The Hoffiusses refused to rent to both sets of applicants because they said it was against their religious beliefs to rent to an unmarried cohabiting couple.

1. THE COMPLAINTS

The Complaint of Rose Baiz. This complaint alleged that the Hoffiusses ran an advertisement in the *Citizen Patriot* seeking renters for a vacancy in a residential unit they owned on Lansing Avenue in Jackson, Michigan. Rose Baiz responded to the ad for the purpose of negotiating a rental agreement. Defendants refused to rent to Rose Baiz and Peter Perusse (plaintiffs) because they were unmarried. Mr. Hoffius expressly stated that unmarried cohabitation was "against [his] religious beliefs." Plaintiffs sought money damages, alleging that the defendants' conduct constituted unlawful housing discrimination on the basis of marital status in violation of the Elliott Larsen Civil Rights Act. (See Complaint of Baiz and Perusse.)

The Complaint of Kristal McCready. The complaint of McCready and Kerr is virtually identical to the Baiz complaint with one exception: it did not affirmatively allege that Mr. Hoffius stated that unmarried cohabitation was against his religious beliefs. (See Complaint of McCready and Kerr.)

2. THE ANSWERS

The Answer to the Baiz Complaint. Defendants admitted that they owned the residential property in question. Defendants admitted that unmarried cohabitation is against their religious beliefs. They neither admitted nor denied that they refused to rent to plaintiffs because plaintiffs were unmarried. They denied that their actions violated state law. Defendants raised several affirmative defenses, including: that the Elliott Larsen Act does not protect unmarried cohabiting couples; that defendants can not be forced to enter into an illegal contract that is prohibited by the criminal law of Michigan; and that to the extent that the Elliott Larsen Act might apply, it would violate the defendants' rights to religious freedom, freedom of association, freedom of speech under the state and federal Constitutions, and free exercise of religion under the Religious Freedom Restoration Act. (See Answer to Baiz Complaint.)

The Answer to the McCready Complaint. The answer to the McCready Complaint is virtually identical to the answer to the Baiz complaint. (See Answer to McCready Complaint.)

3. THE MOTIONS FOR SUMMARY DISPOSITION

Defendants' Motions for Summary Disposition. In both cases, the defendants moved for a summary disposition under MCR 2.116(c)(8), alleging that plaintiffs failed to state a claim upon which relief can be granted. Defendants argued that there were no genuine issues of material facts in dispute under MCR 2.116(c)(10). Affidavits in support of the defendants' motions established the following facts. The Hoffiusses own residential property on Lansing Avenue. They advertised a vacancy in a local newspaper.

On July 19, 1993, Kristal McCready contacted the defendants, telling them that she and her boyfriend, Keith Kerr, wanted to rent the unit. On July 25, 1993, Rose Baiz contacted the

defendants, telling them that she wanted to move in with her fiance, Peter Perusse. The Hoffiusses refused to rent to both sets of plaintiffs because they believe unmarried cohabitation is sinful and that facilitation of this conduct would violate their religious beliefs. (See Defendants' Motion and Supporting Affidavits.)

Plaintiffs' Motion for Summary Disposition. Plaintiff moved for summary disposition under MCR 2.116(c)(9), arguing that the defendants failed to state a valid defense to the claim alleged against them, and because there was no genuine issue of material fact in dispute under MCR 2.116(c)(10). The facts alleged in plaintiffs' supporting affidavits in both cases are similar to those alleged by the defendants, with the following additions.

In the first telephone conversation with Baiz, Mrs. Hoffius informed Baiz that her husband wanted tenants who were married. When Baiz spoke with Mr. Hoffius later that day, he informed her that it was against his religious beliefs to rent to unmarried couples. He would not make an exception for Baiz even though she and Mr. Perusse had been a couple for eight years. McCready told Mr. Hoffius that she was not married and that she wanted to share the rental unit with her friend, Keith Kerr.

McCready and Baiz each made independent complaints to the Jackson Fair Housing Commission. The Commission sent various testers to contact the Hoffiuses. Each time the married testers were allowed to inspect the rental unit and the unmarried testers were not allowed to inspect. The unmarried testers were informed by the defendants that the rental unit was only available for married couples. Mr. Hoffius even inquired into a tester's future date of marriage. When informed that the date had not been set, Mr. Hoffius indicated that it would be different if a date was set. Mr. Hoffius did not inquire into the marital status of some testers. These testers reported that Hoffius

would have rented to them even though he did not know whether or not they were married.

The Hoffiuses have rental units in three separate locations in Jackson. (See Plaintiffs Motions and Supporting Affidavits.)

4. THE HEARINGS AND RULINGS ON THE MOTIONS

The Baiz Case. The motions in the Baiz case were heard by Circuit Court Judge Alexander C. Perlos. Judge Perlos ruled that the term "marital status" in the Act does not prohibit a landlord from refusing to rent to an unmarried couple. (RT 22-23) He denied the plaintiffs' motion for summary disposition. Since defendants' motion was granted on the basis of statutory interpretation, Judge Perlos did not rule on the defendants' alleged constitutional defenses. (RT 23) The complaint was dismissed with prejudice. Neither at the hearing, nor in its order, did the court give the plaintiffs an opportunity to amend the complaint. The decision of Judge Perlos was based on three separate conclusions of law:

> **Singular Versus Plural.** Concluding that the law protects an individual but not two persons who want to jointly rent, the court ruled that the statute "prohibits discrimination in housing against a person. Singular." (RT 4-5)
>
> **Criminal Law.** The court relied on a criminal statute as a tool to interpret the Civil Rights Act, commenting: "[L]iving together lewd and lascivious outside of the bounds of matrimony is illegal under the law of Michigan." (RT 5) "[I]t's against the law in the state of Michigan to live with somebody, if you're not married. There's no question about it. That statute is on the books and you can go to jail for it. The Legislature could not have intended for marital status to include and protect unmarried cohabiting couples of the opposite sex when such conduct is prohibited by another statute." (RT 22)
>
> **Public Policy.** The court also relied on one aspect of public policy, stating: "Michigan public policy favors marriage over unmarried cohabitation of couples of the opposite sex. For example, the state may discriminate in housing based on couples of marital status on public universities . . . . It is inconceivable that the legislature intended to ignore prior statutory and public policy and to have marital status applied to unmarried cohabitation." (RT 22)

The McCready Case. The motions in the McCready case were heard by Circuit Court Judge Edward J. Grant. Judge Grant listened to arguments at the hearing but deferred his ruling until he gave the matter further consideration. (RT 39) He denied the plaintiff's motion. Since he granted the defendant's motion on the basis of statutory interpretation, he did not rule on the constitutional claims of the parties. (Opinion, p. 6) In his written opinion, Judge Grant cited four reasons in support of his ruling for the defendants:

> **Singular Versus Plural.** Citing case law from Minnesota, the court relied on its conclusion that the term "marital status" was meant to protect a person, i.e., an individual, on the basis of his status, and not two people who may be spouses, fiancees, or domestic partners. (Opinion, p. 3)
>
> **Status Versus Conduct.** Relying on case law from Wisconsin, the court concluded that it was the "conduct" of living together, not the marital "status" of the prospective tenants, that was the motivation for the discrimination. (Opinion, p. 3)
>
> **Criminal Law.** The court relied on the Criminal Code section which prohibits persons from "lewdly and lasciviously cohabiting together" in reaching its conclusion that housing discrimination against unmarried couples was not prohibited by the Civil Rights Act. (Opinion, p. 3) To conclude otherwise, the court stated, "would protect and favor conduct prohibited by statute." (Opinion, p. 4.)
>
> **Public Policy.** The court found that Michigan public policy favors the institution of marriage, citing examples such as family housing rules at universities, testamentary distribution rights, testimonial privileges, and loss of consortium actions. (Opinion, p. 4)

The Court of Appeals declines "to recognize the Civil Rights Act as preventing housing discrimination against unmarried couples and at the same time legitimizing criminal conduct." The Court agreed that the "lewd and lascivious cohabitation" statute applied, and held that "The Civil Rights Act prohibits discrimination against couples who enjoy marital (sic) status but the act is not violated when a landlord refuses to rent to unmarried persons who will be engaging in criminal unmarried cohabitation."

The Court went on to state that Plaintiffs had not met the burden of showing the implied repeal of the cohabitation law. The panel refused to consider with equal access to housing should outweigh religious interests, and refused to allow Plaintiff's to amend their complaint to set forth other constitutional issues.

ARGUMENT

I

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR THE DEFENDANTS SINCE THE COMPLAINT STATED A VALID CLAIM OF MARITAL STATUS DISCRIMINATION UNDER THE CIVIL RIGHTS ACT

The complaint in each case alleged that the defendants refused to rent to the plaintiffs because they were unmarried. Money damages were sought on the theory that the defendants' conduct constituted unlawful housing discrimination on the basis of marital status in violation of the Elliott Larsen Civil Rights Act, hereinafter "Civil Rights Act."

In each case, the defendants moved for a summary disposition under MCR 2.116(C)(8), alleging that plaintiffs had failed to state a claim upon which relief could be granted. Defendants also alleged that they were entitled to a summary disposition under MCR 2.116(C)(10) because there was no genuine issue as to any material fact. The trial judge in each case granted the motion and entered a dismissal with prejudice. Since the defendants alleged two independent grounds for summary disposition, each will be addressed separately.

A. The Complaint Was Sufficient Under MCR 2.116(C)(8)

The judgment below should be reversed because the complaint stated a prima facie case of marital status discrimination in violation of the Civil Rights Act. Furthermore, the ruling below should be reviewed *de novo* by this Court. *Merillat v. Michigan State University*, 207 Mich App 240, 244; 523 NW2d 802, 804-805 (1994).

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the

complaint, considering only the pleadings. *Wade v. Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). All well-pleaded allegations are accepted as true, and are construed most favorably to the nonmoving party. Id. at 162-163, 483 NW2d 26. A court may grant a motion pursuant to MCR 2.116(C)(8) only where the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. Id. at 163, 483 NW2d 26.

The complaints alleged that the defendants refused to rent to plaintiffs "because plaintiffs were unmarried." Defendants neither admitted nor denied this allegation. Making reference only to the pleadings to test the sufficiency of the complaint to withstand a challenge under MCR 2.116(C)(8), it is clear that the complaint stated a valid claim of marital status discrimination in a housing transaction in violation of the Civil Rights Act.

Under MCL 37.2502 (MSA 3.548(2502)), "A person engaging in a real estate transaction . . . shall not on the basis of . . . marital status of a person or a person residing with that person . . . (a) refuse to engage in a real estate transaction with a person." Refusing to rent to a protected class of prospective tenants is proscribed by subsection (a). *Department of Civil Rights v. Beznos Corporation*, 421 Mich 110, 118; 365 NW2d 82, 86-87 (1985). By including marital status as a protected class, the Legislature manifested its intent to prohibit discrimination based on whether a person is married. *Miller v. C.A. Muer Corporation*, 420 Mich 355, 363; 362 NW2d 650, 654 (1985). The Court of Appeals cited Miller, supra, but said that the phrase "marital status" refers only to the status of *being* married. It did not apply to the status of being single or divorced.

Making reference only to the pleadings as required by MCR 2.116(G)(5), accepting all allegations in the complaint as true, and construing them most favorably to the plaintiffs (*Wade, supra*, at 162-163), it is clear that the complaint is not deficient on its face. The allegations are

sufficient to constitute a prima facie case of housing discrimination on the basis of marital status. As a result, the motion of defendants under MCR 2.116(C)(8) should not have been granted.

B. The Motion Under MCR 2.116(C)(10) Should Have Been Denied

The undisputed facts in the affidavits establish two potential violations of the Civil Rights Act: (1) the landlords indicated a preference for married tenants; and (2) they refused to rent to two unmarried tenants who wanted to jointly share the rental unit.

B.1. The Subdivision (f) Violation.

The fair housing provisions of MCL 37.2502 may be violated in a variety of ways. Under subdivision (f), a landlord commits a violation if he makes a statement which indicates an intent to make a preference on the basis of marital status or other prohibited basis. The affidavit of the plaintiffs in the Baiz case stated that Mrs. Hoffius told Baiz that her husband wanted tenants who were married. This fact was not controverted by the defendants' affidavits.

No Michigan cases have been found that construe subdivision (f)'s prohibition against a landlord making statements which indicate a preference on the basis of marital status or other protected classifications. However, cases construing a comparable provision in the federal Fair Housing Act (FHA) provide guidance.[1] The federal statute is violated if an ordinary person would construe the statement as indicating that a particular group is preferred. *Jancik v. Department of Housing and Urban Development*, 44 F3d 553, 556 (7th Cir 1995). No showing of a subjective intent to discriminate is necessary to establish a violation of this particular statutory prohibition. (Id.)

An oral statement by a landlord to one individual indicating a preference for tenants on the

[1] When Michigan's Civil Rights Law is silent on as subject, analogous federal case law is used as an aid to construe state law. *Victorson v. Department of Treasury*, 439 Mich 131, 142; 482 NW2d 685, 689 (1992).

basis of criteria enumerated in the fair housing statute is sufficient to constitute a violation of the "no preference" prohibition. *United States v. Gilman*, 341 F Supp 891 (SD NY 1972).

Here, plaintiffs' supporting affidavits established the fact that the landlords made a statement indicating a preference for married tenants. The defendants offered no proof to the contrary. As a result, the court should not have granted a judgment in favor of the defendants in the Baiz case since the undisputed facts showed that the landlords violated subdivision (f). Rather than dismissing the case with prejudice, a partial summary judgment should have been granted to the plaintiffs, and the Baiz case then should have proceeded to a trial on the affirmative defenses raised by the defendants.

B.2. The Subdivision (a) Violation.

A landlord violates subdivision (a) if he refuses to rent to a person on the basis of marital status or on the basis of the marital status of a person who will reside with the tenant. In the Baiz case, it was undisputed that Ms. Baiz wanted to move into the unit with her fiancee, Peter Perusse, and that Mrs. Hoffius indicated that her husband wanted to rent to married tenants. In the McCready case, plaintiffs affidavit stated that McCready told the landlords that she was not married and that she wanted to move in with her "friend," Keith Kerr, while the defendant's affidavits declared that McCready referred to Mr. Kerr as her "boyfriend." The defendants admitted that they would not rent to both sets of applicants. They claimed that their decision was based on their belief that unmarried cohabitation is sinful and that facilitation of such conduct would violate their religious beliefs.

The undisputed facts show that the landlords preferred to rent to married tenants. The plaintiffs in each case were not married. The defendants in each case refused to rent to the plaintiffs. No justification for this refusal was given other than the defendants' belief that "unmarried cohabitation is sinful." The only reasonable inference that can be drawn from these facts is that the

defendants would have rented to a man and a woman who were married to each other (tenants A and B) but would not rent to a man and a woman who were not married to each other (tenants C and C). The only difference between tenants A and B, on the one hand, and tenants C and D, on the other, is their marital status, i.e., the preferred set of tenants are married to each other while the disfavored tenants are not.

The legal question presented below, and to this Court, is whether the prohibition against "marital status" discrimination in housing is violated by a landlord who will allow two adults who are married to each other to jointly occupy a rental unit, but who refuses to allow two adults who are not married to each other to do so. Both trial court judges answered that question in the negative. Both rulings were legally wrong.

I(a)

Plaintiffs' Position is Supported by the Only Appellate Decision Involving Discrimination by a Business Against Two Unmarried Consumers

In *Whitman v. Mercy-Memorial Hospital*, 128 Mich App 155; 339 NW2d 730 (1983), the Court of Appeal ruled that the policy of a hospital that allowed an acknowledged father not married to the mother to be in the delivery room during the birth of the child, while permitting a father who is married to the mother to be in attendance in the delivery room, violated the statutory ban against discrimination on the basis of marital status.

Even though *Whitman* was decided in the context of "public accommodations" (MCL 37.2302; MSA 3.548(2302)) and not that of a real estate transaction (MCL 37.2502), it would be

unreasonable to conclude that "marital status" has a more restrictive meaning in the latter context than in the former. The "opportunity to obtain employment, housing . . . and equal utilization of public accommodations . . . without discrimination because of . . . marital status . . . is recognized as declared to be a civil right." (MCL 37.2102; MSA 3.548(102)) In the absence of evidence to the contrary, it is reasonable to assume that the Legislature intended for terms such as race, religion, or marital status to have the same meaning throughout the Civil Rights Act.

Although the Civil Rights Act was amended in substantive ways in 1992 (P.A. 1992, No. 124), the Legislature did not modify the interpretation of "marital status" in *Whitman*. When the Legislature amends a statute without significantly changing language which has been interpreted by the judiciary, it is presumed to have acquiesced in the interpretation. *Hasty v. Broughton*, 133 Mich App 107, 113; 348 NW2d 299, 302.

Furthermore, even though the Supreme Court has subsequently reviewed cases involving alleged marital status discrimination, it has not criticized or questioned the reasoning or conclusion of *Whitman*. *Miller v. C.A. Muer, supra*; *Whirlpool Corporation v. Civil Rights Commission*, 425 Mich 527; 390 NW2d 625 (1986).

In neither of the instant cases did the trial courts mention *Whitman*. As a matter of stare decisis, especially in view of the presumption of legislative acquiescence, the trial courts erred by concluding that the term "marital status" did not prohibit a landlord from refusing to rent to two adults because they were not married to each other.

Both trial courts below cited cases from Minnesota and Wisconsin to support their conclusions that the term "marital status" in the state Civil Rights Act did not prohibit discrimination against unmarried couples. (Baiz, RT 20-21; McCready, Opinion 3) However, the trial courts failed

to acknowledge numerous cases to the contrary in other jurisdictions. Since statutory construction is a judicial task that requires an analysis of factors unique in each jurisdiction (e.g., legislative history, prior judicial decisions, public policy considerations), selective reliance on precedents in other jurisdictions to decide an issue of statutory interpretation is unhelpful. A full review of state and federal cases interpreting prohibitions against "marital status" discrimination reveal that some cases conclude that discrimination against unmarried couples is prohibited. Others hold to the contrary. Some states are internally split on the issue. However, the better reasoned cases support the position of appellants.[2]

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[2] See *Swanner v. Anchorage Equal Rights Commission*, 874 P2d 274 (Alas 1994), cert. den. 115 S Ct 460, 130 L Ed 2d 368 (1994) [unmarried couples protected from housing discrimination]; *Foreman v. Anchorage Equal Rights Commission*, 779 P2d 1199 (Alas 1989) [same]; *Atkisson v. Kern County Housing Authority*, 130 Cal Rptr 375 (Cal App 1976) [unmarried couples protected from discrimination in public housing]; *Hess v. Fair Employment and Housing Commission*, 187 Cal Rptr 712 (Cal App 1982) [protection against discrimination in private housing]; *Commonwealth v. Dowd*, 638 NE2d 923 (Mass App 1994) [unmarried couples protected from discrimination in housing]; *Worchester Housing Authority v. M.C.A.D.*, 547 NE2d 43 (Mass 1989) [same]; *McFadden v. Elma Country Club*, 613 P2d 146 (Wash App 1980) [unmarried couples not protected from discrimination by country club]; *Loveland v. Leslie*, 583 P2d 664 [unmarried couples protected from housing discrimination]; *Cooper v. French*, 460 NW2d 2 (Minn 1990) [unmarried couples not protected from housing discrimination]; *State by McClure v. Sports & Health Club*, 370 NW2d 844 (Minn 1985) [can't discriminate in employment against employee because she is cohabiting out of wedlock]; *State by Johnson v. Porter Farms*, 382 NW2d 543 (Minn App 1986) [same]; *County of Dane v. Norman*, 484 NW2d 367 (Wis 1992) [county lacks authority to prohibit discrimination against unmarried couples in housing]; *Zahorian v. Russell Fitt Real Estate Agency*, 301 A2d 754 (NJ App 1973) [refusal to rent to two unmarried women is marital status discrimination]; *Maryland Commission on Human Relations v. Greenbelt Homes*, 475 A2d 1192 (Md App 1984) [restricting occupancy to immediate family does not constitute marital status discrimination against unmarried couple]; *Mister v. A.R.K. Partnership*, 553 NE2d 1152 (Ill App 1990) [refusal to rent to unmarried couple is not marital status discrimination]; *Markman v. Colonial Mortgage Co.*, 605 F2d 566 (D.C. Cir. 1979) [unmarried couples protected from credit discrimination]; *Hahn v. Housing Authority*, 709 F Supp 605 [unmarried couple protected from discrimination in public housing].

I(b)

The Erroneous Conclusions Reached by the Trial Courts Below Are Based on Flawed Reasoning

The trial courts essentially gave four reasons to support their conclusion that the term "marital status" did not prohibit a landlord from refusing to rent to a man and woman who are not married to each other. None of the four reasons withstands scrutiny.

I(b)1. Singular Versus Plural

Both courts relied on the statute's reference to the term "person" in the singular as a basis for concluding that marital status was meant to protect an individual, but not to protect two persons who may be spouses, fiancees, or domestic partners. In addition to ignoring the decision in *Whitman*, the trial court also ignored other language in the Civil Rights Act that signals an intent not to limit protection to one individual.

The definitions that govern the entire Civil Rights Act are contained in MCL 37.2103; MSA 3.548(103). The term "person" is not limited to an individual but also includes an association. MCL 37.2103(g). Blacks Law Dictionary defines "association" in its most generic sense as "the act of a number of persons in uniting together for some special purpose . . . ; Also, the persons so joining; the state of being associated." Two people who have united together for the purpose of jointly renting a house or apartment fall within this broad definition of "association." Since the Civil Rights Act is remedial and must be liberally construed to effectuate its ends (*Eide v. Kelsey-Hayes Co.*, 431 Mich 26, 34; 427 NW2d 488 (1988)), the broad definition of "person" contained in the act should be construed to prohibit a landlord from refusing to rent to two persons because they are not married to each other.

Furthermore, MCL 37.2502(1) specifically prohibits discrimination on the basis of the "marital status of a person **or a person residing with that person.**" (Emphasis added.) It does not even take a liberal construction of this phrase to conclude that the Legislature intended to prohibit racial, religious, or marital status discrimination against two people who jointly live together and not merely against one individual.[3]

I(b)2. Criminal Law

To bolster the conclusion that discrimination against unmarried couples was not prohibited by the Civil Rights Act, each of the trial courts below relied on MCL 750.335; MSA 28.557 which specifies that "[a]ny man or woman, not being married to each other, who shall lewdly and lasciviously associate and cohabit together . . . shall be guilty of a misdemeanor." Reliance on this criminal provision was misplaced for several reasons.

Judge Perlos read this statute too broadly, erroneously concluding that "it's against the law in the state of Michigan to live with somebody, if you're not married." (Baiz, RT 22) The statute is not violated without proof that the cohabitation of an unmarried man and woman is lewd and lascivious. "It is not sufficient to be unmarried and cohabitate together. In order to violate the statute, the activity must be done lewdly and lasciviously." *Briggs v. North Muskegon Police*

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[3] In addition to definitional arguments, common sense suggests that the reasoning of the courts below is superficial and absurd. Accepting for the sake of argument that the statute was intended to protect individuals does not resolve plaintiffs' claims. Rose Biaz is an individual. So is Peter Perusse. So is each of the two plaintiffs in the companion case. In each case, the trial court seem to suggest that even though each plaintiff was discriminated against by the same defendants, in the same transaction, they can only obtain relief in separate law suits. Such a position flouts the rule requiring joinder of all persons having "interests in the subject matter" of the claim (MCR 2.205(A)) and would only result in the needless multiplication of law suits. Consider, for example, a biracial unmarried couple. If a landlord refuses to rent to the couple because of the race of one member, both members of the couple have distinct and individual causes of action for racial discrimination. It would be absurd to require them to pursue such claims separately. The instant cases are no different. Each plaintiff was a victim of marital status discrimination.

Department, 563 F Supp 585, 591 (1983), aff'd, 746 F.2d 1475 (1984), cert den 473 US 909 (1985). Even if a cohabiting couple admitted to having sexual relations, the statute would not be violated without evidence that such was done in a lewd, lustful, lascivious, or licentious manner. (Ibid.)

Judge Grant also misread the effect of the lewd and lascivious cohabitation law on the fair housing provisions of the Civil Rights Act. Contrary to his overbroad reading of this criminal statute, prohibiting a landlord from discriminating against two adults because they are not married to each other would not "protect and favor conduct prohibited by statute." (Grant Opinion, p. 4) There is no evidence in the record that either set of plaintiffs had an ongoing sexual relationship, much less that they engaged in sexual conduct that was lewd and lascivious. Merely living together is insufficient evidence of lewd and lascivious cohabitation. *People v. Davis*, 294 Mich 499, 501-502; 293 NW 734, 735 (1940). A violation of this statute may not be based on "conjecture and imagination." (Ibid.)[4]

Therefore, a proper reading of the criminal statute in question shows that it's continued existence is not in conflict with a prohibition against housing discrimination against two people who are not married to each other. The criminal statute and the civil rights statute serve totally different purposes. While the criminal law punishes sexual conduct that is flagrant, open, and offensive[5] (not

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[4] To digress briefly, one can legitimately wonder what religious belief the defendants claim to espouse. Although there are conservative religious denominations which hold that all sexual activity outside of marriage is a sin, amici know of no existing religious sect in America which claims that "living together" is itself a sin. The ancient pagan cults which demanded strict separation of unmarried males from unmarried females no longer exist. It is incredibly presumptuous to assume that sexual activity is a part of a modern cohabitation arrangement, considering that sexual activity is absent from many marriages, especially those where the spouses decide not to separate for the sake of the kids, or continue to live together for reasons of economy or convenience. Furthermore, it would be an extraordinary invasion of privacy to permit a landlord or other commercial venture to inquire into the sexual practices of prospective tenants or customers.

[5] Even at common law, cohabitation was not an offense unless it was openly, publicly, and notoriously (continued...)

present here), the civil rights law seeks to eliminate business decisions based on group stereotypes rather than individual merit.

Moreover, MCL 750.335 is unconstitutional both on its face and as applied to the parties in this case. Appellants raised the unconstitutionality of the cohabitation statute before the Court of Appeals. The Court ignored this important issue. In Appellant's Brief (page 18) Plaintiffs note that there was nothing in the trial record to suggest that they had ever had sex, and that if the issue of non-marital sex had been raised "plaintiffs would have asserted that the 'lewd and lascivious' statute is unconstitutionally vague and violates plaintiff's right to privacy." An unconstitutional statute is wholly void, and is inoperative as if it had never been passed. *Kozlowski v. Kozlowski*, 403 A2d 902, 907 (NJ 1979). As a result, MCL 750.335 may not be relied upon to deny relief to the plaintiffs in the instant cases.[6]

Since MCL 750.335 does not define "lewdly and lasciviously," thereby failing to give notice to potential offenders, or guidance to prosecutors, judges, and juries as to what conduct is prohibited, the statute is unconstitutionally vague in violation of state and federal constitutional provisions that

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[5](...continued)
committed. *Delaney v. People*, 10 Mich 241 (1862). In contemporary society, sexual conduct has to be committed in a very public place in order to be considered lewd and lascivious. *Campbell v. State*, 331 So 2d 289 (Fla 1976).

[6] To the extent that MCL 750.335 was relied on by the trial courts to deprive plaintiffs of their fair housing rights, plaintiffs have standing to challenge its constitutionality. This case involves an actual case or controversy in which their rights have been adversely affected by the criminal statute in question. *Baker v. Carr*, 369 US 186, 204, 82 S Ct 691, 703, 7 L Ed 2d 663 (1962) (to confer standing, the plaintiff must allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions"); *Automobile Club v. Secretary of State*, 195 Mich App 613, 617, 491 NW2d 269, 272 (1992) ("Substantive constitutional questions are to be resolved in conjunction with the usual rules of constitutional adjudication, which require, among other things, concrete facts against which to test the measure and a party with standing to raise the constitutional challenge").

guarantee due process of law. Citing *Morgan v. City of Detroit*, 389 F Supp 922, 929,[7] the court in *Briggs v. North Muskegon Police Department, supra*, questioned whether MCL 750.335 was unconstitutionally vague. *Briggs, supra*, at 591. However, the court did not reach a decision because the plaintiff in that case had not challenged the constitutionality of the statute. Here, however, such a claim is being raised.

When making a vagueness determination, courts must take into consideration any judicial interpretation of the statute in question. *People v. Lino and Brashier*, 447 Mich 567, 575; 527 NW2d 434, 438 (1994). Lino & Brashier, supra, construed together with earlier cases interpreting the same statute (e.g. People v Howell, 396 Mich 16 (1976)) establishes that private, non-commercial sexual acts between competent, consenting adults is not a crime in the State of Michigan. Whatever the cohabitation law proscribes as "lewd and lascivious" it is not private, consensual, unpaid adult sex. Nothing in the record suggests that the statute has any relevance or that any "lewd or lascivious" activity was involved here.

Cases interpreting the lewd and lascivious cohabitation portion of MCL 750.335 are few in number. Mere living together does not violate the statute. *People v. Davis, supra*. At common law, the conduct had to be openly, publicly, and notoriously committed. *People v. Smith, supra*. Even cohabitation with sexual intercourse is not enough if the sexual conduct is not lewd and lascivious. *Briggs, supra*. Reference to the "common sense of the community" is not an adequate or legally appropriate standard. *People v. Brashier and Lino, supra*, at 571.

Courts in other states have invalidated similar criminal statutes as being void for vagueness,

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[7] In *Morgan, supra*, the court found a prohibition against "lewd" conduct in a Detroit ordinance to be unconstitutionally vague and severed the invalid portion of the statute from the remainder which was constitutional. (Id., at 929-930)

or they have saved such laws from facial invalidation by interpreting them to exclude private sexual conduct between consenting adults. *State v. Kueny*, 215 NW2d 215 (Iowa 1974) (invalidated lewd and lascivious cohabitation statute); *Commonwealth v. Balthazar*, 318 NE2d 478 (Mass 1974) (construed lewd and lascivious conduct statute to not include private noncommercial conduct between consenting adults).

The right of privacy of plaintiffs that is implicit in the Michigan[8] and the United States constitutions is also violated by MCL 750.335, as is their freedom of association that is protected by the First Amendment. Many courts have recognized that the right of privacy protects the intimate association of consenting adults in private.[9] If the cohabitation statute remains valid and applies as the Court of Appeals suggested, it violates international treaty obligations of the U.S. and should be invalidated as a violation of international law.

The United States ratified the "International Covenant on Civil and Political Rights," General Assembly resolution 2200A (XXI). 21 U.N. GAOR Supp (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 UNTS 171 [hereafter cited as "ICCPR"] which entered into force on March 23, 1976. As an international treaty signed by the U.S., ICCPR is the supreme law of the land and creates legal

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[8] *Advisory Opinion 1975 P.A. 227*, 396 Mich 465, 504-505; 242 NW2d 3 (1976) ("No one has seriously challenged the existence of a right to privacy in the Michigan Constitution nor does anyone suggest that the right to be of any less breadth than the guarantees of the United States Constitution.")

[9] *Doe v. Duling*, 603 F Supp 960 (E D Vir 1985) (lewd and lascivious cohabitation law violated right of privacy), reversed on other grounds, 782 F2d 1202 (4th Cir 1986); *State v. Saunders*, 381 A2d 333 (NJ 1977) (fornication law violated right of privacy of consenting adults); *City of Sherman v. Henry*, __ S.W.2d __, 1995 WL 316535 (Tex App 1995) (right of privacy protects sexual behavior of consenting adults in private); *City of Dallas v. England*, 846 SW2d 957 (Tex App 1993) (same); *Commonwealth v. Wasson*, 842 SW2d 487 (Ky 1993) (same); *Post v. Oklahoma*, 715 P2d 1105 (Okla App 1986) (statute prohibiting consensual sexual acts of heterosexuals violated right of privacy); *State v. Sochet*, 580 A2d 176 (Md 1990) (same); *State v. Pilcher*, 242 NW2d 348 (Iowa 1976) (same); *People v. Onofre*, 415 NE2d 936 (NY App 1980) (right of privacy violated by statute that penalized private sexual conduct of consenting persons who were unmarried).

obligations of observance and enforcement in the U.S. by the U.S. government. The Vienna Convention on the Law of Treaties (4) Article 26 states "Every international agreement in force is binding upon the parties to it and must be performed by them in good faith. The inter-American Commission on Human Rights of the Organization of American States (OAS), of which the U.S. is a member and signator, recognizes its jurisdiction to issue interpretive statements regarding the ICCPR, which interpretive statements are binding upon the U.S. as a member.

In Asakura v Seattle, 265 US 332, 342 (1924) The U.S. Supreme Court states that "treaties are to be construed in a broad and liberal spirit and when two constructions are possible, one restrictive of rights which may be claimed under it, and the other favorable to them, the latter is to be preferred." In Rodriguez-Fernandez v Wilkerson 645 F2d 1388 the 10th Circuit held that "It is proper to consider international law principles for notions of fairness as to propriety in holding aliens in detention. No principle of international law is more fundamental than the concept that human beings should be free from arbitrary detention."

ICCPR Article 12 gives "Everyone lawfully within the territory of a state the right to liberty of movement and freedom to choose his residence." To allow religious or ethnic "enclaves" to develop through housing discrimination would place Michigan and the stance of the former Yugoslavia. "ICCPR Article 17 protects against "arbitrary or unlawful interference with his privacy, family, home or correspondence." Article 18 gives "*Everyone*" (not just landlords) "the right to freedom of thought, conscience and religion" and says "no one shall be subject to coercion" (such as loss of housing) if they refuse to comply with religious dictates. Article 18, Sec 3 provides a useful guide. It states "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the

fundamental rights and freedoms of others." By requiring religious landlords to obey the same laws as other landlords, the court would protect the fundamental rights of tenants, who are also required to obey the law regardless of their religion.

ICCPR Article 23 bans coercive marriages, and Article 26 states: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Under these provisions, it has been held that laws that seek to regulate private, consensual, non-commercial homosexual conduct between competent consenting adults is invalid. See, for example, Toonen v Australia, UN Human Rights Committee, Communication No. 488 / 1992, 31 March 1994, in which Tasmania's sodomy law was struck down as a violation of the right to privacy.

This Court should reach a similar conclusion that MCL 750.335 violates the right of privacy of the plaintiffs and therefore should interpret the scope of the Civil Rights Act without reference to the unconstitutional criminal statute.

I(b)3. Status Versus Conduct

Judge Grant erroneously concluded that it was the "conduct" of living together, not the "marital status" of plaintiffs that motivated the defendants to refuse to rent to the plaintiffs. (Grant Opinion, p. 3) This conclusion is not supported by logic or reason.

If an employer refused to hire an African-American applicant because he had a criminal conviction for theft, but nonetheless hired a white applicant who had been convicted of theft, no one could seriously conclude that the black applicant had no action for race discrimination since the

employer's rejection of the applicant was based on his criminal conduct. Similarly, if a restaurant refused to serve a barefoot woman but did serve a barefoot man, the restaurant would not escape liability for sex discrimination on the theory that the woman was refused because of her conduct, i.e., walking in bare feet. Likewise, a landlord who refused to rent to a disabled man because he smoked but who rented to non-disabled man who smoked, could not avoid a claim of handicap discrimination by claiming that the disabled applicant was rejected because of his conduct.

Here, the landlord would rent to a married couple who planned to live together but not to an unmarried man and woman who intended to share living quarters. It is the marital "status" that distinguishes the two couples, not the conduct of living together, since both couples would be engaging in the same "conduct" of living together.

Although the Wisconsin Supreme Court adopted the illogical "conduct" theory in a case similar to these, it did so without any analysis, and simply concluded: "Norman refused to rent to the prospective tenants in this case because they intended to live together. Living together is `conduct' and not `status.'" *Dane County v. Norman*, 174 Wis 2d 683, 497 NW2d 714 (1993). If this conclusion were applied to racial, sex, and handicap discrimination, then presumably the Wisconsin court would insulate the employer, restaurant, and landlord from liability in the examples cited above, on this "conduct" theory. This Court should reject such an approach as both illogical and inconsistent with the overriding purpose of the Civil Rights Act to eliminate discrimination based on the characteristics listed in the statute.

The Supreme Court of Alaska saw this "conduct" argument for what it really is: camouflage and obfuscation. In *Swanner v. Anchorage Equal Rights Commission*, 874 P2d 274 (Alaska 1994), the Supreme Court convincingly stated:

> "The definition of `cohabit' demonstrates that marital status and conduct are inextricably combined. `Cohabit' means `to live together in a sexual relationship when not legally married.' The American Heritage Dictionary 259 (1980). Swanner cannot reasonably claim that he does not rent or show property to cohabiting couples based on their conduct (living together outside of marriage) and not their marital status when **their marital status (unmarried) is what makes their conduct immoral in his opinion.** The undisputed facts demonstrate that Swanner would have rented to the prospective tenants if they were married. Swanner's argument that he discriminated against the prospective tenants based on their conduct and not their marital status is without merit." (Id., at 278.)[10] (Emphasis added.)

This Court should align itself with the reasoning in the *Swanner* case.

I(b)4. Public Policy

In both cases, the lower courts relied on public policy favoring marriage as a reason for concluding that landlords may discriminate against unmarried couples with impunity. This reasoning is based on a gross oversimplification of relevant public policies.

Plaintiffs never argued that the law must treat them the same as married couples in all aspects of life. No one disputes a general public policy favoring marriage. Similarly, plaintiffs never contested the fact that married couples are treated more favorably than unmarried couples in many legal contexts, e.g., intestate succession, testimonial privilege, right to sue for loss of consortium or wrongful death, etc. However, this does not mean that the Legislature intended for two unmarried adults to have absolutely no protection against discrimination in the context of a necessity of life such as housing.

Unmarried cohabitation has not been a sufficient reason to strip individuals of normal civil

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[10] A recent decision in a similar case in Chicago agreed with the reasoning of the Alaska Supreme Court and rejected the illogical conclusion of the Wisconsin court. *Jasniowski v. Rushing*, Cook County Circuit Court, Case No. 94 CH 5546, Memorandum Opinion of Judge Aaron Jaffee, filed December 22, 1994.

rights to which they are otherwise entitled, such as the right to custody of a child or the right to enter into contracts and have them enforced. In *Fletcher v. Fletcher*, 447 Mich 871, 886; 526 NW2d 889, 896 (1994), the Supreme Court ruled that unmarried cohabitation is not a sufficient reason, standing alone, to deprive a parent of custody on the grounds of "immorality" under the Child Custody Act. Similarly, Michigan courts will not refuse to enforce an express oral agreement between a man and a woman, merely because they lived together and had a sexual relationship. *Tryanski v. Piggins*, 44 Mich App 570; 205 NW2d 595 (1973). Cohabitation does not preclude enforcement of an agreement supported by other valuable consideration. *Hierholzer v. Sardy*, 128 Mich App 259; 340 NW2d 91 (1983). There is no reason why two adults who live together should be denied fair housing rights simply because of their unmarried cohabitation.

The courts in these cases could have, but did not, cite the public policy favoring marriage, as a reason to simply reject the litigant's right to child custody or to enforce a contract. Instead, the courts looked to the specific public policies in the context under scrutiny to determine whether relief should be granted or denied. The same process should be used here. This Court should look to Michigan's public policy with respect to public policies concerning discrimination in general, and fair housing in particular, as it evaluates whether the Legislature intended to prohibit landlords from refusing to rent to two unmarried adults because they are not married to each other.

The prohibitions against discrimination and the promotion of civil rights rise to a level of a clearly established public policy in Michigan. *Baxter v. Gates Rubber Co.*, 171 Mich App 588, 591; 431 NW2d 81 (1988). The Civil Rights Act specifically declares that the "opportunity to obtain . . . housing . . . without discrimination because of . . . marital status . . . is recognized and declared to be a civil right." MCL 37.2102.

The purpose of the Civil Rights Act is to prevent discrimination directed against persons because of their membership in a certain class and to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases. *Radtke v. Everett*, 442 Mich 368, 379; 501 NW2d 155 (1993). Prohibiting a landlord from refusing to rent to a man and a woman, because they are not married to each other and because the landlord considers all such unmarried cohabitors to be sinners, fits perfectly within the general purpose of the Civil Rights Act. A landlord who automatically excludes all such couples even though they may have good jobs, excellent credit, and superb references from previous landlords, certainly has denied them equal housing opportunities because of their membership in a disfavored class and has prejudged them on the basis of group stereotypes and personal bias.

Public policy with respect to housing discrimination is so strong in Michigan that a "civil right to private housing" exists under present day common law. *Beech Grove Investment Company v. Civil Rights Commission*, 380 Mich 405, 436; 157 NW2d 213, 228 (1968). Separate and apart from any statutorily conferred claim, a common law cause of action for "unjust discrimination" may be brought against a business owner that offers housing publicly, such as through a newspaper advertisement. (Id., at 433, 436.)

Considering Michigan's strong public policy to ban discrimination based on group stereotypes and subjective biases, and the express declaration of the Legislature that freedom from marital status discrimination is a civil right, and the policy to liberally construe the Civil Rights Act, the decisions of the trial courts below should be reversed.[11]

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[11] Defendants are not aided by the fact that the Civil Rights Act does not prohibit universities from limiting family housing to students who are married or who have children. **University housing for students is** **(continued...)**

I(c)

Although Precedents of the Michigan Supreme Court Involving Marital Status Discrimination in Employment Contexts Are Distinguishable, They Do Shed Some Light On the Intended Beneficiaries of the Statutory Ban Against Marital Status Discrimination

Marital status discrimination is prohibited in employment as well as in housing. Two decisions of the Michigan Supreme Court reviewing employment discrimination claims shed light on the scope of the prohibition against marital status discrimination.

Miller v. C.A. Muer Corporation, supra, involved two consolidated cases. In both cases, employees sued their employers, claiming that antinepotism policies of each employer constituted illegal marital status discrimination. *Miller*, 420 Mich 355.

The antinepotism policy at the C.A. Muer Corporation prohibited a husband and wife or any

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[11](...continued)
governed by Article 4 of the Civil Rights Act whereas private businesses that rent housing in the general market are governed by Article 5. The Legislature made a specific decision to include marital status in Article 5 but not to include marital status in Article 4 except for college admissions. 1983-1984 Mich. Op. Atty Gen. 316, 1983-1984 Mich. OAG No. 6227. While an early version of the Civil Rights Act prohibited all forms of marital status discrimination in Article 4, the final version that was adopted only prohibited marital status discrimination in admissions policies. This conscious decision of the Legislature not to prohibit marital status discrimination in the special housing market that is available only to enrolled students, therefore, has no bearing on legislative intent with respect to the prohibition against marital status discrimination in the general housing
market. It merely reflects a policy decision to give greater deference to decision making by colleges and universities that must ration a limited segment of student housing.

The Attorney General has acknowledged that tenants in the general housing market and tenants in a university housing market are not similarly situated and so the Legislature made different rules for each market and did not intend for Article 5 rules to apply to college housing. "Such [university] housing is not available to the general public and is provided only to individuals enrolled in those institutions. Where enrollment is a condition precedent to obtaining student housing, article 4 of the Act, supra, applies inasmuch as the educational institution's housing function is incidental to its primary function of education." (Ibid.) (Emphasis added.)

relatives from working in the same restaurant. The policy explained that past experience had proven that employment of relatives in the same work space caused an undue strain on all parties concerned. Id., 420 Mich 355, 359. The antinepotism policy at Sinai Hospital of Detroit was not quite as strict. It prohibited spouses and other close relatives from working in the same department, although the policy could be waived under special circumstances. Id., 420 Mich 355, 359-360.

The Supreme Court noted that the Legislature had not defined the term "marital status" in the Civil Rights Act. Id., at 361. The Court looked to the purpose of the act to assist it in statutory construction, observing:

> "Civil rights acts seek to prevent discrimination against a person because of stereotyped impressions about the characteristics of a class to which the person belongs. The Michigan civil rights act is aimed at `the prejudices and biases' borne against persons because of their membership in a certain class . . . and seeks to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases." *Miller*, at 362-363.

The Court then looked to the reasons advanced by employers in support of anti-nepotism policies, and from those reasons it concluded that anti-nepotism policies did not fall within the scope of business practices prohibited by the act, explaining:

> "Some of the reasons advanced in justification of anti-nepotism policies include potential emotional interference with job performance, collusion in grievance disputes, favoritism, morale problems resulting from the appearance of favoritism, and conflicts of interest that arise if an employee is required to supervise the employee's spouse. Whether these reasons are valid in all circumstances or not, **they do not appear to reflect offensive or demeaning stereotypes, prejudices, or biases.** Absent a more specific manifestation of legislative intent, we conclude that the prohibition of employment discrimination on the basis of `marital status' was not meant to protect a right to be employed in the same department as one's spouse." *Miller*, at 363-364. (Emphasis added)

Finding that the anti-nepotism policies did not facially discriminate on the basis of marital status because they applied to relatives as well as spouses, the court nonetheless reversed the decision of the trial court granting summary judgment to the defendants, and remanded the case for further proceedings, stating:

> "A facially neutral employment practice can operate as a mask or pretext for impermissible discrimination. Thus, our decision that the instant policies are facially neutral concerning the criterion of whether one is married does not preclude a finding that Miller and Lowry were nevertheless discriminated against because of their marital status or for some other impermissible reason." *Miller*, at 365-366.

The rationale used in *Miller* is instructive. Unlike the underpinnings of the antinepotism policies which were grounded in reasonable and objective business concerns, the landlord's policy of exclusion in the instant cases is based on personal bias and group stereotypes. In effect, the landlord has said to the prospective tenants, "I believe that all unmarried men and women who live together are immoral and guilty of sinful conduct and despite the fact that you may otherwise be excellent tenants, I refused to rent to you because you are a member of this immoral group." Never mind that the tenants may have differing religious or moral views, never mind that they may choose to live together for emotional, economic and safety reasons, and never mind that they may have good jobs, excellent credit, and rave reviews from previous landlords. This landlord lumps all unmarried cohabitors into one big trash bin and refuses to do business with them. That is exactly the type of demeaning stereotyping, prejudice, and bias from which the Civil Rights Act was designed to protect tenants.

Another anti-nepotism policy was at the heart of the dispute in *Whirlpool Corporation v. Civil Rights Commission, supra*, 425 Mich 527. A majority of the justices declined to invalidate a "no

spouse" rule, adhering to the rationale that "This is not discrimination based on a stereotypical view of the characteristics of married or single people." *Whirlpool*, at 531.[12]

In sharp contrast to the *Whirlpool* situation, the landlord in the instant cases is engaging in discrimination based on stereotypes. He seems to believe that all married persons who cohabit are sufficiently virtuous to warrant further inquiry into their individual merits as tenants, whereas all unmarried cohabitors are immoral and sinful and should be automatically rejected without further consideration. Allowing landlords to implement such discriminatory policies would frustrate the purpose of the Civil Rights Act to insure that "each individual be considered on the basis of his individual capabilities and not on the basis of any characteristics generally attributable to a group." *Hildebrand v. Revco Discount Drug Centers*, 137 Mich App 1, 10 (1984).

It is also noteworthy that even though *Miller* and *Whirlpool* were decided subsequent to the decision in *Whitman v. Mercy-Memorial Hospital*, the Supreme Court did not disapprove of the conclusion in *Whitman* that the term "marital status" prohibited discrimination against an unmarried couple.

Applying the reasoning of *Miller* and *Whirlpool* to the instant case, this Court should conclude that the ban on marital status discrimination in the fair housing provisions of the Civil Rights Act prohibits a landlord from using the unmarried status of a man and woman as a basis for refusing to allow them to jointly share a rental unit. Commentators agree that the "plain meaning" of "marital status" is clear. When tax forms ask a filer to declare their "marital status", the IRS wants to know whether they are single, married or divorced. Marital status may change throughout life, voluuntarily

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[12] Three justices would have invalidated the rule on the ground that its enforcement required an employer to inquire into the marital status of employees, noting that **such inquiries are themselves prohibited by the Civil Rights Act.** Id., at 540-541.

and involuntarily. A person's "marital status" may be: single, engaged, married, separated, widowed or divorced. See, 9 Michigan Bar Journal 76, *Sexual Orientation and Michigan Law*, Sept. 1997, p 950. If the Court of Appeals was correct, discrimination against divorced persons (especially women) is not prohibited. Likewise, widows, widowers and separated persons could all be ejected from their homes.

Even if this Court were to conclude otherwise, it should reverse the summary judgment and dismissal with prejudice and remand the cases for further proceedings just as was done in *Miller*.[13]

II

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR THE DEFENDANTS AND DISMISSING THE CASES WITH PREJUDICE, WITHOUT FIRST AFFORDING PLAINTIFFS AN OPPORTUNITY TO AMEND THE COMPLAINTS TO ALLEGE ADDITIONAL FACTS OR LEGAL THEORIES TO SUSTAIN A CAUSE OF ACTION AGAINST THE LANDLORD

In each case, the trial courts below granted the defendant's motion for summary judgment without first affording the plaintiffs an opportunity to amend the complaints. Summary disposition of the cases in this preemptory manner violated MCR 2.116, subdivision (I)(5) which states:

> "If the grounds asserted are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court

[13] Any finding by this Court that the landlord's policy and practice of refusing to rent to unmarried couples does not constitute a facial violation of the ban on marital status discrimination "does not preclude a finding that [the prospective tenants] were nevertheless discriminated against because of their marital status or for some other impermissible reason." *Miller*, at 366. As argued elsewhere in this brief, the landlord's refusal to rent to prospective tenants whose lifestyle or conduct offends the landlord's religious beliefs constitutes discrimination on the basis of religion in violation of both the Elliott Larsen Civil Rights Act and the federal Fair Housing Act, and may also constitute "unjust discrimination" in violation of the common law of Michigan.

shows that amendment would not be justified." (Emphasis added)

In each case below, the defendant's motion was based on subrule (C)(8) and (C)(10). Therefore, since MCR 2.116 requires ("shall") that plaintiffs be afforded an opportunity to amend before a case is dismissed with prejudice, the trial courts erred. Furthermore, the error was prejudicial inasmuch as both complaints could easily have been amended to allege that the same transaction between the landlord and prospective tenants constituted discrimination on the basis of religion in violation of federal and state statutes, and/or unjust discrimination in violation of Michigan common law.

The Court of Appeals merely said that Plaintiffs "did not raise this issue before the trial court." Plaintiffs did argue that a "religious test" was applied to them, and the Court of Appeals was asked to allow amendment of the complaint as well (Triangle Brief, p 31).

In *Royal Palace Homes Inc. v. Channel 7 of Detroit Inc*, 197 Mich App 48, 51; 495 NW2d 392, 394 (1993), the trial court granted summary judgment in favor of the defendants under subrule (C)(8) for failing to state a claim upon which relief could be granted. Although the Court of Appeals found that the general allegations of defamation were not sufficient to state a claim for libel, the defect was not fatally defective because it was possible that the plaintiff could amend the complaint to plead a case of defamation by implication. However, since this required the plaintiffs to allege additional specific facts, the appellate court reversed the summary judgment, stating: "Plaintiffs should, however, be given the opportunity to amend their complaint. Leave to amend a pleading 'shall be given freely when justice so requires.' MCR 2.118(A)(2)." *Royal Palace*, at 57.

In *Hoye v. Westfield Insurance Company*, 194 Mich App 696; 487 NW2d 838 (1992), the insured brought action against the insurer and its agent. The Court of Appeal ruled that summary

disposition in favor of the defendants on an "equitable estoppel" claim was proper because equitable estoppel is not a cause of action. However, the appellate court found, through a careful reading of the complaint, that the facts that were pleaded might give rise to a cause of action for fraud or negligence. Even though plaintiff's legal theory was "inartfully stated," the court remanded the case to the trial court with directions to give the plaintiff "an opportunity to plead a claim or fraud or to state properly a claim of negligence." *Hoye*, at 704, 707.

In *Midura v. Lincoln Consolidated Schools*, 111 Mich App 558; 314 NW2d 691 (1982), the Court of Appeals explained that "[t]he rule governing amendment of pleadings . . . was designed to facilitate amendment of pleadings except where prejudice to the opposing party would result." *Midura*, at 562. The court warned that prejudice in this context has a special meaning: "[P]rejudice must stem from the fact that new allegations are offered late rather than in the original pleadings and not from the fact that the opponent may lose his case on the merits if the amendment is allowed." Ibid.

The rule allowing amendments is so liberal that an amendment will relate back to the date of the original pleading and thus avoid any statute of limitations problems, so long as the amendment arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. *LeBar v. Cooper*, 376 Mich 401, 406; 137 NW2d 136, 138 (1965). As the Supreme Court has explained: "It is beside the point that the amendment introduces new facts, a new theory, or even a different cause of action, so long as it springs from the same transactional setting as that pleaded originally. Ibid. "[J]ust because a particular case may primarily sound in one cause of action does not exclude the possibility that there also exists a less obvious cause of action." *Li v. Wong*, 162 Mich App 767, 772; 413 NW2d 493 (1987).

Here, as in *Jones v. Pendelton*, 151 Mich 442, 445; 115 NW 468, 469 (1908), the plaintiff

had but one cause of action for housing discrimination, but he failed to properly describe it. The Supreme Court ruled that courts have "the power to permit plaintiff to amend his [complaint] so that he may recover on the precise cause of action for which he brought suit, but which he failed to properly describe . . . ." Ibid.

Plaintiffs alleged that the defendants refused to rent to them because cohabitation by unmarried couples was against the religious beliefs of defendants. Plaintiffs described the landlords' act of discrimination as a violation of the "marital status" provision of the state Civil Rights Act. In fact, the landlords' statement of preference for married tenants and their refusal to rent to an unmarried man and woman because unmarried cohabitation offends the landlords' religious beliefs is much more than marital status discrimination. As argued below, the landlord effectively used a religious test to qualify prospective tenants. The same conduct that was alleged in support of the marital status claim also would trigger liability under a legal theory of discrimination on the basis of religion under both the state Civil Rights Act and the federal Fair Housing Act. It also could constitute a violation of the common law prohibition of unjust discrimination in housing.[14]

If alternative legal theories support a single claim for relief, a preliminary disposition of one of the alternative theories cannot be made the subject of a final judgment against the plaintiff. *McCarthy & Associates v. Washburn*, 194 Mich App 676, 679-680; 488 NW2d 785, 786 (1992). This is precisely the situation in the cases at bench. The same conduct of the landlord -- refusing to

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[14] Moreover, to the extent that a landlord claims a constitutional right not to rent to unmarried couples, the unmarried persons have an equal right to be able to rent without suffering discrimination due to their religious, ethical, or moral beliefs. That is probably why Congress and the Michigan Legislature have chosen to outlaw discrimination because of religion as a means of keeping such personal beliefs out of the commercial marketplace, thereby ensuring that objective secular business criteria will be used to judge consumers or employees.

rent to tenants who cannot pass a religious test imposed by a landlord -- is actionable under alternative legal theories, i.e., discrimination on the basis of marital status, discrimination on the basis of religion, or unjust discrimination in violation of common law. Here, only one theory was alleged and only that theory was tested in the summary disposition proceedings. Had the trial court given plaintiffs an opportunity to amend as required by court rules, plaintiffs could have alleged these additional theories, and included any necessary additional facts to support these theories, and then had those theories tested for legal sufficiency.

"It should be no barrier to merited relief that the claimant has mislabeled or misapprehended his remedy." *Williams v. Lansing Board of Education*, 69 Mich App 654, 659; 254 NW2d 365 (1976). Public policy in Michigan is to dispose of cases according to their merits, rather than by applying technical rules formalistically to bar meritorious claims. *Churchill v. Palmer*, 57 Mich App 210, 216-217; 226 NW2d 60, 63 (1974). Dismissal is a harsh remedy to be invoked cautiously. *North v. Department of Mental Health*, 427 Mich 659, 662; 397 NW2d 793, 794 (1986).

The Court of Appeals will not be bound by a party's choice of label for its action where to do so would only put form over substance. *St. Paul Fire & Marine Ins. Co. v. Littky*, 60 Mich App 375, 378-379; 230 NW2d 440 (1975); *Vander Bossche v. Valley Pub*, 203 Mich App 632, 643; 513 NW2d 225, 230 (1994). That is why the Court of Appeals in previous cases has sometimes looked beyond the plaintiff's designated legal theory to adjudicate the appeal on the basis of other legal theories that would support a cause of action arising out of the same set of facts. *Campos v. Oldsmobile Division*, 71 Mich App 23, 25; 246 NW 2d 352, 354 (1976) (cause of action pleaded as slander but construed by appellate court as intentional infliction of emotional distress); *Shephard v. Redford Community Hospital*, 151 Mich App 242, 246; 390 NW2d 239, 241 (1986) (facts alleged were construed by

appellate court to be general negligence rather than medical malpractice). Here, the Court was dismissive of plaintiff's rights.

This Court also has the power itself to grant plaintiffs leave to amend their complaints pursuant to MCR 7.316(A)(1). Leave to amend should be granted, either directly by this Court or by the trial courts on remand, because, as argued below, the amendment would not be futile. *City of Midland v. Helger Construction Company Inc.*, 157 Mich App 736, 745; 403 NW2d 218, 222 (1987).

III

AN AMENDED COMPLAINT COULD INVOKE THE FEDERAL FAIR HOUSING ACT BECAUSE A LANDLORD WHO REFUSES TO RENT TO TENANTS WHOSE CONDUCT OFFENDS THE LANDLORD'S RELIGIOUS BELIEFS HAS DISCRIMINATED AGAINST THE TENANTS ON THE BASIS OF RELIGION

A victim of housing discrimination in violation of the federal Fair Housing Act (FHA) may commence a civil action in state court no later than two years after the occurrence of an alleged discriminatory housing practice. 42 U.S.C.A. § 3613(a)(1)(A). A plaintiff need not pursue any administrative remedies at all before filing suit under the FHA. *Ward v. Hart*, 494 F.Supp. 109, 113 (S.D. N.Y. 1992).

State courts have concurrent jurisdiction of private enforcement actions under the FHA. *Barber v. Ranco Mortgage*, 26 Cal App 4th 1819, 32 Cal Rptr 906, 908 (1994). This means that the applicable law is the federal substantive law, although state court rules of procedure apply to trial

court proceedings and any appellate review of the judgment. Ibid.

The federal Fair Housing Act (FHA) prohibits discrimination on the basis of religion in the sale or rental of a dwelling.[15]

Congress has declared the eradication of discrimination in housing as having the "highest national priority." *United States v. Hughes Memorial Home*, 396 F Supp 544 (W.D. Vir. 1975). State laws that interfere with, or are contrary to, the laws of Congress, including the FHA, are invalid under the Supremacy Clause.[16]

Although there is a dearth of case law interpreting the FHA's prohibition against religious discrimination,[17] precedents in the analogous context of employment discrimination are plentiful. When there is no housing case directly on point, federal courts consistently look to Title VII

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[15] The FHA and its implementing regulations make it illegal, *inter alia*, to "(a) To refuse to . . . rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of . . . religion . . . ; (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of . . . religion . . .; (c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on . . . religion . . . or an intention to make any such preference, limitation, or discrimination; (d) To represent to any person because of . . . religion . . . that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available. 42 U.S.C. § 3604; 24 C.F.R. § 100.050.

[16] *Wisconsin Public Intervenor v. Mortier*, 501 US __, 115 L Ed 2d 532, 542-543 (1994); *City of Edmonds v. Oxford House Inc.*, __ U.S. __, docket no. 94-23, opinion filed May 15, 1995 [Local zoning law declared invalid because it infringed on housing rights protected by the handicap provisions of the FHA]; *Deep East Texas Regional Mental Health and Mental Retardation Services v. Kinnear*, 877 SW2d 550, 557 (Tex App 1994) [State laws affecting federal fair housing policies must yield to the FHA]; *"K" Care, Inc. v. Town of Lac Du Flambeau*, 510 NW2d 697, 699 (Wis App 1993) [The FHA, by its own terms and by virtue of the supremacy clause of the federal Constitution overrides state law provisions to the extent that state law may be used to discriminate].

[17] Only two reported cases could be found. *United States v. Hughes Memorial Home*, 396 F.Supp. 544 (W.D.Va. 1975); *United States v. Columbus Country Club*, 915 F.2d 877 (3rd Cir. 1990).

employment cases to interpret similar provisions of the FHA.[18]

Employment discrimination cases under Title VII uniformly hold that accommodation of religion is unwarranted if doing so will discriminate against or harm an identifiable third party. *Trans World Airlines v. Hardison*, 432 US 63, 80-84, 97 S Ct 2264, 53 L Ed 2d 113 (1977); *Brenner v. Diagnostic Center Hospital*, 671 F2d 141, 146-147 (5th Cir 1982); *Ka Nam Kuan v. City of Chicago*, 563 F Supp 255, 258-259 (N D Ill 1983).

More specifically, an employer violates Title VII's prohibition against discrimination on the basis of religion if the employer imposes "forced religious conformity" on others. *Young v. Southwestern Savings and Loan*, 509 F2d 140, 141, 145 (5th Cir 1975). The Sixth Circuit came to the same conclusion in *Blalock v. Metals Trades, Inc.*, 775 F2d 703, 709 (6th Cir 1985) [When an employer lowers its level of tolerance for an employee because the employee's religious views no longer conform to those of the employer, the employer has engaged in differential treatment on the basis of religion), as did the Ninth Circuit in *EEOC v. Townley Engineering & Manuf. Co.*, 859 F2d 610, 620 (9th Cir 1988) [Protecting a person's right to be free from forced observance of the religion of a business owner is at the heart of statutes prohibiting religious discrimination].

Townley is significant not only because it affirms that taking adverse action against an employee who does not conform his conduct to the employer's religious beliefs is discrimination on

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[18] *Trafficante v. Metropolitan Life Insurance*, 409 US 205, 93 S Ct 354, 34 L Ed 2d 415 (1972); *Huntington Branch, NAACP v. Town of Huntington*, 844 F2d 926, 935 (2nd Cir 1988), aff'd per curiam (1988) 488 U.S. 15 [Appropriate to interpret FHA with reference to Title VII because the two statutes "are part of a coordinated scheme of federal civil rights enacted to end discrimination [and] the Supreme Court has held that both statutes must be construed expansively to accomplish that goal."]; *Morgan v. Secretary of H.U.D.*, 985 F2d 1451, 1455 (10th Cir 1993); *Ring v. First Interstate Mortgage*, 984 F2d 924, 926 (8th Cir 1993); *United States v. Balestieri*, 981 F2d 916, 929 (7th Cir. 1992), fn. 2; *Pinchback v. Armistead Homes Corporation*, 907 F2d 1447, 1451 (4th Cir 1990), *cert. denied* (1990) 111 S Ct 515; *H.U.D. v. Blackwell*, 908 F2d 864, 870 (11th Cir 1990).

the basis of religion, but also because it upheld the enforcement of Title VII against a federal Free Exercise challenge by the employer. *Townley, supra*, 859 F.2d, at 619-622.) The *Townley* court specifically held that the government's interest in eradicating religious discrimination was compelling and that Title VII's ban on such discrimination was the least restrictive means of achieving this compelling interest. *Townley, supra*, 859 F.2d, at pp. 620-621.

In *Turic v. Holland Hospitality, Inc.*, 849 F Supp 544 (W D Mich 1994), a woman was discharged because her decision to have an abortion offended the religious beliefs of her employer. Since her decision to have an abortion was not compelled by her own religious beliefs, the court observed that her claim under Title VII was not religious discrimination in the classic sense. However, the court found that when an employer imposes a religious test as a condition of employment, the ban on religious discrimination is violated. In other words, the court found that the religious beliefs of a business owner may not be forced on others. The fact that Turic's disagreement with her employer was not premised on a faith of her own did not alter the conclusion that the employer engaged in discrimination on the basis of religion. Id., at pp. 551-552.

Since the FHA is to be construed liberally (*Hughes Memorial Home, supra,*) and exemptions must be read narrowly (*City of Edmonds v. Washington State Building Code Council*, 18 F.3d 802 (9th Cir. 1994)), Title VIII's prohibition against housing discrimination on the basis of religion should be interpreted similarly to it's employment discrimination counterpart in Title VII. The FHA prohibits a housing provider from conditioning access to housing on a tenant's conformity with the provider's religious beliefs.

The FHA does not require religion to be the sole basis of denial, but only that religion was a motivating factor in the denial. (See 42 U.S.C. § 2000e-2(m) (as amended by the Civil Rights

Restoration Act of 1991); *Price Waterhouse v. Hopkins*, 490 US 228, 241-242 (1989); *Cato v. Jilek*, 779 F Supp 937, 943-944 (N D Ill 1992) [applying *Price Waterhouse* to FHA claim after effective date of the 1991 Civil Rights Restoration Act].)

Nor does the FHA require that the landlord be found to have a bad motive toward the prospective tenant to be held in violation of the FHA. Conduct that treats plaintiffs differently on account of their lack of conformity to defendants' religious beliefs is unlawful religion-based discrimination, regardless of whether the landlords' denial of housing was based on their sincere religious belief, their concern for their own soul, or their concern for the souls of tenants. Having benign or paternalistic motives for adverse treatment on account of religion does not excuse discrimination and/or establish a defense to a discrimination claim.[19]

The affirmative defense raised by the defendants under the Religious Freedom Restoration Act and the free exercises clauses of the state and federal constitutions was not resolved below and, therefore, need not be addressed at any length here. However, even if these statutory and constitutional provisions arguably apply to the case at hand -- which plaintiffs will strenuously oppose on remand -- the FHA's prohibition on religious discrimination in housing would survive the application of a compelling state interest test. Prohibiting discrimination on the basis of religion is the least restrictive means of implementing a compelling state interest to discourage and eliminate religious discrimination in business transactions. *Townley, supra*, 859 F.2d 610, 619-620; *EEOC v. Freemont School*, 781 F2d 1362, 1368-1369 (9th Cir. 1986).

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[19] *International Union, United Auto v. Johnson Controls Inc.*, 499 US 187, 199 (1991) [Absence of malevolent motive does not convert discriminatory policy into neutral policy; nor do benign motives establish a defense]; *Williams v. Matthews Company*, 499 F2d 819, 827 (8th Cir 1974) [Subjective good intentions do not overcome intentional discrimination]; *Horizon House v. Township of Upper Southhampton*, 804 F Supp 683, 694, 696 (E D Pa 1992) [Even benign or paternalistic discrimination violates the FHA].

The FHA applies to all dwellings except those specifically exempted. 42 U.S.C.A. § 3603(a)(2). Whether defendants are exempt from the FHA involves material facts that may be in dispute and therefore the plaintiffs' proposed amendment alleging religious discrimination under the FHA may not be resolved as a matter of law at this juncture.

The FHA does not apply to an owner who rents a single-family house, provided that he does not own more than three such single-family houses at one time. 42 U.S.C. § 3603(b)(1). However, a duplex is not a single-family house within the meaning of 42 U.S.C. § 3603(b)(1). *Lamb v. Sallee*, 417 F Supp 282, 284 (E D Ky 1976) The FHA also exempts rental transactions involving an apartment building containing four units or less if one of the units is occupied by the owners. 42 U.S.C.A. § 3603(b)(1).

Plaintiffs' affidavits show that defendants rent out units at three separate locations in the City of Jackson. The record is silent about the nature of these units. It is also silent as to whether the defendants resided in any portion of the building from which plaintiffs were denied occupancy. However, when the case is remanded the plaintiffs will prove, by affidavit or testimony, that the residential property from which they were rejected as tenants was in fact a duplex, and that the defendants did not reside in any portion of that building.

Furthermore, the record is silent as to whether or not the defendants used the rental services of any agent, broker, or services of any person in the business of renting dwellings. If such services are used, then the landlord is not exempt from the act even under the exemptions granted for single-family houses or owner-occupied buildings of four units or less. 42 U.S.C. § 3603(b)(1). Material facts that may be in dispute on this issue will have to be resolved when the case is remanded.

Additionally, defendants do not qualify for the only religious exemption contained in the FHA.

Such exemptions are limited to religious organizations, or non-profit groups associated with religious groups, that rent dwellings for non-commercial purposes, allowing such groups to limit occupancy to persons "of the same religion." 42 U.S.C.A. §3607(a).[20]

Since the FHA must be construed broadly and generously in favor of its enforcement, courts must construe narrowly any exemptions from the act. *United States v. Columbus Country Club*, 915 F.2d 877, 883 (3rd Cir. 1990). As a private landlord who rents residential properties on a for-profit basis, defendants do not come close to qualifying for the only religious exemption Congress saw fit to confer.

As demonstrated by the arguments set forth above, giving plaintiffs an opportunity to amend their complaints to allege a violation of the FHA would not be an idle gesture or a futile act. Therefore, the judgment below should be reversed because the trial court failed to afford plaintiffs an opportunity to amend as required by MCR 2.116.

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[20] In the employment context, permission to employ persons "of a particular religion" granted by Title VII's exemption for religious organizations from the Title's prohibition against discrimination on the basis of religion includes permission to employ only those persons whose beliefs and conduct are consistent with the religious employer's purpose, and is not limited solely to religious affiliation. *Little v. Wuerl*, 929 F2d 944, 949-951 (3rd Cir 1991). In *Little*, a teacher brought suit after a Catholic school failed to renew her contract because of her remarriage. Although Title VII prohibits discrimination on the basis of religion, Congress has granted an exemption to religious organizations to employ persons "of a particular religion." The church argued that this exemption involved more than denominational affiliation but also allowed a religious organization to employ only those
persons whose conduct was consistent with church principles. The appeals court agreed, concluding that Congress wanted to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices. On the basis of this exemption, the court allowed the church to fire an employee who had publicly engaged in conduct regarded by the church as inconsistent with its religious purposes, i.e., remarriage. Ibid. It is noteworthy that Congress has not seen fit to grant such an exemption to private individuals engaged in a for-profit business, such as the defendants in this instant cases.

IV

AN AMENDED COMPLAINT WOULD STATE A VALID CLAIM OF DISCRIMINATION ON THE BASIS OF RELIGION IN VIOLATION OF THE STATE CIVIL RIGHTS ACT

The facts currently alleged in the Baiz complaint are sufficient to support a claim of discrimination on the basis of religion in violation of the Elliott Larsen Civil Rights Act. It alleges that defendants refused to rent to plaintiffs because they were unmarried and that defendants expressly stated that unmarried cohabitation is against their religious beliefs. Although plaintiffs alleged "marital status" discrimination as their theory of recovery and failed to allege that the landlords' conduct constituted discrimination on the basis of "religion," this defect can easily be remedied by amending the complaint. The McCready complaint can also be amended, first by adding a factual allegation that the defendants refused to rent to plaintiffs because their conduct did not conform to the defendants' religious beliefs,[21] and then by citing the prohibition against religious discrimination in the Civil Rights Act. Leave to amend should be granted for this purpose.

Article I, Section 2 of the Michigan Constitution declares that "No person shall be denied . . . the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion . . . . The legislature shall implement this section by appropriate legislation." 1963 Const., art I, § 2.

The state Civil Rights Act implements this constitutional provision by declaring that the "opportunity to obtain employment, housing and other real estate, and the full and equal utilization

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[21] By the allegations contained in their answers, the defendants themselves admit that their refusal to rent to plaintiffs was based on religion.

of public accommodations, public service, and educational facilities without discrimination because of religion . . . is recognized and declared to be a civil right." MCL 37.2102(1). The Civil Rights Act further implements the constitutional policy by prohibiting discrimination "on the basis of religion" in a real estate transaction. MCL 37.2502(1).

The Legislature did not specifically define what it meant by discrimination "on the basis of religion." When the state Civil Rights Act is silent on a definition, the state Supreme Court has looked to analogous federal case law as an aid in construing the state law. *Victorson v. Dept. of Treasury*, 439 Mich 131, 142; 482 NW2d 685, 689 (1992). As argued at considerable length above, under analogous federal law a business owner discriminates on the basis of religion when he takes adverse action against others because their lifestyle or conduct offends the business owner's religious beliefs. Michigan civil rights law should be interpreted in a similar manner.

Just as the employer in *Turic v. Holland Hospitality* was held to violate federal civil rights laws because "a religious test was established as a condition of employment," the defendants here have violated state civil rights law by establishing a religious test as a condition of housing. *Turic, supra*, 849 F Supp at 551. Laws that require transactions "without religious discrimination" implicitly prohibit the use of a "religious test" or qualification. *Snyder v. Charlotte Public School District*, 421 Mich 517, 537-538; 365 NW2d 151, 159-160 (1985). A ban against religious discrimination "prohibits the granting or denial of any right of benefit on the basis of a religious test." *Alexander. Bartlett*, 14 Mich App 177, 181; 165 NW2d 445, 447 (1969).

Public policy in Michigan clearly protects the right of every person, including a prospective renter, "to worship God according to the dictates of his own conscience" rather than the dictates of someone else's conscience. 1963 Const. art. I, § 4. The plaintiffs in these cases presumably acted

according to their own consciences when they decided to live together out of wedlock. They do not expect everyone to agree with their decision, but it is theirs to make, without suffering discrimination by a landlord who holds contrary beliefs.

Religion should play no part in business transactions between landlords and tenants since "[t]he civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief." 1963 Const. art. I, § 4. Refusing to rent to tenants because their presumed future conduct may offend the religious beliefs of the landlord certainly enlarges the rights of the landlord and diminishes the rights of the tenant on the basis of "religious belief." Not only is this generally contrary to clearly defined public policy, but it specifically constitutes discrimination on the basis of religion in violation of the Civil Rights Act.[22]

In *Michigan Department of Civil Rights v. General Motors Corporation*, 412 Mich 610; 317 NW2d 16 (1982), four members of the Supreme Court suggested that a business owner's decision to grant or deny benefits on the basis of religious considerations may violate the state Civil Rights Act's mandate barring discrimination because of religion. In addressing whether or not state law

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[22] Although resolution of the landlord's claim for a religious exemption is premature at this stage because there may be material facts in dispute on this issue (e.g., is the landlord's belief sincerely held), and because the lower courts never made any decision on this affirmative defense, case law in other jurisdictions has denied such exemptions. For example, just this year the Court of Appeals in Minnesota underscored the difference between a for-profit business and a non-profit religious organization, observing: "[T]he Minnesota Human Rights Act (Act) has been held constitutional on its face and as applied to private companies whose owners held strict religious beliefs. *State by McClure v. Sports and Health Club, Inc.*, 370 NW2d 844, 854 (Minn 1985); *State by Johnson v. Porter Farms Inc.*, 382 NW2d 543, 548 (Minn App 1986). Those cases did not involve an application of the Act to a church and are not controlling." *Geraci v. Eckankar*, 526 NW2d 391, 399 (Minn App 1995). The defendant in *Sports and Health Club* was held liable because he discriminated on the basis of both "marital status" and "religion." The club had refused to hire unmarried applicants who were living with someone out of wedlock because such conduct offended the club owner's religious beliefs. *Porter Farms* involved a farm owner who fired a farm hand for similar reasons. In both cases the owners were held in violation of the law and were denied exemptions under state and federal constitutional provisions protecting the free exercise of religion.

required a business owner to accommodate the religious beliefs of an employee, Justice Levin wrote in Part III of his concurring opinion:

> "Accommodation of one employee's religious practice may necessitate the transfer of another employee to a less desirable shift; solely because of their religions, one employee would be moved to a more desirable shift, and another employee would be moved to a less desirable shift. Such a reallocation of benefits because of religion may go beyond what is required by the FEPA and may indeed be inconsistent with its mandate barring discrimination because of religion." 412 Mich 610, 625.

Justice Williams wrote a separate opinion for himself and two others, and by agreeing with Justice Levin created a majority on this issue, stating: "[S]ince we agree with Part III of Justice Levin's opinion as far as it goes, we remand to the circuit court for evidentiary proceedings." Id., 412 Mich 610, 628. Justice Williams also noted that even though the legislature "has not attempted to outline what `discriminate' means in respect to religious practices," he concluded that the purpose of the prohibition of religious discrimination is to prevent discrimination "based on the legally irrelevant factor of religion." Id., at 628, 659.

Therefore, even if this Court were to decide adversely to plaintiffs on their marital status claim, plaintiffs should be allowed to amend their complaints to allege discrimination on the basis of religion. The case should then proceed to trial on all religious issues, including plaintiffs' statutory claims and defendants' alleged defenses under the free exercise clauses of the state and federal constitutions and the Religious Freedom Restoration Act.

V

AN AMENDED COMPLAINT WOULD STATE A VALID COMMON LAW CLAIM OF UNJUST DISCRIMINATION BY A PUBLIC ACCOMMODATION INASMUCH AS DEFENDANTS MADE RENTAL UNITS AVAILABLE TO THE PUBLIC THROUGH NEWSPAPER ADVERTISING

When a vacancy occurred in the residential unit on Lansing Avenue, defendants could have attempted to find prospective tenants through private channels, such as through their church or through their friends and acquaintances. However, they opened up the application process to members of the general public by placing an advertisement in the *Citizen Patriot*. By doing so, defendants subjected themselves to a common law prohibition against unjust discrimination. Therefore, even if refusal to rent to an unmarried couple does not constitute "marital status" discrimination under the Civil Rights Act, plaintiffs should be afforded an opportunity to amend their complaints to allege a claim of unjust discrimination under the common law of Michigan.

Under the state Constitution, the common law remains a viable source of legal protection in Michigan. 1963 Const., art. III, § 7. The passage of civil rights statutes has not replaced common law protections against unjust discrimination. Such statutes were intended to build upon existing nondiscrimination law, not to restrict or totally supplant it, and to add remedies, not limit them. *Pompey v. General Motors Corporation*, 385 Mich 537, 559; 189 NW2d 243, 254 (1971). As a result, the common law is available as a source of protection for consumers victimized by unjust discrimination even when civil rights statutes do not address a particular discriminatory business

practice. *Beech Grove Investment Co. v. Civil Rights Commission*, 380 Mich 405, 429-430; 157 NW2d 213, 224-225 (1968).

For more than a century now, Michigan common law has recognized a "remedy against any unjust discrimination to the citizen in all public places." *Ferguson v. Gies*, 82 Mich 358, 365; 46 NW 718, 720 (1890). The *Ferguson* case involved a restaurant that insisted on segregating black and white customers. The Supreme Court concluded: "When Gies undertook to conduct a public business, he did so subject to the requirement that the business be carried on without 'unjust discrimination.'" Ibid.

More recently, in *Beech Grove Investments, supra*, the Supreme Court held "there is a civil right to private housing . . . at common law . . . where, as in this case, that housing has been publicly offered for sale by one who is the business of selling housing to the public." 380 Mich 405, at 436. The court noted that the Beech Grove Investments was in business to make a profit and that the company held itself out to the public by placing advertisements in newspapers and placing signs on its properties. Ibid. The Court stressed that "[b]usinesses offering public accommodations may not pick and choose to whom those accommodations will be offered." Ibid.[23]

Plaintiffs in the cases at bench, "like Ferguson, in *Ferguson v. Gies, supra*, as [members] of the public [are] entitled to the same treatment and consideration as anyone else -- no better, but no worse; and [defendants], like Gies in the Ferguson case were obligated by reason of the public nature of their enterprise to treat all members of the public alike." 380 Mich 405, at 436. However, they

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[23] The common law cause of action is limited to businesses that hold their goods or services out to the public and then deal unfairly with consumers. In contrast, however, the right to be free from discrimination in private employment was not regarded as a civil right entitled to protection of the common law. *Pompey v. General Motors Corp.*, 385 Mich 537, 552; 189 NW2d 243, 251 (1971).

were not treated in this manner. Couples who were married were preferred and unmarried couples were excluded. This is really no different than a hotel or motel demanding to see a marriage license before providing accommodations to a man and a woman who want to share a room, or an inn refusing to provide a double bed to two adults of the same gender on the theory that such sleeping arrangements are restricted to married couples.

There can be no doubt that there is a "common law action for damages against a private proprietor of public accommodations." *Smith v. University of Detroit,* 145 Mich App 468, 476; 378 NW2d 511, 515 (1985). Since the common law cause of action of unjust discrimination applies to a broad spectrum of businesses, including hotels, motels, restaurants, and car rental companies, and since the common law applies to businesses that sell real estate, there is no reason in logic or public policy not to apply the same common law principles to landlords who publicly advertise vacant rental units.

"`Statutes, including those of recent origin, play a part in the formation of common law, and like court decisions that are not strictly analogous, sometimes point the way into other territory when the animating principle is used as a guide.'" *Beach Grove, supra*, 380 Mich 405, 429. The Civil Rights Act defines "public accommodation" in a very broad manner. "`Place of public accommodation' means a business . . . or institution of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public."

Certainly, the common law, which is more flexible than statutory law, should not give a more restrictive meaning to the term "public accommodation," so as to exclude businesses that advertise rental units, especially when persons selling residential properties as a business are bound by common

law standards of basic fairness and equality in dealing with the consuming public. Landlords who rent properties for a profit and who solicit the public to fill vacancies are also businesses involved in public accommodations.[24]

As the Michigan Supreme Court has gleaned from various legal treatises, the beauty of the common law is its ability to adapt to present societal conditions. In *Beech Grove Investment Co. supra,* 380 Mich 405, 429-430; 157 NW2d 213, 224-225, the Court observed:

> "'The common law does not consist of definite rules which are absolute, fixed, and immutable like the statute law, but it is a flexible body of principles which are designed to meet, and are susceptible of **adaptation to**, among other things, **new . . . public policies**, conditions, usages and practices, and **changes in mores**, trade commerce, inventions, and increasing knowledge, as the progress of society may require.'" (Emphasis added.)

The adaptation of the common law to current public policies should take into account the trend to expand protection against various forms of unjust discrimination. Statutory prohibitions once were limited to race, religion, color, and national origin. Over time, they have been expanded to include age, sex, disability, marital status, height and weight. What these statutory classifications have in common is the proscribing of the unjustness of making business decisions on the basis of personal subjective biases or group stereotypes rather than judging persons on the basis of their individual merits.

The common law prohibition of unjust discrimination against consumers is broad enough to apply to the situation presented in the cases at bench. Here, landlords ran an advertisement inviting

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[24] Other jurisdictions, like Michigan, have expanded the reach of public accommodations statutes from "common carriers . . . railroads, hotels, restaurants, theaters and the like, to include 'all business establishments of every kind whatsoever.'" *Marina Point Ltd. v. Wolfson*, 30 Cal 3d 721, 731; 640 P2d 115, 120 (1980). Landlords who rent residential units have been held to come within this broad statutory definition. Ibid. They should also fall within Michigan's broad common law definition of "public accommodations."

the public to apply for a vacant rental unit. As part of the consuming public in search of housing, plaintiffs responded to the ad. Instead of judging plaintiffs on their individual merits to determine whether they would be good tenants, the defendants imposed a religious test, branded all cohabiting couples as infidels unworthy of consideration, and rejected them out of hand. For all the defendants knew, the plaintiffs may have had better jobs, better references from previous landlords, and better credit ratings than many, if not most, married couples. Nonetheless, because they were a man and woman not married to each other, plaintiffs were automatically rejected. Such a business practice constitutes unjust discrimination under common law standards.

Michigan's common law should adapt to changes in mores regarding individual and family living arrangements. Recent data from the Census Bureau shows that the once dominant "Ozzie and Harriet" style of living is now only one of many types of household arrangements in Michigan.[25]

Nearly 45 percent of Michigan households do not contain a married couple.[26] On a statewide basis, 23.6 percent of Michigan households consist of one person living alone, 13 percent are single parents raising minor children, 5 percent are unmarried adults living together, and 2.9 percent involve other family living arrangements that do not include a married couple. Furthermore, on a per capita basis, about 39% of all adults in Michigan are not married.

In urban areas of the state, diversity in household composition is even more apparent. For example, only 41 percent of households in Jackson contain a married couple, with the variety listed

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[25] Official figures of the United States census are matters which this Court may take judicial notice. *In re Apportionment of the Michigan Legislature*, 377 Mich 396, 454; 140 NW2d 436, 459 (1966).

[26] Data regarding household and living arrangements has been taken from the 1990 Census of Population, "General Population Characteristics," Michigan, Tables 39 and 64 (1990 CP-1-24) and from "Social and Economic Characteristics," Michigan, Tables 21 and 170 (1990 CP-2-24). Both documents are published by the United States Department of Commerce, Bureau of the Census.

above accounting for the rest. In cities such as Detroit, Pontiac and Kalamazoo, unmarried households predominate, with married couples residing in only 29.7 percent, 37.3 percent, and 37.7 percent of the households, respectively.

For the common law to respect contemporary mores, it should protect the right of a single adult (whether living alone or as a single parent) to take on a roommate for economic, safety, or emotional reasons. If a landlord wants to impose numeric occupancy limits restricting the number of occupants, regardless of relationship, that's one thing. But, if two people are acceptable numerically, then the common law should protect a tenant's right to take on a roommate even if the two are not married to each other. Restricting joint occupancy to persons who are married to each other constitutes unjust discrimination if the unmarried tenants are otherwise qualified, using secular and objective business criteria.

The number and percentage of unmarried couple households has increased significantly over the years. According to the Census Bureau, "Today, there are 6 unmarried couples for every 100 married couples, compared with only 1 for every 100 in 1970."[27] Furthermore, under contemporary mores, unmarried cohabitation has become a normal part of the marital decision-making process for most couples.

According to a recent national survey, "Today, 60% of never-marrieds think it wise to live with one's partner before getting married."[28] One-quarter of all adults have cohabiting experience,

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[27] "Marital Status and Living Arrangements: March 1993," Current Population Reports (P20-478), Bureau of the Census, p. VIII.

[28] Barna Research Group Ltd., Family in America survey (Glendale, California: Barna Research Group, Ltd., 1992), as reported in "Unmarried America: How Singles are Changing and What it Means for the Church," aBarnaReport, 1993. Barna Research Group, Ltd. has become the nation's largest full-service (continued...)

as have half of all people who were recently married.[29] The Census Bureau estimates that about 60 percent of cohabiting couples eventually marry.[30] As one research company has summed it up, "cohabitation is becoming a new stage of courtship."[31]

Each year, about 71,000 couples in Michigan get married.[32] If half of these couples cohabited beforehand, as research data suggests, then more than 35,000 couples are at risk for housing discrimination each year simply because they are cohabiting out of wedlock. The common law should protect these couples from unjust discrimination by landlords who impose personal and subjective religious tests as a condition of tenancy.

About 35 percent of unmarried-couple households include children.[33] The common law should protect children living in such households from housing discrimination based on the unmarried status of their parents, that is, unless secular law will enforce the biblical admonition that "the sins of the parents shall be visited upon their children."

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[28](...continued)
marketing research company dedicated to the needs of the Christian community.

[29] Bumpass, Larry and James Sweet, "Young Adults' Views of Marriage, Cohabitation, and Family," National Survey of Families and Households Working Paper No. 33 (Madison Wisconsin: Center for Demography and Ecology, University of Wisconsin), p. 1. Bumpass and his colleagues are reputable researchers who have been cited as authoritative sources on the issue of unmarried cohabitation by the United States Census Bureau. See: "Marital Status and Living Arrangements: March 1993," supra, at p. VII; "Studies in Marriage and the Family," Current Population Reports, Series P-23, No. 162 (Bureau of the Census, 1989), at p. 9, 11, 24, 36.

[30] "Studies in Marriage and the Family," Current Population Reports, Series P-23, No. 162 (Bureau of the Census, 1989), at p. 9.

[31] Unmarried America, supra, at p. 50.

[32] Michigan Health Statistics: 1993, Office of the State Registrar, Department of Public Health, p. 167, as confirmed by telephone with the Statistical Information Office [(517) 335-8708].

[33] "Marital Status and Living Arrangements: 1993," supra, at p. IX; Statistical Abstract of the United States 1992, p. 45.

Furthermore, the common law should take into account the disparate impact that would occur to racial minorities if landlords are allowed to veto the choice of an unmarried tenant to take on a roommate simply because the tenant and the roommate are not married to each other. "The proportion never married is higher for Blacks than for Whites" and "Persons of Hispanic origin also [have] large proportions never married."[34] Also, "Black children are less likely than White children to live with two parents. In 1989, 38 percent of Black children lived with two parents, compared with 80 percent of White children."[35] "Compared with children living with two parents, children living with one parent are more likely to have a parent who has low income, and who is less educated, unemployed, and

rents their home." Id., at p. 3.

Considering contemporary mores, strong public policies against discrimination, the adverse impact of marital status discrimination on children living in unmarried households, and the disparate impact of such discrimination on racial minorities, the common law of Michigan should recognize a cause of action against landlords for unjust discrimination of the type involved in these cases. Plaintiffs should be allowed to amend their complaints to allege such a theory of recovery.

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[34] "Studies in Marriage and the Family," supra, at p. 2.

[35] "Marital Status and Living Arrangements: March 1989," Population Characteristics, Series P-20, No. 445, Bureau of the Census, p. 2.

CONCLUSION

For the foregoing reasons, the judgment granting summary disposition in favor of defendants should be reversed because plaintiffs stated a valid cause of action for marital status discrimination. However, even if this Court were to conclude otherwise, plaintiffs should be afforded an opportunity to amend their complaints to allege three additional theories of recovery, i.e., religious discrimination under federal law, religious discrimination under state law, and a common law cause of action for unjust discrimination.

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