Nos. 97-35220, 97-35221

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEVIN THOMAS and JOYCE BAKER

Plaintiffs-Appellees

v.

ANCHORAGE EQUAL RIGHTS COMMISSION; MUNICIPALITY OF ANCHORAGE; AND PAULA HALEY IN HER OFFICIAL CAPACITY AS THE EXECUTIVE DIRECTOR OF THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS

Defendants-Appellants

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS AND URGING REVERSAL

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether the provisions of Alaska and Anchorage law prohibiting discrimination in housing on the basis of marital status are "generally applicable" within the meaning of Employment Division v. Smith, 494 U.S. 872 (1990).

2. Accepting the panel's understanding of the "hybrid" rights exception of Smith, whether plaintiffs made a "colorable claim" that a provision of a fair housing law prohibiting discrimination in leasing constitutes a "regulatory taking" of their rental property.

3. Accepting the panel's understanding of the "hybrid" rights exception of Smith, whether plaintiffs made a "colorable claim" that provisions of a fair housing statute infringe on their right to free speech by prohibiting (1) lying about the availability of space for rent; and (2) making any communication "with respect to the use, sale, lease or rental of real property" that indicates any preference or discrimination based on marital status.

STATEMENT OF INTEREST

"It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. 3601. The Attorney General is responsible, in conjunction with private persons and the Department of Housing and Urban Development, for the enforcement of the Fair Housing Act, 42 U.S.C. 3601 et seq., which prohibits discrimination in the selling or renting of any dwelling in the United States on the basis of race, color, religion, sex, familial status, national origin, or disability. 42 U.S.C. 3604(a) and (f). In furtherance of this prohibition, the statute also deems it unlawful to "make, print, or publish * * * any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on" any proscribed ground, and to "represent to any person because of [these grounds] that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available." 42 U.S.C. 3604(c) and

(d). (We have reprinted the relevant provisions of the Fair Housing Act and their state and local analogues as an addendum to this brief).

The panel's holdings -- that a law prohibiting discrimination by landlords may constitute a "regulatory taking" and that provisions prohibiting discriminatory statements in the course of a rental transaction may violate the Free Speech Clause -- are not limited to the marital status provisions of the local laws at issue. Instead, these holdings, if adopted by the en banc court, could be directly applied to federal Fair Housing Act cases. The implications of the panel opinion are that landlords could make out "colorable" claims that being forced to rent to African-Americans or persons with disabilities constitutes a compensable taking, or that lying to a person about the availability of a room for rent is protected by the First Amendment. Such holdings would directly interfere with the federal interest in assuring a housing market free of discrimination.

STATEMENT OF THE CASE

Two owners of residential rental property in Anchorage, Alaska, hold religiously-based beliefs that cohabitation between unmarried individuals constitutes a sin. They thus refuse to rent their property to unmarried couples who plan to live together. They have previously declined to rent to unmarried couples and wish to continue to turn away prospective tenants on this ground. This violates the fair housing provisions of the

State of Alaska and the City of Anchorage that prohibit discrimination on the basis of "marital status." See Foreman v. Anchorage Equal Rights Comm'n, 779 P.2d 1199, 1202 (Alaska 1989).

The landlords filed separate lawsuits in federal court claiming that enforcement of the antidiscrimination laws against them would violate the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb et seq. The district court declared that the application of the laws to the landlords violated their rights under both the Free Exercise Clause and RFRA, and permanently enjoined both the state and city governments from enforcing the laws against the landlords.

A divided panel of this Court affirmed. It held that strict scrutiny was appropriate for each of the challenged provisions because the landlords' Free Exercise Clause claims were the "hybrid situations" described in Employment Division v. Smith, 494 U.S. 872 (1990); that a number of provisions of the laws substantially burdened the landlords' religious beliefs; and that the governments' interests in prohibiting marital status discrimination in housing were not sufficiently compelling to justify denying religious exemptions to the plaintiffs. It thus affirmed the district court's injunction.[1/]

[1/] The panel correctly found (165 F.3d at 697 n.4) that the landlords' claims under RFRA were no longer viable, as the Supreme Court had declared the Act unconstitutional as applied to state and local governments in City of Boerne v. Flores, 521 U.S. 507 (1997). We note, however, that the United States is governed by, and supports the continuing constitutionality of, RFRA as

(continued...)

SUMMARY OF ARGUMENT

The landlords have not contended they can prevail on their Free Exercise Clause claims unless this Court applies strict scrutiny. In Employment Division v. Smith, 494 U.S. 872 (1990), the Court established the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. The Court noted, however, an exception to this rule for certain "hybrid situation[s]" involving the Free Exercise Clause in conjunction with other constitutional protections.

[1/](...continued)
applied to federal statutes. See In re Young, 141 F.3d 854, 858-860 (8th Cir.), cert. denied, 119 S. Ct. 43 (1998); Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 832 (9th Cir. 1999). RFRA thus prohibits federal laws, such as the Fair Housing Act, from being applied so as to "substantially burden a person's exercise of religion" unless the application of that burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000bb-1(a) and (b).

For the reasons discussed in this brief, we do not believe that strict scrutiny should be applied in these cases. Accordingly, this brief does not address the questions raised by the panel's application of strict scrutiny; in particular, we will not address the panel's holding that application of the state and local antidiscrimination statutes would substantially burden plaintiffs' religious exercise and that the state and local governments do not have a compelling interest that would justify the denial of religious exemptions to such statutes. We note, however, that courts often have held that the federal government's interest in eradicating forms of discrimination is sufficiently compelling to justify denial of religious exemptions. See, e.g., Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983); Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1398-1399 (4th Cir.), cert. denied, 498 U.S. 846 (1990); EEOC v. Fremont Christian Sch., 781 F.2d 1362, 1368-1369 (9th Cir. 1986).

The landlords never have challenged the laws' neutrality, and we agree with the panel that the single exception in each law does not deprive either law of its generally-applicable nature. Assuming, arguendo, that the panel was correct in holding that plaintiffs need only make a "colorable" showing that some other constitutional provision has been violated in order to constitute a "hybrid situation," strict scrutiny is still not appropriate in these cases. The landlords have no "colorable" claim under the Takings Clause. The Supreme Court made clear in Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964), that nondiscrimination laws do not constitute takings of property. That holding is confirmed by application of the traditional three-factor analysis used in assessing regulatory takings. Furthermore, because the Takings Clause is not violated until a property owner has sought and been denied "just compensation," the landlords have not shown an essential element of a takings claim.

Nor do the landlords have "colorable" claims under the Free Speech Clause to challenge the state and local provisions analogous to those in the federal Fair Housing Act. Properly construed, these analogous provisions do not regulate political speech or innocuous conversations. They simply prohibit lying or other speech tightly intertwined with illegal discrimination in housing. That the landlords may have religious motives for such speech does not change its constitutional character. So long as the government may prohibit the underlying discriminatory

conduct, it may prohibit speech that signals to prospective tenants that the landlords are likely to show an illegal preference in their housing decisions. Such speech is not entitled to heightened constitutional protection and, therefore, none of these provisions presents a "colorable" free speech claim. Without such "colorable" claims, there is no basis for this Court to apply strict scrutiny, and the district court's injunction should be reversed.

ARGUMENT

THE STATE AND LOCAL PROVISIONS REGARDING MARITAL STATUS DISCRIMINATION IN HOUSING ARE NOT SUBJECT TO STRICT SCRUTINY

As we understand the posture of these cases, the landlords have not contended on appeal that the provisions of the statutes they are challenging can be declared unconstitutional under rational-basis review. Thus, the landlords cannot prevail unless this Court reviews a given provision under strict scrutiny.

In Employment Division v. Smith, 494 U.S. 872 (1990), the Court "establish[ed] the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993). The Court in Smith also noted that it had applied a form of strict scrutiny to neutral, generally applicable laws in certain "hybrid situation[s]" involving "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the

rights of parents * * * to direct the education of their children." 494 U.S. at 882, 881 (citations omitted).

Before the panel, the landlords argued both that the laws in question were not generally applicable, and that, in any event, these cases involve "hybrid situations." The provisions in question, however, are generally applicable, and the provisions in these cases that are analogous to federal law (i.e., Alaska Stat. § 18.80.240(1) and (5); Anchorage Mun. Code 5.20.020(A), (E) and (G)) do not involve "hybrid situation[s]." Thus, strict scrutiny is not appropriate for any of these provisions.

C. The Provisions Are Neutral And Generally Applicable

If a law substantially burdening religious exercise is not "neutral" and "generally applicable," then strict scrutiny is appropriate in a Free Exercise challenge to that application of the law. See Lukumi, 508 U.S. at 531-532. The landlords did not challenge the statutes' neutrality below. Haley E.R. 99 ("no dispute" that laws were neutral). Although they also did not challenge the general applicability of the statutes in the district court (Appellees' Panel Br. 40 n.26), the landlords argued to the panel (id. at 39-43) that each statute's single exception denied it general applicability.[2/]

[2/] The Alaska statute permits landlords to refuse to rent on the basis of marital status for "housing for 'singles' or 'married couples' only." Alaska Stat. § 18.80.240(1). The Anchorage ordinance excepts owners who rent space in "individual home[s] wherein the renter * * * would share common living areas with the owner." Anchorage Mun. Code 5.20.020.

But the existence of a single exception does not, in and of itself, deprive a law of its general applicability. In Smith, the criminal law at issue prohibited possession of a "controlled substance" unless "the substance has been prescribed by a medical practitioner." 494 U.S. at 874. Similarly, the Court in Smith (id. at 880) characterized as "generally applicable" the Social Security tax upheld in light of a Free Exercise challenge in United States v. Lee, 455 U.S. 252 (1982), despite the fact that that statute excepted a variety of employer-employee relationships (such as newspaper deliverers under 18, high level government officials, sharecroppers, children working for a parent, and foreign agricultural workers) from its tax. See 26 U.S.C. 3121(b)(1)-(b)(21).

As in Lukumi, there is no need in these cases to "define with precision the standard used to evaluate whether a prohibition is of general application." 508 U.S. at 543. It is enough to say that, as in Smith, the single exception found in each of the statutes at issue here, which do not disfavor religious claims to an exemption compared to analogous secular claims, cannot deprive a statute of general applicability. We agree with the district court, see Haley E.R. 99, the panel, see 165 F.3d at 701-702, and the Alaska Supreme Court, see Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 280 (Alaska), cert. denied, 513 U.S. 979 (1994), that the statutes are "generally applicable" as that term was used in Smith and Lukumi. Thus, absent a "hybrid situation," no heightened scrutiny is warranted.

B. There Are No "Colorable Claims" That Would Make This A "Hybrid Situation" Warranting Strict Scrutiny

The panel parsed the relevant Free Exercise Clause cases and determined that in order to give meaning to the "hybrid situation" language of Smith, strict scrutiny would be triggered if a plaintiff made out a "colorable claim" that a companion right had been infringed. The panel equated this standard with "the traditional 'likelihood of success on the merits' test that governs the issuance of preliminary injunctive relief." 165 F.3d at 706. The panel concluded that "[i]n order to trigger strict scrutiny, a hybrid-rights plaintiff must show a 'fair probability' -- a 'likelihood' -- of success on the merits of his companion claim." Ibid. We do not address the difficult question whether the panel was correct that a "colorable" companion claim is sufficient to trigger the "hybrid situation" identified in Smith. Even applying the panel's standard, both the Takings Clause and the Free Speech Clause claims must fail as to those provisions that have federal law analogues because those claims are not "colorable."

1. There Is No "Colorable" Takings Clause Claim

The panel held that the landlords had made out a "colorable" claim that the nondiscrimination prohibitions violated the Takings Clause, which provides that "private property [shall not] be taken for public use, without just compensation." The provisions at issue make it unlawful for property owners to "[r]efuse to sell, lease, or rent the real property to a person

because of * * * marital status." Alaska Stat. § 18.80.240(1); Anchorage Mun. Code 5.20.020(A).

a. The panel's holding -- which could dramatically alter the application of numerous federal and state housing laws -- directly conflicts with Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964). Heart of Atlanta rejected a Takings Clause challenge to Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a et seq., which prohibits "place[s] of public accommodation," including "any inn, hotel, motel, or other establishment which provides lodging to transient guests," 42 U.S.C. 2000a(b)(1), from refusing to rent rooms on the basis of race. A motel owner claimed that forcing him to rent rooms to black persons would, inter alia, constitute a taking, arguing "[t]he right to use one's property as that owner sees fit is a property right and the taking of that right is a taking of property." (We have attached as an addendum the Takings Clause argument made by the plaintiff in that case.)

The Court rejected the argument, stating that it did not find "any merit in the claim" as the "cases are to the contrary." 379 U.S. at 261; see also id. at 277 (Black, J., concurring) ("A regulation such as that found in Title II does not even come close to being a 'taking' in the constitutional sense."). This holding applies to "regulatory" takings claims as well as to "physical" takings claims.[3/] United States v. Central Eureka

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[3/] There are two distinct classes of takings. A physical taking occurs when the government authorizes "a physical

(continued...)

Mining Co., 357 U.S. 155 (1958), one of three takings cases cited by the majority in Heart of Atlanta, and the only one cited by the concurrence, was a regulatory takings case in which the Court reviewed whether a statute "so diminish[ed] the value of property as to constitute a taking." Id. at 168; see also Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 440 (1982) (citing Heart of Atlanta as a case in which the Court "affirmed that States have broad power to regulate * * * the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails," and contrasting it with cases involving "permanent occupation of the landlord's property by a third party").

There have been a number of developments in takings doctrine since the Court decided Heart of Atlanta. None, as we discuss below, would permit the landlords to prevail in these cases. In any event, this Court is bound to follow Heart of Atlanta because it is directly on point -- prohibiting discrimination in renting rooms does not constitute a taking. "[I]f a precedent of [the Supreme] Court has direct application in a case * * *, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." Agostini v. Felton, 521 U.S. 203, 237 (1997);

[3/](...continued)
occupation of property (or actually takes title);" when the government "merely regulates the use of property," whether a "regulatory" taking has occurred "entails complex factual assessments of the purposes and economic effects of government actions." Yee v. City of Escondido, 503 U.S. 519, 522-523, 527 (1992).

see also Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533, 535 (1983) (per curiam). As the question was definitively resolved by the Supreme Court in Heart of Atlanta, the panel erred in suggesting that the landlords stated a "colorable" takings claim.[4/]

b. Even apart from the holding in Heart of Atlanta, the panel simply erred in holding that the landlords had articulated a "colorable" takings claim. As the panel acknowledged (165 F.3d at 708), the Supreme Court's decision in Yee v. City of Escondido, 503 U.S. 519 (1992), precludes any argument that the laws involve a physical taking. The Court explained that when landowners "voluntarily open their property to occupation by others, [they] cannot assert a per se right to compensation based on their inability to exclude particular individuals." Id. at 531; see also Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 82-83 (1980).

The panel held (165 F.3d at 708-709), nonetheless, that the landlords had made out a "colorable" claim of a regulatory taking because of the nature of the intrusion. In order to constitute a

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[4/] Before Heart of Atlanta, state courts uniformly rejected claims that provisions prohibiting property owners from discriminating in the sale and rental of property constituted takings. See New York State Comm'n Against Discrimination v. Pelham Hall Apts., 170 N.Y.S.2d 750, 758-759 (N.Y. Sup. Ct. 1958); Colorado Anti-Discrimination Comm'n v. Case, 380 P.2d 34, 42 (Colo. 1962); Massachusetts Comm'n Against Discrimination v. Colangelo, 182 N.E.2d 595, 598 (Mass. 1962); Porter v. City of Oberlin, 209 N.E.2d 629, 634 (Ohio Ct. App. 1964), aff'd in part, 205 N.E.2d 363 (Ohio 1965). Since Heart of Atlanta, it appears that no court has addressed the issue. Perhaps this is because it is generally accepted that such claims are meritless.

regulatory taking, three factors have "particular significance: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225 (1986) (internal quotation marks omitted). The landlords did not show (and never even claimed) either diminution in value or interference with expectations, and the panel properly concluded (165 F.3d at 708) that it was very unlikely that they could ever do so.

In cases, like these appeals, that do not involve physical takings, the absence of both economic diminution and interference with reasonable, investment-backed expectations precludes a takings claim. For the Supreme Court has held that "mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." Concrete Pipe & Prods. v. Construction Laborers Pension Trust, 508 U.S. 602, 644-645 (1993). At the very least, it follows that diminution in value is a necessary component of any regulatory takings claim. Similarly, "the claimant must show that the government's regulatory restraint interfered with his investment-backed expectations" in order "[f]or any regulatory takings claim to succeed." Good v. United States, 189 F.3d 1355, 1360 (Fed. Cir. 1999). The landlords have neither alleged nor shown that they could satisfy either of these requirements, and thus have not made out a "colorable" claim.

Moreover, at least one of the landlords in these cases purchased the property after Alaska had prohibited discrimination on the basis of marital status in 1975.[5/] This means that the right to exclude persons on that basis was not one of the "bundle of sticks" that he purchased from the previous owner. The laws, therefore, did not "take" anything from him. See Good, 189 F.3d at 1361; Dodd v. Hood River County, 136 F.3d 1219, 1230 (9th Cir.) (proper inquiry is "what, if any, 'investment-backed expectations' the Dodds may have had when they purchased the 40-acre parcel" in light of "Oregon state law at the time"), cert. denied, 119 S. Ct. 278 (1998); United States Olympic Comm. v. Intelicense Corp., 737 F.2d 263, 267-268 (2d Cir.), cert. denied, 469 U.S. 982 (1984); cf. Carson Harbor Village Ltd. v. City of Carson, 37 F.3d 468, 476 (9th Cir. 1994) (applying rule to facial takings claim). This is consistent with the basic economic underpinnings of the Takings Clause. If a restriction was imposed before the land was transferred, then the purchase price incorporated any effects the regulation had on the value of the property. In essence, when the current landowner purchased

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[5/] Thomas entered the residential landlord business in 1986. Haley E.R. 2 (Thomas alleged that he has been a "residential landlord for a period of nine years" as of 1995). The dissent characterized this as the time he "acquired his residential properties." 165 F.3d at 724. The briefs filed in response to the petition for rehearing en banc do not contest, and indeed appear to agree with, the dissent's characterization. See Opp. to Pet. for Reh'g En Banc 14 (adopting the Pacific Legal Foundation's arguments); Amicus Br. of Pacific Legal Foundation in Opp. to Pet. for Reh'g En Banc 13 (explaining that "the exact issue raised by the facts here" was raised in another case in which "the Plaintiffs purchased their homes after the federal government enacted the challenged statutes").

the property, he did not pay for a right to exclude people on the basis of marital status. See Good, 189 F.3d at 1361.

c. There is at least one other bar to the landlords' takings claim. The Supreme Court has made clear that the Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power. This basic understanding of the [Fifth] Amendment makes clear that it is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 314-315 (1987) (citations omitted). Thus, government action does not violate the Takings Clause unless property is taken and the government denies compensation. "[N]o constitutional violation occurs until just compensation has been denied." Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 195 n.13 (1985).

While often referred to as a "ripeness requirement," this "hurdle stems from the Fifth Amendment's proviso that only takings without 'just compensation' infringe that Amendment." Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 734 (1997). Here, there has been no allegation that the landlords have sought, much less been denied, compensation. Nor is there any indication that such compensation, if appropriate, would not have

been available in Alaska's courts.[6/] Until the landlords have invoked the applicable state procedures and been denied "just compensation," there cannot be a cognizable federal takings claim. "Had the [government] paid for the property or had an adequate postdeprivation remedy been available, [the property owner] would have suffered no constitutional injury from the taking alone." City of Monterey v. Del Monte Dunes, 119 S. Ct. 1624, 1639 (1999); accord Williamson County, 473 U.S. at 195.[7/]

The panel's holding that the landlords had made a "colorable" Takings Clause claim was error. As there was nothing to "hybridize" the landlords' challenge to Section 18.80.240(1) of the Alaska Statutes and Section 5.20.020(A) of the Anchorage Municipal Code, the provisions prohibiting marital status

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[6/] Consistent with First English, Alaska permits suits against it and its municipalities for regulatory takings. See Cannone v. Noey, 867 P.2d 797 (Alaska 1994); Zerbetz v. Municipality of Anchorage, 856 P.2d 777 (Alaska 1993); see also Richardson v. City & County of Honolulu, 124 F.3d 1150, 1161 (9th Cir. 1997) (a landowner's "burden of showing that complying with the state's procedures would be futile is a heavy one"), cert. denied, 119 S. Ct. 168 (1998).

[7/] This Court has recognized an exception to this rule for "facial" takings challenges alleging that a statute does not "substantially further" legitimate state interests. Richardson, 124 F.3d at 1165. But the landlords themselves have acknowledged that their claim is an as-applied challenge, not a facial one. See Opp. to Pet. for Reh'g En Banc 14 (adopting the Pacific Legal Foundation's arguments); Amicus Br. of Pacific Legal Foundation in Opp. to Pet. for Reh'g En Banc 17 ("this case involves an 'as-applied' challenge"). Nor did the landlords challenge these statutes as failing to further legitimate interests. Rather, they relied on cases that they described as recognizing "the 'right to exclude' as a constitutionally protected property interest, such that its forced relinquishment must be accompanied by compensation." Appellees' Panel Br. 52 (emphasis added).

discrimination in leasing property, strict scrutiny is not appropriate for these provisions.[8/]

2. There Are No "Colorable" Free Speech Clause Claims For Those Provisions That Have Analogues In The Federal Fair Housing Act

The panel properly did not rely on the Free Speech Clause claims to "hybridize" a challenge to the principal prohibitions at issue here -- those that prohibit plaintiffs from discriminating in the rental of property. Instead, the panel relied on the Free Speech Clause claims to trigger strict scrutiny for three other distinct provisions of the statutes. The free speech claim was not an alternative ground for "hybridizing" the prohibitions on discrimination in the actual renting of property discussed above, but a separate holding to "hybridize" the landlords' challenges to the laws' speech-related provisions.

The Free Speech Clause does not protect speech relating to illegal commercial activity. See 44 Liquormart, Inc. v. Rhode

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[8/] These cases do not raise, and thus we do not address, whether the application of a nondiscrimination law to owners renting out part of the home that they live in might implicate some other constitutional right. These landlords only rent out houses in which they are not residing. Haley E.R. 31-32 (Joyce Baker), 66 (Thomas). Moreover, Anchorage law expressly excludes from its coverage an "individual home wherein the renter * * * would share common living areas with the owner," Anchorage Mun. Code 5.20.020, and the Commission for Human Rights has created by regulation a similar exemption to the state law, see 6 Alaska Admin. Code 30.990(d). Further exemptions may be sought by petitioning for amendments to the regulations. See Alaska Stat. § 44.62.230; Anchorage Mun. Code 3.40.035; cf. Haley E.R. 48 (defendant Haley avers that the coverage "issues raised by the Bakers and Kevin Thomas involve policy issues that must be determined by the commissioners").

Island, 517 U.S. 484, 497 n.7 (1996) ("[T]he First Amendment does not protect commercial speech about unlawful activities."). And, in particular, the government may prohibit commercial speech that "signals" that the speaker is likely to engage in unlawful conduct in the underlying transaction. See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388-389 (1973). The provisions found presumptively unconstitutional by the panel that are analogous to the federal proscriptions are tightly intertwined with the underlying prohibition on discrimination in housing. None present a "colorable" free speech claim.

a. The first pair of provisions state that it is unlawful for the "owner * * * or other person having the right to sell, lease or rent * * * real property * * * to represent to a person that real property is not available for inspection, sale, rental, or lease when in fact it is so available * * * because of the * * * marital status * * * of that person or of any person associated with that person." Alaska Stat. § 18.80.240(5); Anchorage Mun. Code 5.20.020(E). They are virtually identical to a provision of the Fair Housing Act that makes such misrepresentations unlawful when done "because of race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. 3604(d). Like their federal counterpart, the state and local provisions simply "confer[] on all 'persons' a legal right to truthful information about available housing." Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982).

First, no claim challenging the constitutionality of those provisions is properly before this Court. The landlords did not show (or even allege) that they have violated this provision or ever will. Their affidavits make clear that they "are honest with unmarried couples as to why we don't rent to them." Haley E.R. 33 (Joyce Baker), 66 (Thomas). There is no indication that these landlords falsely "represent to a person that real property is not available * * * when in fact it is so available," or that they wish to lie to applicants. They, therefore, have no standing to challenge these provisions.

In any event, prohibiting landlords from lying to prospective tenants is not constitutionally problematic. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) ("there is no constitutional value in false statements of fact"); Bryson v. United States, 243 F.2d 837, 839 (9th Cir. 1956) (individual "had no constitutional right to lie"), cert. denied, 355 U.S. 817 (1957); Gates v. City of Dallas, 729 F.2d 343, 346 (5th Cir. 1984). Any other result would draw into doubt provisions prohibiting perjury and fraud, statutes that have never been perceived to present First Amendment concerns. See Donaldson v. Read Magazine, Inc., 333 U.S. 178, 189-192 (1948); Rice v. Paladin Enters., Inc., 128 F.3d 233, 244 (4th Cir. 1997), cert. denied, 523 U.S. 1074 (1998). There is thus no "colorable" free speech claim relating to these provisions.

b. The second provision challenged states that it is unlawful for the "owner * * * or other person having the right to sell, lease, rent or advertise real property to * * * [c]irculate, issue or display, make, print or publish * * * any communication, sign, notice, statement or advertisement with respect to the use, sale, lease or rental of real property that indicates any preference, limitation, specification or discrimination based on * * * marital status." Anchorage Mun. Code 5.20.020(G). Alaska has a similar provision, but it does not extend to marital status. See Alaska Stat. § 18.80.240(7). The Anchorage Ordinance is similar, but not identical, to the prohibition in 42 U.S.C. 3604(c).

It is not clear exactly what speech the landlords claim to have made (or wish to make) that violates this provision. They made no allegations in their complaints that this provision imposes a substantial burden on their religious exercise; the allegations focused only on the effect of the underlying nondiscrimination prohibition. In their affidavits, they stated that they "never hide, conceal, or lie about our Christian beliefs regarding cohabitation, and we are honest with unmarried couples as to why we don't rent to them. * * * We also believe it would be wrong to hide our Christian beliefs, since we believe that the Lord Jesus desires us to stand up and be recognized as his children and followers." Haley E.R. 33 (Joyce Baker), 66 (Thomas).

The landlords argued (Appellees' Panel Br. 46-48) that this provision prohibits them from sharing their beliefs regarding renting to unmarried couples with their pastor or friends, or petitioning the legislature for a change in the law. While there is no definitive judicial construction of this ordinance,[9/] Anchorage has argued that this provision should be construed in light of the First Amendment to apply only to commercial speech, see Anchorage Panel Reply Br. 7, and should be read only to apply to "rental signs or advertising," Anchorage Panel Br. 17, or "in the course of discussing or advertising the rental of apartments to prospective residents." Haley Pet. for Reh'g and Suggestion for Reh'g En Banc 11.[10/] See Frisby v. Schultz, 487 U.S. 474, 483-484 (1988) (federal court must consider any limiting construction proposed by counsel for government in briefs or at oral argument). Furthermore, Alaska courts are "willing to narrowly construe a statute in order to save it from a first amendment challenge," so long as the narrower reading is a "reasonable construction." Bonjour v. Bonjour, 592 P.2d 1233, 1237 n.7, 1238 (Alaska 1979).

[9/] Unlike the underlying prohibition on discrimination, which has been the subject of two court cases and a pending administrative complaint (165 F.3d at 698), there is no evidence in the record or in any judicial opinion that this provision has ever been enforced, much less that it has been enforced in relation to statements regarding marital status discrimination.

[10/] In their petitions for rehearing en banc, the governmental defendants divided discussion of the "colorable" claims identified by the panel: Anchorage addressed only the Takings Clause and Haley primarily addressed the Free Speech Clause. It is thus fair to assume that the views in Haley's brief about the scope of this provision reflect the views of Anchorage.

Given that the law is targeted only at the "owner" and other persons responsible for the rental of the property, it is fair to read the language "with respect to the * * * rental of real property" to mean, as defendants suggest and the dissent would have held (165 F.3d at 726), that the communication must be to tenants (prospective or actual) with respect to the rental of the owner's real property. The hypotheticals raised in the landlords' brief about conversations with friends, pastors, and legislators are, on this reading, outside the scope of the Anchorage provision, as are public expressions of opposition to the law itself. This is consistent with interpretations of the prohibition in 42 U.S.C. 3604(c). See United States v. Hunter, 459 F.2d 205, 212 n.9 (4th Cir.) (Fair Housing Act does not prohibit criticism of the statute or expression of opinions in public fora), cert. denied, 409 U.S. 934 (1972); United States v. Northside Realty Assocs., Inc., 474 F.2d 1164, 1170-1171 (5th Cir. 1973) (same); cf. 6 Alaska Admin. Code 30.910(b) ("relevant federal case law" is "instructive, but not binding" in determining meaning of state nondiscrimination law).

So construed, the provision is clearly constitutional. See Frisby, 487 U.S. at 483 ("statutes will be interpreted to avoid constitutional difficulties"). We start with the premise that, for the reasons given in Part B.1, supra, the landlords' challenge to the underlying discrimination provisions cannot be sustained. Therefore, discrimination on the basis of marital status in housing is illegal in Anchorage. It follows that

offers or threats to engage in illegal activity, as well as statements and advertisements to prospective tenants that "signal[] that the [landlords] were likely to show an illegal * * * preference" in leasing can themselves be banned without trenching on the Free Speech Clause. Pittsburgh Press, 413 U.S. at 388-389; see also Village of Hoffman Estates v. Flipside, 455 U.S. 489, 496 (1982) ("government may regulate or ban entirely" speech "proposing an illegal transaction"); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 646 n.12 (1985) ("advertisements * * * may be forbidden because they propose an 'illegal transaction'"). For this reason, "no court has ever held that a notice, statement, or advertisement otherwise unlawful under § 3604(c) [of the Fair Housing Act] is protected by the first amendment." Robert G. Schwemm, Housing Discrimination § 15.4(1) (1990).

The speech the landlords have engaged in, informing prospective tenants that they are unwelcome because of their marital status, is simply language furthering the illegal conduct of discrimination. In making this assessment, it is important to consider the relationship of the speaker and the listener. See NLRB v. Gissel Packing Co., 395 U.S. 575, 617-618 (1969). When the context is statements of preference made during the course of the potential formation of a landlord-tenant relationship, a landlord telling a prospective tenant that he prefers not to rent to unmarried couples has the same effect on the relationship as using speech to refuse to rent to them. Such statements

"signal[] that the [speakers] were likely to show an illegal * * * preference in their [rental] decisions. Any First Amendment interest which might be served by [the speech] and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the [underlying] commercial activity itself is illegal and the restriction on [speech] is incidental to a valid limitation on economic activity." Pittsburgh Press, 413 U.S. at 389.[11/]

The panel suggested (165 F.3d at 711) that the fact that the landlords' statements are religiously motivated makes it "religious" speech, which in turn is entitled to a higher level of constitutional protection. Insofar as the panel's analysis is premised on the notion that religious speech is entitled to greater protection than nonreligious speech under the Free Speech

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[11/] Subsequent to Pittsburgh Press, the Court has taken a broader view about the protection to which "commercial speech" is entitled, so long as the underlying commercial activity is legal. Thus, in Linmark Associates v. Township of Willingboro, 431 U.S. 85 (1977), for example, the Court held that a locality could not prohibit "For Sale" signs in front of properties in order to stem white flight. These appeals are different. While the Court in Linmark acknowledged that the government was furthering an important governmental objective in attempting to assure racially integrated housing, there was no indication that the underlying conduct that the speech was furthering (i.e., the sale of homes by white homeowners) was itself illegal, unlike the conduct that the speech in these cases directly "signals." Moreover, the landlords in these cases make statements about their preferences directly to the prospective tenants while refusing to engage in the very commercial transaction at issue. See Haley E.R. 33 (Joyce Baker), 66 (Thomas). As then-Judge Kennedy has explained, "the First Amendment is quite irrelevant if the intent of the actor and the objective meaning of the words used are so close in time and purpose to a substantive evil as to become part of the ultimate crime itself." United States v. Freeman, 761 F.2d 549, 552 (9th Cir. 1985), cert. denied, 476 U.S. 1120 (1986).

Clause, that is mistaken. See Heffron v. International Soc'y For Krishna Consciousness, Inc., 452 U.S. 640, 652-653 (1981). Nor is there any authority for the panel's apparent belief that the Supreme Court's rules governing commercial speech are inapplicable where that commercial speech is religiously motivated. Indeed, the panel's suggestion that a law regulating statements about illegal commercial activity is entitled to heightened scrutiny because it burdens religiously-motivated speech is directly contrary to the premise of Smith. Smith held that if a law is neutral and generally applicable, the mere fact that it burdens religiously-motivated acts is irrelevant to the constitutional validity of the law. A religiously-motivated violation of an otherwise valid law regulating speech cannot be the underlying right that "hybridizes" a Free Exercise claim. That would be bootstrapping pure and simple.

The landlords have no "colorable" Free Speech Clause claim regarding Anchorage Municipal Code 5.20.020(G), or the other provisions discussed above. Therefore, strict scrutiny of these provisions is not required by the "hybrid situation" exception recognized in Smith.[12/]

[12/] The federal Fair Housing Act does not contain a provision that specifically prohibits inquiries by owners about prospective tenants' status. Compare Alaska Stat. § 18.80.240(4); Anchorage Mun. Code 5.20.020(C). We thus do not address whether the landlords have articulated a "colorable" Free Speech Clause claim for these provisions, as they are clearly severable from the challenged provisions that have direct federal analogues. See Bonjour, 592 P.2d at 1238 & n.8 (severability of statutes); Fardig v. Municipality of Anchorage, 803 P.2d 879, 884 (Alaska Ct. App. 1990) (severability of Anchorage ordinances). We note,

(continued...)

CONCLUSION

Each of the provisions at issue is a neutral and generally applicable exercise of the police power. The landlords in these appeals have failed to show "colorable" claims under the Takings Clause or Free Speech Clause for those provisions that have federal analogues and, thus, cannot invoke the "hybrid situation" exception to Smith. Because there is no basis for strict scrutiny (and the landlords have not contended that they can prevail without strict scrutiny), the injunction and judgment of the district court should be reversed as to those provisions.

Respectfully submitted,

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12/ (...continued)
however, that 42 U.S.C. 3604(c) has been interpreted to prohibit inquiries about prospective buyers and renter when, from the context, the inquiry indicates the owner's preference not to sell or rent to certain classes of persons. See Secretary v. Blackwell, 908 F.2d 864, 872 (11th Cir. 1990); Jancik v. HUD, 44 F.3d 553, 557 (7th Cir. 1995). Compare Soules v. HUD, 967 F.2d 817, 824 (2d Cir. 1992) (no violation when asking about children, as there are legitimate reasons for such an inquiry apart from discriminating on the basis of "familial status"). As applied to such inquiries, there would be no "colorable" Free Speech Clause claim for the reasons discussed in the text.

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached amicus curiae brief is monospaced, has 10.5 or fewer characters per inch, and contains 6998 words.

_____

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Addendum A

Excerpts from Federal, State, and Local Laws

Discrimination

3. Section 804(a) of the Fair Housing Act, 42 U.S.C. 3604(a), provides, in relevant part:

> [I]t shall be unlawful * * * [t]o refuse to sell or 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 race, color, religion, sex, familial status, or national origin.

4. Section 18.80.240(1) of the Alaska Statutes provides, in relevant part:

> It is unlawful for the owner, lessee, manager, or other person having the right to sell, lease, or rent real property * * * to refuse to sell, lease, or rent the real property to a person because of sex, marital status, changes in marital status, pregnancy, race, religion, physical or mental disability, color, or national origin; however, nothing in this paragraph prohibits the sale, lease, or rental of classes of real property commonly known as housing for "singles" or "married couples" only[.]

5. Section 5.20.020(A) of the Anchorage, Alaska, Municipal Ordinances provides, in relevant part:

> [I]t is unlawful for the owner, lessor, manager, agent or other person having the right to sell, lease, rent or advertise real property to * * * [r]efuse to sell, lease or rent the real property to a person because of race, religion, age, sex, color, national origin, marital status or physical or mental disability.

False Representations

1. Section 804(d) of the Fair Housing Act, 42 U.S.C. 3604(d), provides, in relevant part:

   [I]t shall be unlawful * * * [t]o represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

2. Section 18.80.240(5) of the Alaska Statutes provides, in relevant part:

   It is unlawful for the owner, lessee, manager, or other person having the right to sell, lease, or rent real property * * * to represent to a person that real property is not available for inspection, sale, rental, or lease when in fact it is so available, or to refuse to allow a person to inspect real property because of the race, religion, physical or mental disability, color, national origin, age, sex, marital status, change in marital status, or pregnancy of that person or of any person associated with that person[.]

3. Section 5.20.020(E) of the Anchorage, Alaska, Municipal Ordinances provides, in relevant part:

   [I]t is unlawful for the owner, lessor, manager, agent or other person having the right to sell, lease, rent or advertise real property to * * * [r]epresent to a person that real property is not available for inspection, sale, rental or lease when in fact it is available, or refuse a person the right to inspect real property, because of the race, religion, age, sex, color, national origin, marital status or physical or mental disability of that person or because of any person associated with that person.

Discriminatory Statements

1. Section 804(c) of the Fair Housing Act, 42 U.S.C. 3604(c), provides, in relevant part:

   [I]t shall be unlawful * * * [t]o 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 race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

2. Section 18.80.240(7) of the Alaska Statutes provides, in relevant part:

   It is unlawful for the owner, lessee, manager, or other person having the right to sell, lease, or rent real property * * * 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 real property that indicates any preference, limitation, or discrimination based on race, color, religion, physical or mental disability, sex, or national origin, or an intention to make the preference, limitation, or discrimination.

3. Section 5.20.020(G) of the Anchorage, Alaska, Municipal Ordinances provides, in relevant part:

   [I]t is unlawful for the owner, lessor, manager, agent or other person having the right to sell, lease, rent or advertise real property to * * * [c]irculate, issue or display, make, print or publish, or cause to be made or displayed, printed or published, any communication, sign, notice, statement or advertisement with respect to the use, sale, lease or rental of real property that indicates any preference, limitation, specification or discrimination based on race, religion, age, sex, color, national origin, marital status or physical or mental disability. This shall not be construed to apply to publishing companies which accept advertising in the ordinary course of business.

Addendum B

Excerpts from Plaintiff-Appellant's Brief in
Heart of Atlanta Motel, Inc. v. United States, No. 64-515

CERTIFICATE OF SERVICE

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