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Brief of the John Marshall Law School Fair Housing Clinic as Amici Curiae in Support of Defendant, Thomas v. Anchorage Equal Rights Commission, 220 F.3d 1134 (Ninth Circuit Court of Appeals 2000) (Nos. 97-35220, 97-35221)

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No. 97-35220
No. 97-35221

IN THE NINTH CIRCUIT

Kevin Thomas, *et al.*

Plaintiffs-Appellees

v.

Anchorage Equal Rights Commission, *et. al.*

Defendants-Appellants

On Appeal from the District of Alaska
U.S. District Court Case A95274 CI (HRH)

BRIEF OF THE JOHN MARSHALL LAW SCHOOL FAIR HOUSING LEGAL CLINIC AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS

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QUESTION PRESENTED

Whether the anti-discrimination statutes of both the State of Alaska and the Municipality of Anchorage, forbidding discrimination in housing on many grounds, including marital status, are unconstitutional as applied to landlords who are members of the Christian faith and believe that cohabitation is a sin.

CERTIFICATE OF COMPLIANCE

This brief is proportionately spaced in fourteen point CG Times. The text is doubled spaced while headings and footnotes are single spaced.

This text of this brief contains 8,254 words in 41 pages.

AMICUS CURIAE STATEMENT OF INTEREST

The John Marshall Law School Fair Housing Legal Clinic is a legal clinic of The John Marshall Law School in Chicago, Illinois. The Clinic provides litigation and dispute resolution training for law students and litigation and dispute resolution assistance to persons who complain of housing discrimination in violation of federal, state, and local laws. The Clinic operates under the supervision of the John Marshall Law School Fair Housing Legal Support Center, which conducts national conferences and is a national resource for attorneys, agencies, fair housing groups, and trade associations in the housing, lending, and insurance areas. Both the Department of Housing and Urban Development and private contributions provide funding for the Clinic.

The Clinic addresses the following issue in its brief:

> Whether the anti-discrimination statutes of both the State of Alaska and the Municipality of Anchorage, forbidding discrimination in housing on many grounds, including marital status, are unconstitutional as applied to landlords who are members of the Christian faith and believe that cohabitation is a sin.

Amicus believes that this issue presents broad questions of policy with significant import for both housing litigants and those charged with administering the laws. The issue involves several areas of law which are not

yet well delineated by precedent. For these reasons, *Amicus* believes that its participation will be of assistance to the Court.

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STATEMENT OF FACTS

Plaintiffs Joyce and Gary Baker ("The Bakers") and Kevin Thomas ("Thomas") each own several units of housing in Anchorage, Alaska. The Bakers own five units, of which four are single-family dwellings and one is a two-family duplex. (Gary Baker Aff. ¶ 7, Abst. p. 28; Joyce Baker Aff. ¶ 7, Abst. p. 21). Thomas owns an unspecified number of units. (Thomas Aff. ¶ 7, Abst. p. 72). Both the Bakers and Thomas are in the business of renting these housing units. (Gary Baker Aff. ¶ 7, Abst. p. 28; Joyce Baker Aff. ¶ 7, Abst. p. 21; Thomas Aff. ¶ 7, Abst. p. 72). The evidence in the case does not make clear whether the management and rental of these buildings is the sole source of income for either the Bakers or for Thomas.

All three plaintiffs have given affidavits declaring that as Christians, they believe that cohabitation, a man and woman living together in a sexual relationship outside of marriage, constitutes the sin of fornication. (Gary Baker Aff. ¶ 5, Abst. p. 28; Joyce Baker Aff. ¶ 5, Abst. p. 21; Thomas Aff. ¶ 5, Abst. p. 72). Fornication is "voluntary sexual intercourse between two unmarried persons or two persons not married to each other." *Random House Unabridged Dictionary*, 2d Ed., 753 (1993).

The Bakers have given further affidavits stating their belief that any unmarried man and woman living together are sinning, whether or not they are

fornicating, because such a couple would appear to the Bakers to be fornicating. (Gary Baker 2d Aff. ¶ 2, Abst. p. 43; Joyce Baker 2d Aff. ¶ 2, Abst. p. 46). The Bakers further fear that such a couple, while not fornicating from the outset, would be tempted by proximity to fornicate with each other in the future. (Gary Baker 2d Aff. ¶ 2, Abst. p. 43; Joyce Baker 2d Aff. ¶ 2, Abst. p. 46).

All three plaintiffs state they believe that by renting housing to sinners, they will be assisting and facilitating sin. (Gary Baker Aff. ¶ 5, Abst p. 28; Joyce Baker Aff. ¶ 5, Abst. p. 21; Kevin Thomas Aff. ¶ 5, Abst. p. 72). All three state they believe that such assistance or facilitation is in itself a sin. (Gary Baker Aff. ¶ 5, Abst p. 28; Joyce Baker Aff. ¶ 5, Abst. p. 21; Kevin Thomas Aff. ¶ 5, Abst. p. 72). The Bakers and Thomas believe that the sins, sinful appearances, or possible future sins of their tenants implicate the landlords and make them sinners also. (Gary Baker Aff. ¶ 5, Abst p. 28; Joyce Baker Aff. ¶ 5, Abst. p. 21; Kevin Thomas Aff. ¶ 5, Abst. p. 72).

The State of Alaska ("State") has found that discrimination because of "race, religion, color, national origin, age, sex, physical or mental disability, marital status, changes in marital status, pregnancy, or parenthood," AS 18.80.200, threatens the well-being of society. *Id.* The State declared its

interest in protecting its inhabitants by preventing and eliminating discrimination. *Id.* The Municipality of Anchorage ("City") and the State accordingly enacted statutes which prohibit discrimination in housing based on any of the above-listed characteristics. AS 18.80.240; AMC 5.20.020.

Plaintiffs wish to discriminate by refusing to rent housing to any unmarried, unrelated man and woman living together. They have argued that the marital status provisions of the anti-discrimination statutes are unconstitutional as applied to themselves and similarly situated landlords because they force plaintiffs to choose between possible prosecution, enforced vicarious sin, or withdrawal from their rental property businesses.

The District Court held that the marital status provisions of the statutes were unconstitutional as applied to plaintiffs and similarly situated landlords and granted an exemption.

SUMMARY OF ARGUMENT

It is the policy of the United States that all people are entitled to decent, safe, and sanitary housing. Fair Housing Act, 42 U.S.C. § 3601 *et. seq.* The emotional, mental, and physical health and welfare of every individual depends upon it. The safety and general welfare of the community at large depends upon it. Congress has declared that "the general welfare and security of the

Nation and the health and living standards of its people require. . .the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family. . . ." 42 U.S.C. § 1441. The Universal United Nations Declaration of Human Rights includes a provision that all people have a right to housing. Universal United Nations Declaration of Human Rights, Article 25(1) (1948). Fair housing laws help to further the goal of providing decent, safe and sanitary housing to everyone. Federal, state, and local fair housing laws protect people from being denied shelter for discriminatory reasons.

When the District Court granted the exemption from the marital status provision of the State and City anti-discrimination statutes, it applied the stringent tests of the Restoration of Religious Freedom Act, 42 U.S.C. § 2000bb *et. seq.* The Supreme Court has since declared this statute unconstitutional in *Boerne v. Flores,* 1997 WL 345322 (1997). The RFRA provided that a substantial burden on religion must be unavoidable and justified by a compelling government interest. 42 U.S.C. § 2000bb *et. seq.*

The test for the constitutionality of a statute burdening religion is set forth in *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595 (1990). *Smith*'s holding is that a neutral, generally

applicable statute is constitutional, even where it incidentally burdens religious practices or religiously motivated conduct.

The District Court found that the statutes were neutral and generally applicable. However, because plaintiffs complained that their free speech and property rights, as well as their free exercise rights, were violated, the District Court held that the statutes caused a "hybrid" violation. It held that such hybrid violations require the substantial burden/compelling interest test. It then held that the statutes substantially burdened plaintiffs' free exercise rights and that the government interests in eliminating discrimination were not compelling.

To exempt a landlord from neutral, generally applicable anti-discrimination statutes because the landlord believes that some tenants or prospective tenants are or might be sinners is to grant that landlord the freedom to discriminate at will. Such an exemption defeats the purpose of the statute by permitting certain landlords to engage in the very practices that deny rights which, for the good of society, the statute was designed to protect. It places ordinary, secular, commercial transactions on the same constitutional footing as religious ceremonies and rituals. Further, it establishes that a person's religious beliefs are paramount law. Under such a theory, the laws of the land would apply only to those who have no religious objection to them.

Further, a Federal Court-created exemption granted by the District Court of Alaska to landlords who wish to discriminate against cohabitors or perceived cohabitors is not an effective protection from vicarious fornication or any other sin. If the Federal Court should enforce it, it is instead an apparent license for landlords claiming religious scruples to violate tenants' constitutionally protected privacy rights, associational freedom, and freedom of religion. It gives landlords the right to inquire into any aspect of a tenant's life, including its most intimate, personal details. The exemption gives landlords the right to condition the tenant's access to housing upon the landlord's personal assessment that the tenant is free from what the landlord considers to be sin.

Plaintiffs may be correct in their assertion that they must choose among violating the law, operating their business in conflict with the dictates of conscience, or entering another business where they are less likely to be implicated in the sins of third parties. However, it is those very others, the potential tenants and the public at large, whom the law seeks to protect, and whose rights and human dignity will be violated by granting landlords the right to discriminate against sinners.

Decent, safe, sanitary housing is one of life's necessities. Plaintiffs' business may be pleasant and profitable to them if they do not have to obey the

law, but the residential rental business is not the only option open to them. If they cannot accept the choices, habits, and beliefs of others, then they must choose a business where government does not regulate against discrimination or where the behavior of third parties is less likely to have a spiritual impact on them.

ARGUMENT

I. FAIR HOUSING AND THE ELIMINATION OF DISCRIMINATION ARE NATIONAL GOALS. EXEMPTIONS FROM THE PROVISIONS OF FEDERAL, STATE, AND LOCAL LAWS PROHIBITING DISCRIMINATION FRUSTRATE THE ACHIEVEMENT OF THOSE GOALS.

The Federal Fair Housing Act ("FHA"), 42 U.S.C. § 3601 *et. seq.*, sets forth national goals. "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. Although originally drafted to protect against racial, religious, and ethnic discrimination, the ever-expanding scope of the Act indicates that congressional intent is to seek out and protect an increasing range of classes.

The FHA does not at present bring marital status within its protection. However, the scope of the law's protection has been regularly widening as congress perceives the need for additional protection. The Consumer Credit Protection Act, 15 U.S.C. § 1601 *et seq.*, already prohibits discrimination on

the basis of marital status, 15 U.S.C. § 1691, in mortgage transactions. 15 U.S.C. § 1602(w). The plain language of the statute forbids lenders to treat unmarried applicants differently than married applicants. *Markham v. Colonial Mortgage Service Co.*, 605 F.2d 566, 569 (D.C. Cir. 1977).

As passed in 1968, the FHA prohibited discrimination on the basis of race, color, national origin, and religion. 42 U.S.C. § 3601 *et. seq.* An amendment passed in 1974 added sex discrimination. Housing and Community Development Act of 1974, Pub.L. No. 93-383. In 1988, Congress again amended the Fair Housing Act to prohibit discrimination against disabled persons and families with children. 42 U.S.C. § 3601 *et. seq.* The Fair Housing Act prohibits discrimination in all transactions that involve the sale or rental of a dwelling. *Id.* It applies to both governmental and private action. *Id.* The 1988 amendments were a result of Congressional findings that there was widespread discrimination against both disabled persons and families with children. The Amendments require housing providers to make reasonable accommodations in their rules, policies, practices, or services to afford disabled persons equal opportunity to use and enjoy a dwelling. 42 U.S.C. § 3601 *et. seq.* It also requires that certain multi-family units constructed after 1990 be designed and constructed to contain certain features to make them usable and

accessible to disabled persons. *Id.* The Act can be enforced by an administrative action filed with the United States Department of Housing and Urban Development, a suit in federal court filed by the Department of Justice, and a private suit for damages and an injunction. *Id.*

The FHA encourages state and local governments to enact their own anti-discrimination laws. 42 U.S.C. §§ 3615, 3616, 3616a. The FHA does not limit the classes which a state may protect to those enumerated therein. 42 U.S.C. § 3615. The FHA allows the Secretary of Housing and Urban Development ("HUD") to cooperate with state and local agencies in the administration of fair housing laws. 42 U.S.C. § 3616. The FHA empowers HUD to financially and otherwise assist state and local governments in implementing anti-discrimination programs and policies where those programs and policies are substantially equivalent to the FHA. 42 U.S.C. § 3616a. HUD has declared that both the Alaska statute and the Anchorage fair housing ordinance are substantially equivalent. 53 Fed. Reg. 45019-20 (Nov. 7, 1988).

Free exercise challenges to fair housing laws, brought because the landlord's religion demands discriminatory business practices, will dilute the power of all fair housing laws. Judicially-sanctioned discrimination, in the

form of exemptions from neutral, generally applicable anti-discrimination statutes, granted to commercial enterprises, frustrates the national policy that all people should have fair and equal access to housing. For instance, the District Court of Alaska's ruling that plaintiffs may discriminate against cohabitors or perceived or potential cohabitors diminishes the opportunities of unmarried persons to find housing, whether or not those labels apply. Such a rule would, for example, prevent a woman from living with male friends for protection if she believed her safety depended on it.

Although the District Court denied that granting an exemption to these plaintiffs raised any possibility of a slippery slope, history shows otherwise. In *Bob Jones University v. U.S.*, 461 U.S. 574, 103 S.Ct. 2017 (1983), the Supreme Court upheld the denial of tax-exempt status to two Christian schools because of their discriminatory practices that were followed because of their sponsors' sincerely held religious belief that interracial marriage or dating was sinful. The landlords here are similarly demanding an exemption from fair housing laws based on marital status. Other landlords may assert beliefs that violate the racial, sex, handicap, and familial status provisions of all fair housing acts, including the FHA.

Housing discrimination against any person or group of persons denies them the property rights enjoyed by others. In this case, plaintiffs' discrimination against cohabitors, potential cohabitors, and perceived cohabitors denies to unmarried persons the same rights to housing opportunities that married persons, persons living singly, or persons who are not perceived to be cohabitors or potential cohabitors have.

Further, it amounts to gender discrimination; plaintiffs have testified that they discriminate only against unmarried couples of the opposite sex. Plaintiffs' discrimination denies to a man and woman together the same access to housing that two men or two women together enjoy. Although the denial is based upon the combination of genders, at bottom, the only basis for the denial is gender itself. A couple of opposite genders do not enjoy the same rights enjoyed by a same-gender pair.

Housing discrimination against unmarried couples adversely affects a large and ever-growing segment of the population. In 1960, the United States Census showed 439,000 unmarried couple households. U.S. Bureau of the Census, *Unmarried-Couple Households, by Presence of Children: 1960 to the Present* (last modified Sept.20,1996) <http://www.census.gov/populations/socdemo/ms-la/95his02.txt> The U.S.

Bureau of the Census Current Population Report showed that, by 1980, the number had grown to 1,589,000 households, nearly four times as many. *Id.* In 1990, there were 2,856,000 such households. *Id.* In 1995, there were 3,668,000 unmarried couple households, *Id.*, or 7,336,000 people against whom landlords such as plaintiffs wish to practice Christian discrimination.

Alaska has decided that housing in that state should not be restricted only to married people or to those who follow Christian principles. Alaska has decided that no person should be denied access to fair, decent, safe, and sanitary housing based what it considers to be irrelevant, personal characteristics. Alaska's laws are justified because they will help to ensure fair and equal housing in that state.

II. NEITHER THE STATE OF ALASKA NOR THE MUNICIPALITY OF ANCHORAGE PLACES SUBSTANTIAL, UNAVOIDABLE BURDENS ON THE FREE EXERCISE OF RELIGION BY REQUIRING LANDLORDS WHO ALSO HAPPEN TO BE CHRISTIANS TO OBEY STATUTES THAT PROHIBIT DISCRIMINATION BASED UPON MARITAL STATUS.

The State and City statutes are fully constitutional under the substantial burden/compelling state interest test. The statutes in question do not directly, substantially burden religion because they neither target nor regulate religious beliefs or conduct. The statutes regulate commercial activity, i.e., the business

transaction that takes place between a person wishing to rent housing and a person who has housing available for rental. The statutes neither compel belief nor forbid belief. They do not require or forbid any religious conduct. The statutes merely set the conditions with which a landlord must comply if he or she chooses to engage in the particular business of renting residential real estate.[1]

Further, any burden indirectly placed upon the plaintiffs' Free Exercise is incidental and unavoidable if the State and City are to achieve their joint purpose of eliminating discrimination in housing. By allowing one group of landlords to discriminate against those whom they perceive to be sinners, the District Court has opened the door for all landlords claiming religious scruples to discriminate against any tenant for any behavior or characteristic that the landlord considers to be sinful.

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[1] The Anchorage ordinance, correctly differentiating between religious and commercial activity, has a built-in exemption for those landlords who rent space within their individual homes. AMC 5.20.020.

A. Although plaintiffs strive to adhere to their religious beliefs in every aspect of their daily lives, plaintiffs' rental housing businesses are nonetheless secular, commercial activities. The State and City anti-discrimination statutes regulate these commercial activities, which do not come under the rigorous protection that the First Amendment provides for religious beliefs and activity. Such laws do not create a substantial burden on plaintiffs' religion.

The Free Exercise Clause absolutely protects religious beliefs, *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877, 110 S.Ct. 1595, 1599 (1990). It also protects religious conduct and activities, such as attending religious services, eating or refusing certain foods, and using or not using machinery. *Id.* at 877. However, no individual has absolute freedom to neglect important social duties or subvert good order, even when such neglect or subversion is dictated by his or her religious beliefs. *Braunfield v. Brown*, 366 U.S. at 603-4, 81 S.Ct. 1144, 1146 (1961). Further, no court has ever extended this protection to commercial transactions merely because a religious individual has chosen to involve him or herself in particular business activities.

Churches and religious organizations must pay retail sales and employment taxes and must also follow employment laws. *See, e.g., Jimmy Swaggart Ministries v. Bd. Of Equalization of Cal.*, 493 U.S. 573, 110 S.Ct. 688 (1990) (holding that California's neutral, generally applicable tax on the

retail sale of all tangible personal property does not substantially burden religion and that religious organizations are subject to such taxes); *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680, 109 S.Ct. 680 (1989) (deciding that scheduled payments made for services rendered by the Church of Scientology were part of a *quid pro quo* transaction and therefore not tax-deductible as charitable contributions and also holding that denial of the deduction did not impose a substantial burden on religion); *Tony and Susan Alamo Fdn. v. Sec'y of Labor*, 471 U.S. 290, 105 S.Ct. 1953 (1985) (holding that a religious organization engaged in commercial activities must comply with the Fair Labor Standards Act and that application of the Act to commercial activities was consistent with the First Amendment). Even a preacher must pay income and property taxes. *Swaggart*, 493 U.S. at 386-7, 110 S.Ct. at 694; *Follett v. Town of McCormick, S.C.*, 321 U.S. 573, 577-78, 64 S.Ct. 717, 719 (1944).

The Free Exercise clause does not protect every member of every religion from every burden that may arise in the course of everyday life. *U.S. v. Lee*, 455 U.S. 252, 261, 102 S.Ct. 1051, 1057 (1982). Basic Free Exercise Clause protections pertain to conduct undertaken for *religious reasons*. *Church of the Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520, 531, 113 S.Ct.

2217, 2226 (1993) (emphasis added). "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Lee*, 455 U.S. at 261.

The Bakers and Thomas each own and manage several units of housing which they rent to residential tenants for a profit. They did not undertake the rental property business for religious reasons; as landlords, they are engaged in a commercial activity for a commercial purpose. Plaintiffs are religious people participating in *quid pro quo* commercial transactions. They have made no contention that their rental businesses are religious rather than commercial. They have argued instead that the laws governing their chosen commercial activities are not compatible with their religious beliefs. They wish to discriminate against others because, having entered a commercial business, they find that they cannot comply with both the law of the land and the tenets of their religion. Plaintiffs contend that the law of the land should give way.

In *Smith*, 494 U.S. 872, the plaintiffs, Native Americans who used the illegal drug peyote during religious rituals, argued that requiring "any individual to observe a generally applicable law that requires (or forbids) the

performance of an act that his religious belief forbids (or requires)," *Id.* at 878, was violative of the Free Exercise Clause. *Id.* The Supreme Court disagreed. It held that a generally applicable and otherwise valid law is not violative of First Amendment rights where it merely incidentally burdens free exercise. *Id.* at 878.

As in *Smith*, the burden on Thomas' and the Bakers' free exercise is completely incidental. By contrast, the incidental burdening effect in *Smith* fell upon actual religious rituals and ceremonies; here it falls only upon the plaintiffs' commercial activities. If an incidental burden that will alter or even prevent a religious ceremony is permissible under the First Amendment, then an incidental burden on the operations of a property rental business must also be permissible.

The District Court relied heavily on *Braunfield*, 366 U.S. 599, in determining that the State and City statutes substantially burden plaintiffs' Free Exercise. *Thomas v. Anchorage Equal Rights Comm.*, No. A95-274 CV, slip op. at 16-17, 19-20 (D.Alaska Jan. 28, 1997). It was mistaken, however in its interpretation of *Braunfield*.

The *Braunfield* plaintiffs were retail store owners belonging to the Orthodox Jewish faith. They argued that a Pennsylvania Sunday closing statute

was violative of their Free Exercise rights. Their religion required them to close on Saturdays, for which they made up by opening on Sundays. The Court drew a distinction between actual religious practices and secular activities. *Braunfield*, 366 U.S. at 605. It distinguished legislation that directly burdens religious practices from that which merely indirectly or incidentally burdens them. *Id.* at 606.

The District Court misread an important section of *Braunfield*. It wrote that "[a]lthough no substantial burden was found in *Braunfield*, the Court suggests that had the claimants been faced 'with as serious a choice as forsaking their religious practices or subjecting themselves to criminal prosecution,' the [C]ourt would have found a substantial burden." *Thomas* at 16-17, 19-20, citing *Braunfield*, 366 U.S. at 605. However, the Court made no such suggestion. The language cited by the District Court follows a discussion of *Reynolds v. U.S.*, 98 U.S. 145, 25 L.Ed. 244 (1878), a case upholding a polygamy conviction in spite of the Mormon church's command that its members practice polygamy, and a discussion of *Prince v. Commonwealth of Mass.*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), a case upholding child labor statutes despite a young Jehovah's Witness' belief that it was her religious duty to sell religious literature. *Braunfield*, 366 U.S. at 605.

The Court in *Braunfield* went on to note that in both *Reynolds* and *Prince* the religious practices themselves were in conflict with public interest. *Id.* It commented that deciding such cases was a "particularly delicate task," *Id.*, because a decision in the State's favor leaves the religious individual with a choice between abandoning religious principles or facing criminal prosecution. *Id.*

The Court then proceeded to *distinguish* the facts before it in *Braunfield* from the facts in either *Prince* or *Reynolds*. *Id.* It wrote that "this is not the case before us because the statute at bar does not make unlawful any religious practices of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates to make their religious practices more expensive." *Braunfield*, 366 U.S. at 605. The Court found no substantial burden on religion. *Id.* at 605-6.

The Court rejected the argument that the statute forced plaintiffs to choose between abandoning religious principle or facing criminal prosecution. *Id.* at 605. It recognized that the plaintiffs would be faced with an unpleasant choice between: (1) accepting economic disadvantage and retaining their businesses and their religious principles; or (2) entering a new business which

did not require conduct that would violate either their principles or the law. *Id.* at 605-6.

In its *Braunfield* analysis, the District Court found that Thomas and the Bakers face a choice between abandoning their religious beliefs or facing criminal prosecution. *Thomas* at 16-17, 19-20. The District Court wrote that "the absence of such a choice was a significant factor in *Braunfield*." *Id.* at 20. The District Court further found that the anti-discrimination statute "directly forbids plaintiffs from conforming to their religious convictions." *Id.* However, the District Court is incorrect.

Plaintiffs in this case face a problem closely related to the problem in *Braunfield*. In *Braunfield*, plaintiffs were under no religious or legal requirement to work as retail merchants, any more than the plaintiffs in this case are required to be residential landlords. As in *Braunfield*, the contested law regulates secular activity. It has an incidental effect on plaintiffs' religious beliefs. It does not force them to choose between belief and prosecution. Rather, it places before them the unpleasant possibility that they must sell their buildings (perhaps at a profit) and invest the proceeds in a new business which does not require conduct that would violate either their principles or the law. If the new business should be either less pleasant or less profitable, the Court in

Braunfield noted that some financial sacrifice might be necessary to observe religious beliefs. 366 U.S. at 606.

The District Court next attempted to distinguish the present case from *Lee*, 455 U.S. 252. *Thomas* at 21. In *Lee*, the Court held that an Amish farmer/carpenter must pay Social Security taxes for the employees of his farm and carpentry shop, in spite of his religious belief that his own community should support those members unable to support themselves. The Court wrote that "[g]ranting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees." 455 U.S. at 261.

The District Court recognized that the Supreme Court denied a tax exemption in *Lee* partially because such an exemption would have an adverse effect on the rights of third parties, *Thomas* at 20-21. However, it found that "[a]bsent the statute and ordinance at issue here, unmarried prospective tenants would have no right to object to plaintiffs' refusal to rent to them. [They] are not analogous to employees who are entitled to social security coverage." *Id.* at 21. Absent the Social Security Act, 42 U.S.C. § 301 *et.seq.*, no employee would have rights to social security coverage; thus the District Court's reasoning makes no sense.

The District Court rejected the substantial burden analysis offered in *Smith v. FEHC*, 12 Cal.4th 1143, 913 P.2d 909, 51 Cal. Rptr.2d 700 (Cal. 1996), where on facts identical to these, the California Supreme Court found that plaintiff's rental business was not required by her religion, but was instead a secular activity. *Id.* at 1175. The Court found that the anti-discrimination statute did not burden or restrict religion, but was a law governing operations of a business. *Id.* The California court observed that plaintiff was free to invest in businesses or properties other than residential rentals, and could thus make a living and avoid any burden on her religion at will. *Id.*

The District Court found that the State and City statutes put plaintiffs "out of business." *Thomas* at 22. While this finding is, unfortunately, true in a small sense, it is patently untrue in any larger sense. The statutes do not affect plaintiffs' property values. As the Court in *Braunfield* recognized, if plaintiffs cannot operate their businesses in accord with both the law and their beliefs, they are free to sell their properties at the best price they can get and to reinvest the money elsewhere.[2]

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[2] The District Court correctly found that the unemployment compensation cases, such as *Frazee v. Ill. Dept. Of Employment Security*, 489 U.S. 829, 109 S.Ct. 1514 (1989), *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 107 S.Ct. 1046 (1987), and *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790 (1963), were inapplicable; therefore, this brief does not

The District Court wrote that "[p]laintiffs have a constitutional right to acquire and hold property." *Thomas* at 22. However, plaintiffs have no constitutional right to be landlords, and especially no right to be landlords free from all regulation. Constitutional property rights are subject to government limitations as evidenced by zoning and land use laws, landmark designations, and anti-discrimination statutes like the ones now in question. Those people choosing to engage in any area of commerce must decide whether they can live and work with the laws governing that area.

The anti-discrimination statutes do not substantially burden plaintiffs' religion. The City and the State have enacted statutes governing transactions in real property, not religion. The law does not compel plaintiffs to violate their religious beliefs. It regulates the operation of their businesses. It may present them with the unavoidable choice between those beliefs and their present occupation, but that choice will at worst be unpleasant or expensive, not unconstitutional.

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address them.

B. The State and City anti-discrimination statutes do not place an unavoidable burden on plaintiffs' religion. Exempting landlords from anti-discrimination statutes because they believe that, based upon certain traits or behaviors, particular tenants are or might be sinners, is to render such statutes useless. Further, plaintiffs may avoid the burden by entering a different commercial area.

The State and City enacted their statutes to prevent and eliminate discrimination. To permit discrimination is to fail in preventing and eliminating it. Thus, any burden placed on any person who wishes to discriminate against another is unavoidable.

Any substantial burden placed on the free exercise of religion must be unavoidable. *Wisconsin v. Yoder,* 406 U.S. 205, 215, 92 S.Ct. 1526, 1533 (1972). A law that burdens religion must be narrowly tailored to achieve its purpose. *Lukumi*, 508 U.S. at 533. However, "[t]o maintain an organized society that guarantees religious freedom to great variety of faiths requires that some religious practices yield to the common good." *Lee*, 455 U.S. at 259.

In *Lee*, 455 U.S. 252, the Supreme Court held that the burden on an Amish employer's beliefs was unavoidable. If the social security system was to continue functioning, then the taxes must apply to all employers and benefit all employees. *Id.* at 258-259. To make participation voluntary would probably destroy it and would certainly create an administrative nightmare. *Id.* To

exempt all the members of all the hundreds of religions because of religious objections would be impossible. *Id.* at 260.

The Alaska legislature found that discrimination based on "race, religion, color, national origin, age, sex, physical or mental disability, marital status, changes in marital status, pregnancy, or parenthood," AS 18.80.200, threatens the well-being of society. Its purpose in enacting the challenged law was to eliminate and prevent such discrimination. *Id.* Plaintiffs wish to be allowed to do exactly what the law purposes to prevent. Exempting plaintiffs from the statute leaves all "sinners" open to the destructive effects of discrimination and renders the statute ineffective. If anti-discrimination, fair housing legislation is to succeed, then it must apply to all landlords and benefit all tenants. To make participation voluntary would certainly destroy it; if all people refrained from discrimination on a voluntary basis, then anti-discrimination legislation would not be necessary.

Administration would be an impossibility. This country is home to hundreds of religions and sects within those religions. Some are more tolerant than others. Some believe that cohabitation is a sin. Some believe that people of other races are sinners. Some believe that it is a sin to marry a person of another race. Some believe that it is a sin to marry a person of another

religion. Some believe that eating certain foods is a sin. Some believe that homosexuality is a sin and that AIDS is either a sin or the punishment for sin. The beliefs are as myriad as the people who hold them; if each is to be exempted from anti-discrimination laws, then the laws themselves are useless.

Also, as discussed earlier, the anti-discrimination laws do not harm plaintiffs' property values. Plaintiffs may freely avoid any burden upon their religious beliefs by the sale of the property and entry into a different, more congenial line of business.

III. THE MUNICIPALITY OF ANCHORAGE AND THE STATE OF ALASKA HAVE COMPELLING INTERESTS IN PREVENTING DISCRIMINATION IN HOUSING AND IN PRESERVING AND PROTECTING THE PRIVACY RIGHTS, FREEDOM OF ASSOCIATION, AND RELIGIOUS FREEDOM GUARANTEED TO ALL PEOPLE, INCLUDING THOSE WHO RENT HOUSING OR SEEK TO RENT HOUSING, BY THE UNITED STATES CONSTITUTION.

The State and City have compelling interests in upholding and protecting the rights guaranteed to their inhabitants under the United States Constitution. These rights include the right of privacy, the right to freedom of association, and the right to religious freedom. If landlords may discriminate against cohabitors and others whom they regard as sinners, then landlords will of necessity intrude on privacy, freedom of association, and religious freedom. If,

as in this case, a landlord needs to be certain that no fornication takes place in or on the rental property, that landlord needs to be able to supervise and censor the activities and associations of all tenants, whether married or unmarried, whether living together or singly. Such Big Brother-type watching of and control over the life of another violates every principle on which this country was founded and for which it now stands.

The City and State have also a compelling interest in judicial economy. If individual landlords may seek, and receive, exemptions from anti-discrimination laws based upon their own, highly personal, religious beliefs, courts could be flooded with requests for exemptions of all sorts. Further, although evictions are not in question here, the District Court's decision raises the possibility that a Christian landlord might be able to evict a previously chaste tenant on the grounds that he or she became a fornicator during the period of tenancy.

A. The exemption created by the District Court permitting landlords to discriminate on the basis of disapproved sexual activity, the mere appearance or possibility of such activity, or any other sin violates the privacy rights of all tenants or prospective tenants of those landlords legally exempted. It also denies unmarried couples, friends, and colleagues the equal protection of the laws in violation of the Fourteenth Amendment.

Under the principle of *stare decisis*, the holding of a court becomes the law. Therefore, the District Court's ruling that commercial landlords belonging to the Christian faith may deny fair housing to unmarried couples is now the law in Alaska. It may even be argued that it is the law that any landlord claiming religious scruples may refuse housing to any person perceived to be a sinner. Because of the District Court's decision, the State of Alaska must now permit landlords to treat similarly situated married and unmarried persons, and similarly situated groups of persons in different gender combinations, unequally in violation of the Fourteenth Amendment.

In *Griswold v. Connecticut*, the Supreme Court held that marital sex and contraception fell within a "zone of privacy created by several constitutional guarantees." 381 U.S. 479, 485, 85 S.Ct. 1678, 1682 (1965). In *Eisenstadt v. Baird*, the court held that permitting married people to use contraceptives while denying them to unmarried people was a violation of the Equal Protection Clause. 405 U.S. 438, 454-55, 92 S.Ct. 1029, 1039 (1972). While the Court

did not hold that sexual relations between unmarried people were constitutionally protected, as were the relations between married couples, it must have recognized that the only unmarried couples in need of contraceptives would be those who were sexually active. Why would the Court protect a safeguard for the act, and not the act itself?

In *Skinner v. Oklahoma*, the Court held that marriage *and* procreation were fundamental rights. 316 U.S. 535, 541, 62 S. Ct. 1110, 1113 (1942) (emphasis added). The Court did not hold that married procreation was a right, but that procreation itself was a right. Sexual intercourse, whether married or not, is an essential first step in the procreation process. If the end is constitutionally protected right, then so must be the means.

The District Court made much of the fact that cohabitation was at one time illegal in Alaska. *Thomas* at 23. However, Alaska can change, and has changed, its laws. The fact that an act was once illegal (or legal) does not make it now illegal (or legal) and has not always made such illegality (or legality) right or desirable in terms of human rights. Following the District Court's reasoning might mean that slavery, in the past long legal, would still be legal. Women might still be denied the right to vote. Interracial marriages might still be forbidden. Children of different races might be legally

segregated. The legal status of cohabitation, as of all the above listed acts, has changed, and the State has recognized that change.

1. Permitting landlords to reject cohabitants, percieved cohabitants, or potential cohabitants as prospective tenants will not prevent fornication in the rental property, and thus will not give the plaintiffs their desired protection from sin. The exemption is under-inclusive.

The law cannot protect landlords from the sins of their tenants without allowing them to violate tenants' privacy rights. The exemption granted by the District Court does not protect them. The exemption allows them to turn away a man and woman who are not married but who wish to rent a house together. It does not allow them to turn away a single man who is the sole tenant, but whose girlfriend sleeps over five nights a week, or *vice versa*. It does not allow them to turn away a married couple, even if an adulterous spouse receives his or her lover every afternoon. They cannot deny housing to a family consisting of a husband, wife and a college-age son or daughter when that son or daughter sleeps with his or her boyfriend or girlfriend. They cannot turn away an unmarried, pregnant woman, although she has obviously fornicated. In any of these or similar scenaria, the house rented from plaintiffs would be used by a fornicator or for fornication, but not cohabitation. The exemption is under-inclusive and fails to remedy plaintiffs' injuries.

The only way plaintiffs can be certain that their tenants are not fornicating or will not fornicate or appear to be fornicating is by conducting daily "bed checks" and instantly evicting all discovered or suspected fornicators. *See Griswold*, 381 U.S. at 485 (asking if we would "allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives" *Id.*) In other words, plaintiffs would need the authority to regulate the sexual behavior and associations of all their tenants and prospective tenants and those who will live or visit in the house with them. As sexual abstinence on the part of all those residing in or visiting the rented house would be a condition of tenancy, plaintiffs could conceivably place such conditions in the lease. Tenants could be required to sign chastity clauses to have access to housing.

Landlords who object to the sexual relationships of their tenants, carried on the privacy of their own homes, will never be safe from the risk of vicarious taint. Human beings will naturally enter into intimate relationships with one another, and as virtually every society, religious or not, recognizes, the privacy of one's home is the proper place for displays of affection.

2. Non-marital sex is not the only sin. Allowing landlords to discriminate between sinners and non-sinners at their own discretion places landlords beyond the reach of any anti-discrimination legislation. The

landlord's feelings would become the law and the landlord could deny housing to anyone at all.

The District Court denied that granting this exemption would create a "slippery slope." *Thomas* at 23. Although the court found that the slippery slope argument had "no legal merit whatsoever," *Id.*, it failed to explain why. In granting this particular exemption, the District Court held that religious landlords may discriminate against sinners, perceived sinners, and possible future sinners, even when to do so would violate the prohibited forms of discrimination in fair housing laws.

Although fornication is the particular sin to which Thomas and the Bakers object, it is far from being the only sin. The slippery slope is steep and dangerous. Landlords could claim that they can refuse housing to all those not of their own particular sect of their own particular faith or to those who violate or might violate any of the Ten Commandments. White Supremacy groups may very well believe religiously and sincerely that members of other races are sinners simply because of their genetic makeup. Certainly, those who believe as did the administrators of Bob Jones University could turn away all interracial couples. *See Bob Jones,* 461 U.S. at 579-81 (describing Bob Jones University, a fundamentalist Christian school that for religious reasons: (1) refused to admit

African American students until 1971; (2) admitted only those African Americans who were married within their race from 1971 to 1975; and (3) from 1975 on admitted African Americans, but threatened with expulsion all those who dated or married interracially, or who even advocated such interaction). Those landlords who believe that AIDS is God's punishment for sin[3] could deny housing to all HIV-infected individuals in direct contravention of the Fair Housing Act, 42 U.S.C. § 3601 *et. seq.*, as implemented by the Fair Housing Subchapter of the Code of Federal Regulations. 24 C.F.R. § 100.201 *et. seq.*

For those who believe in the concept of sin, sin lies everywhere and in everybody. Thomas and the Bakers are now troubled by fornication, but they or another will inevitably, given human nature, soon be faced with some other behavior, trait or relationship that violates their religious beliefs. Courts cannot evaluate, on a case by case basis, which sins are worthy of housing discrimination even if they could possibly do so without questioning the centrality of a claimant's religious beliefs. *See Boerne,* 1997 WL 345322 at 4

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[3] A Kaiser Family Foundation survey, taken in November and December of 1995 showed that 12 percent of Americans believe that AIDS is God's punishment for homosexuality. Reuters News Service, *Americans Want Condom Ads, Poll Finds*, CHICAGO TRIBUNE, May 5, 1996. Moral Majority leader Jerry Falwell has preached this doctrine for years, as has Pat Robertson.

(explaining that courts should not question the centrality or validity of individual religious beliefs and practices). Such evaluations are compatible neither with the dignity of the court nor with the separation between church and state.

B. Permitting landlords to deny housing to an individual or individuals because of that individual's lovers or companions violates a tenant's constitutionally protected right to freedom of association. The State and City each have a compelling interest in upholding associational freedoms.

The constitution protects highly personal relationships against state interference. *Roberts v. Jaycees*, 468 U.S. 609, 618, 104 S.Ct. 3244, 3250 (1984). Human emotional life is built upon close ties with other people, *Id.* at 619, and such ties are fundamental to "the ability to independently define one's identity that is central to any concept of ordered liberty." *Id.* Although the Supreme Court has not yet held that cohabitation is a protected association, it has suggested that it would protect such a relationship. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8, 94 S.Ct. 1536, 1541 (1974). The Court has set forth the following criteria for determining which associations receive constitutional protection: (1) smallness; (2) selectivity in formation and continuation of the relationship; and (3) the requirement of seclusion in critical aspects of the relationship. *Roberts,* 468 U.S. at 620.

A cohabiting couple is a small relationship. It is formed of two individuals. A cohabiting couple meets the first requirement for a protected, intimate association.

A cohabiting couple is selective in the formation and continuation of their relationship. The nature of the relationship is deeply emotional and highly intimate. The decision to make a home together requires commitment to each other and results in a life shared. A cohabiting couple meets the second requirement for a protected association.

Plaintiffs have, in effect, stipulated that a cohabiting couple meets the third part of the test, the necessity of seclusion. Plaintiffs' desire to discriminate is based on the fact or fear that a cohabiting couple will be sexually intimate. Sexual relations are a critical aspect of a romantic love relationship. Sexual relations require privacy and seclusion. A cohabiting couple meets the third requirement.

The City and State each have a compelling interest in upholding the constitution and the individual rights it guarantees. They have a further interest in ensuring that their laws do not infringe upon civil liberties. The exemption has made it law that Christian landlords may deny equal access to housing to people involved in a relationship of which they do not approve.

The City and State have compelling interests in safeguarding the intimate associations of their inhabitants. The District Court's exemption has forced them to do the opposite. Because of the District Court's holding, the City and State must allow the very discrimination against which it sought to protect: discrimination on the basis of intimate associations.

C. Permitting landlords to deny housing to an individual or individuals because such persons act in contravention of the landlord's religious beliefs both establishes the landlord's religion and burdens the tenant's religious or irreligious beliefs and expression by denying the tenant full and fair access to housing.

The City and the State each have compelling interests in protecting the free exercise rights of their inhabitants. They also have compelling interests in avoiding the establishment of any particular religion; the constitution demands that they so do.

The First Amendment prohibits the establishment of religion and protects the free exercise of religion. U.S. CONST. amend. I. The Free Exercise Clause equally guarantees religious (or irreligious) freedom to members of all faiths and to those whose beliefs exclude religion. *County of Allegheny v. ACLU*, 492 U.S. 573, 589-90, 109 S.Ct. 3086, 3099 (1989). At a minimum, the Establishment Clause prohibits government from passing laws which "aid one religion, aid all religions, or prefer one religion over another." *Id.*

The District Court's exemption allowing Christian landlords to discriminate against cohabiting couples gives preferential treatment to plaintiffs and to all similarly situated Christian landlords. It aids their particular branch of Christianity. It grants privileges to these Christians that no other landlords, whether Christian or otherwise, enjoy.

Congress included an exemption for religious organizations in the FHA. 42 U.S.C. § 3607(a). That exemption allows religious groups to discriminate *in favor of* members of their own religion in transactions involving real estate. *Id.* It is limited both to property owned or operated by the group or organization (not individual members) for non-commercial purposes. *Id.* The exemption specifically excludes those religions which restrict their membership on account of race, color, or national origin. *Id.* This exemption illustrates the extent of Congress' intent to excuse religious groups from compliance with fair housing laws. Anything further would be a governmental establishment of religion. *See Boerne,* 1197 WL 345322 at 16 (Stevens, J. concurring) (stating that any governmental preference for religion, as opposed to irreligion, violates the First Amendment).

The State and City anti-discrimination statutes are religion-neutral and apply to all landlords. The City and State, recognizing that discrimination is

socially destructive, passed these laws to ensure that all persons seeking housing would be treated fairly and equally.

By exempting religious landlords from the statutes, the District Court has disfavored the religious (or irreligious) beliefs and practices of tenants who will be the objects of legal discrimination. It has, in effect, "punished" all those tenants who believe differently from the plaintiffs by allowing plaintiffs to treat them unequally and unfairly. The District Court has punished tenants by limiting, perhaps severely, their access to housing. It has given adherents of another faith the power to judge them and find them unworthy of what all others may have.

Plaintiffs argue, and correctly, that the anti-discrimination statutes force them to a choice among: (1) violating the law; (2) violating their religious beliefs; or (3) selling their businesses to remain clear with both law and conscience. However, the law merely presents those choices; it does not dictate a particular decision. The choice is entirely up to the plaintiffs.

Tenants will be faced with a different situation if religious landlords are exempted from renting to sinners. They may not be able to find housing. The choice will not be theirs; the religious landlords will make it for them.

Everyone needs a source of income just as everyone needs decent housing. However, plaintiffs may freely choose among any business ventures that may present themselves. No one may deny them the chance because of their beliefs. Their beliefs may make a particular area of business unacceptable to them for any number of reasons, but that is a decision that plaintiffs may make for themselves. If a given opportunity creates difficulties of conscience, then plaintiffs may freely choose another. The essential fact is that plaintiffs will be choosing for themselves.

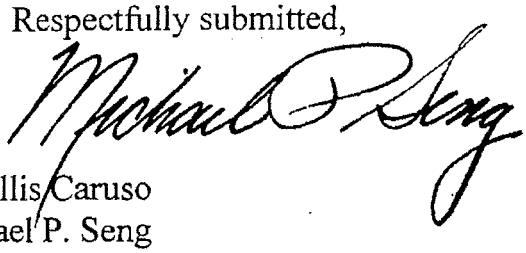
If religious landlords may discriminate against sinning tenants, then tenants will not have that freedom of choice. The landlords will have the power to choose where the tenant will live.

The City and State have compelling interests in preserving free exercise rights for all people. They have compelling interests in complying with the dictates of the constitution by avoiding the establishment of religion. These interests support both the State and City anti-discrimination statutes, which were fully constitutional until the District Court created the exemption allowing religious landlords to discriminate against sinners.

CONCLUSION

For the foregoing reasons, the District Court's decision should be reversed.

Respectfully submitted,



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APPENDIX 1
Stipulation to File Brief of an *Amicus Curiae*

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KEVIN THOMAS, et al.,	)	
	)	
Plaintiff,	)	
v.	)	
	)	No. 97-35220
ANCHORAGE EQUAL RIGHTS	)	No. 97-35221
COMMISSION, et al.,	)	DC# CV-95-00272 (HRH)
	)	District of Alaska
Defendants.	)	(Anchorage)
	)	

STIPULATION TO FILE BRIEF OF AN AMICUS CURIAE

The undersigned parties consent to the filing of any brief by any amicus curiae in the above-captioned matter.

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Date: 9-23-97

Robert A. Royce
Counsel for Appellant Paula Haley in her official
Capacity of Executive Director of the Alaska
State Commission for Human Rights

Date: 9-23-97

Kevin G. Clarkson
Counsel for Appellees

I hereby certify that a true and correct
copy of the foregoing was mailed/hand-delivered
on the 23rd day of September, 1997 to
the following:

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APPENDIX 2
Letter of Agreement to Extended Filing Date

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VIA FAX AND MAIL

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Re: Kevin Thomas, et al. v. Anchorage Equal Rights Commission, et al.
No. 97-035220/97-035221 DC# CV-95-00274(HRH)

Dear Kevin and Rob:

Pursuant to our conversations of yesterday, the Clerk of Court at the Ninth Circuit today docketed an extension for the filing of the appellants' opening briefs based on my family medical emergency. As we stipulated, the extension is from September 30, 1997 to October 14, 1997. The Clerk reminded me over the telephone that a copy of this letter needs to be filed with each of our briefs.

As we discussed yesterday, I am sending around today the stipulation providing consent to the filing of any brief of any amicus curiae in this matter. Any amicus curiae should file a copy of this stipulation with its brief. Additionally, the extension referenced in the opening paragraph of this letter would apply to the filing of a brief by any amicus, and a copy of this letter should be filed by any amicus as well.

Thank you both for your consideration as to both aspects of this matter.

Sincerely,

Cliff John Groh
Assistant Municipal Attorney