COMMONWEALTH OF MASSACHUSETTS

HAMPSHIRE, SS. CIVIL ACTION NO. 2080CV00117

MARGERY JESS,

Plaintiff,

v.

SUMMER HILL ESTATES CONDOMINIUM TRUST and FRANK PUDLO, in his capacity as Chair of the Trustees of Summer Hill Estates Condominium Trust,

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF EMERGENCY MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

INTRODUCTION

Plaintiff Margery Jess respectfully seeks preliminary injunctive relief prohibiting Summer Hill Estates Condominium Trust of Belchertown, Massachusetts ("the Trust") and its Trustees, by and through the Chair of the Trustees Frank Pudlo (collectively "Defendants"), from imposing or threatening to impose on her a daily fine for posting a sign expressing her view that "Black Lives Matter" in the common area just outside her condominium, on her condominium door, and/or in her condominium window.

Defendants have threatened to impose fines on Ms. Jess for expressing her views at her own home despite the fact that there is no duly adopted condominium rule barring the posting of a Black Lives Matter sign in a window, and despite the fact that Defendants allow other condominium unit owners to place expressive decorations in the common areas outside their own

condominiums and on their doors. As such, Defendants are unreasonably and unlawfully curtailing Ms. Jess' ability to express her views on a matter of public concern at her own home.

This case ultimately raises the question whether Article 16 of the Massachusetts Declaration of Rights confers on condominium owners a constitutional right to engage in free expression through the display of signs at their own homes, subject to reasonable time, place and manner regulations. *See, e.g.*, *Mazdabrook Commons Homeowners' Ass'n v. Khan*, 210 N.J. 482, 501 (2012). Particularly in light of the doctrine of constitutional avoidance,[1] however, the constitutional question need not be reached at this stage of litigation because relief is clearly warranted under other governing law.

STATEMENT OF FACTS[2]

Plaintiff Margery Jess has lived at the Summer Hill Estates Condominium since she purchased her condominium unit in October 2012. She holds exclusive ownership and possession of her unit, including the windows and doors, in addition to an undivided ownership interest in the common areas and facilities of the Condominium. G.L. c. 183A, § 4; Master Deed § 4(a) at 2.[3]

On May 30, Ms. Jess placed a "Black Lives Matter" sign in the garden bed in front of her condominium. A picture of that sign is set forth in ¶ 16, **Figure 1**, of the Complaint.

On May 31, the Trustees, through Defendant Frank Pudlo, emailed Ms. Jess to tell her to take down her sign because signs were forbidden under the Trust's rules. **Complaint, Exhibit 1.** No mention was made of a right to seek permission to display the sign. In response, Ms. Jess

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[1] This Court has a duty to interpret G.L. c. 183A, and rules which the statute authorizes the Association to enforce through imposition of fines and liens, so as to avoid the serious constitutional questions arising under Article 16 and the First Amendment. *See, e.g.*, *Commonwealth v. Jones*, 471 Mass. 138, 143 (2015) (and cases cited).
[2] These facts are set forth in the Verified Complaint, ¶¶ 14–36.
[3] The Master Deed is **Exhibit 7** and the Declaration of Trust, including the By-Laws and Rules and Regulations, is **Exhibit 8** to the Verified Complaint.

wrote back and asked how her signs were different from all the others posted in common areas, at which point Defendant Pudlo for the first time indicated permission could be requested and given, but said that Ms. Jess was required to take the sign down pending the Trustees' decision regarding said request. In response, Ms. Jess promptly submitted a "formal request to the Trustees to have my sign approved on the basis of humanity." In her email, she explained, "As some residents have hearts displayed on their doors and windows as an expression of supporting healthcare providers during COVID-19, I [am] supporting our fellow Black Americans as they deal with continued institutional racism and police brutality." This series of emails is attached as **Exhibit 2** to the Verified Complaint.

In an email response dated June 1, Defendant Pudlo, apparently on behalf of the Trustees, threatened Ms. Jess with a $50.00 daily fine for every day that the sign was displayed without approval. **Complaint, Exhibit 3**. A $50 daily fine would cost $18,250 per year, and any unpaid portion of this sum, in addition to interest charged, would constitute a lien on Ms. Jess' property, raising the possibility of a forced sale if the lien were to go unsatisfied. *See* G.L. c. 183A, § 6(a)(ii).

The Trustees met on June 4, 2020 to consider Ms. Jess' request. Ms. Jess was not invited to attend. According to an email sent by Defendant Pudlo, a majority of the Trustees' four members voted against approving Ms. Jess' sign. In his email informing Ms. Jess of this decision, Defendant Pudlo said: "the Trustees voted today on your request and the majority vote was not to allow your sign to be displayed. Our decision is to not allow signs with any political intent or connotation. This decision is especially relevant with this being an election year. The other signs [located outside other owners' units], are not political and are considered decorations." **Complaint, Exhibit 4**.

The Trustees rendered this decision as to Ms. Jess even though many unit owners at Summer Hill Estates display or have displayed decorations, signs, banners, and flags on the exterior walls and doors of their units, or in the grass and shrubbery adjacent to their units, that express views that are at least as "political" as Ms. Jess' Black Lives Matter Sign. These displays include:

a. a freestanding sign on the lawn outside a unit that says "PLEDGE," "hope, UNITED," and "liberty," with indicia of the American flag;

b. an Irish flag flown on the lawn outside a Trustee's unit;

c. a freestanding sign outside of a unit containing the words "Land of the FREE" and "Because of the BRAVE," and adorned with stars and stripes;

d. a banner on a freestanding post outside a condominium unit with the words "Thank you" and an abstract representation of an American flag;

e. a flag attached to the exterior of a unit door, containing stripes and stars.

f. a freestanding post on the grass outside of a unit displaying a red, white and blue flag with a single star on the upper left quadrant;

g. a flag affixed to a unit door containing nine stripes and 36 stars in the upper left quadrant;

h. American and Polish flags hanging from a unit porch; and

i. hearts on unit doors and windows, intended to show support for medical personnel during the COVID-19 crisis.

Ms. Jess continues to want to express her view that Black Lives Matter, just as certain of her neighbors are expressing their views that it is a priority to express gratitude for front-line workers during the COVID pandemic and to recognize contributions by military personnel. So,

by written communication dated September 15, 2020, Ms. Jess asked the Trustees to approve her hanging a Black Lives Matter in a window of her condominium facing out toward the common area. This request was based on her understanding that signs in windows (other than "For Sale" signs, which are specifically and exclusively covered by a separate rule) are not forbidden and do not require prior written authorization. She also asked for clarification as to whether she needed to have permission to express her views on her own door, given her understanding that, under the Master Deed, the door is part of the unit she exclusively owns. In the alternative, she asked for any needed permission. **Complaint, Exhibit 5**.

On September 23, 2020, the Trustees, through Defendant Pudlo, also declined this request, stating: "The short answer is that signs of any kind are not allowed in windows." Defendant Pudlo indicated that expressive decorations, such as "wreaths," are allowed on doors as long as they are "in good taste." He did not reveal any standards for determining what qualifies as "in good taste" or whether Ms. Jess' Black Lives Matter sign could meet that standard. **Complaint, Exhibit 6**.

In the face of the Trustees' denials of approval, lack of clarity, and threats of onerous fines, Ms. Jess has removed her sign and not put it back up in the common area, and she has not posted a Black Lives Matter sign in her window or on her door. She periodically sets a sign, decorated to evoke the American Flag, on a chair in her garage with the garage door open. *See* **Complaint** ¶ 26, **Figure 10**. But the sign is substantially blocked by the vehicles parked in the driveway and not very visible, and it will not be visible at all in impending cold weather when the garage door will have to remain closed. Ms. Jess wants to be permitted to post her sign in the common area outside her unit, where it would be most visible, and, if she chooses, on the door

and /or in a window of her unit so as to express, at her own home, her deeply held support for the Black Lives Matter movement.

ARGUMENT

"A party seeking a preliminary injunction must show that success is likely on the merits; irreparable harm will result from denial of the injunction; and the risk of irreparable harm to the moving party outweighs any similar risk of harm to the opposing party." *Doe v. Worcester Public Sch.*, 484 Mass. 598, 601 (2020) (quoting *Doe v. Superintendent of Sch. of Weston*, 461 Mass. 159, 160 (2011)).

Ms. Jess has a strong likelihood of success because the Condominium Rules simply do not forbid the posting of a Black Lives Matter sign in the window of her unit. Moreover, she has a strong likelihood of success as to the windows and doors, which are part of her unit, because any restrictions on units, as opposed to common areas, must be in the Master Deed or By-Laws, rather than the Rules. She also has a strong likelihood of success on her claims that Defendants have violated their obligation under both Section 11.2 of the Declaration of Trust and the doctrine of equitable reasonableness by failing to have written standards to guide discretion and by unreasonably withholding permission for her to post her Black Lives Matter sign in the common area outside her unit, in her window, and/or on her door.

Absent relief, Ms. Jess will be irreparably injured because her right to express her moral, civic, and political views at her own home will continue to be infringed. The harm Ms. Jess is experiencing outweighs any harm to Defendants from allowing her to post her sign. She accordingly is entitled to preliminary injunctive relief.

I. Plaintiff Jess has a strong likelihood of success on the merits.

Ms. Jess has a strong likelihood of success both with respect to her right to post a sign in her window, on her door, and with respect to the right to post her sign in the common area outside her unit.

A. Condominium Rule 5 does not forbid or require permission for the posting of a Black Lives Matter sign in a condominium window, and, in any event, as to both doors and windows a mere rule is not controlling.

Condominium Rule 5 provides:

> No Unit Owner shall cause or permit anything to be hung or displayed on the *outside* of the windows or placed on the *outside* walls or doors of the Buildings or Units; and *no awning, canopy, shutter, satellite dishes, or radio or television antenna* (except for those expressly permitted by law) shall be affixed to or placed upon the exterior walls or doors, roof or any part thereof, or *exposed on or at any window*, without prior written consent of the Trustees.

(emphases added).

Rule 5 by its plain terms only prohibits the hanging of anything on the *outside* of a window, and the exposure at a window of several enumerated objects (which do *not* include signs) without prior written permission of the Trustees. It does not prohibit the display of a sign on the inside of a window facing out. Moreover, Rule 6 prohibits the placing of "For Sale" signs – and only "For Sale" signs – "in the windows" of a unit.[4] There are no other relevant rules regarding hangings signs in a window. Hence, there is simply no rule barring Ms. Jess from putting a Black Lives Matter sign in her window.

In spite of this, by email dated September 23, 2020, Defendant Pudlo, the Chair of the Board of Trustees, informed Ms. Jess that hanging her Black Lives Matter sign on the inside of her window looking out would constitute a violation of the Rules. Mr. Pudlo did not specify a

[4] Rule 6 reads in full: "'For Sale' Signs. Unit Owners of the Buildings may not place 'For Sale' signs in the windows or on the decks or balconies of their Units."

particular rule as the basis for this statement, although he continued on to discuss "For Sale" signs in his email. Given the history of the Trustees threatening her with daily fines for not conforming to their decrees with regard to her sign – fines that can be turned into a lien on her home[5] – she understandably fears that if she puts the sign in her window, fines will follow.

The Trustees' prohibitions on signs in windows and doors are also invalid because restrictions cannot be imposed on individually-owned units unless such restrictions are set forth in the Master Deed or the By-Laws. *See Johnson v. Keith*, 368 Mass. 316, 319 (1975); *Granby Heights Ass'n. v. Dean*, 38 Mass. App. Ct. 266, 268 (1995); *KACT, Inc. v. Rubin*, 62 Mass. App. Ct. 689, 695 (2004); *Trustees of Muzzey High Condominium Trust v. Town of Lexington*, 15 Mass. L. Rptr. 91, 2002 WL 1799736 at *10–11 (Mass. Sup. Ct. 2002). Under the Master Deed, unit doors and windows belong to the unit owner, and are not a common area. Master Deed, ¶ 8(b) and Exhibit D, ¶ D at 32 ("Doors, windows and skylights (if any), that open from a Unit are part of the Unit from which they open . . . ."). Hence, Ms. Jess should be free to put a Black Lives Matter sign on either the outside of her front door or on the inside of her storm door facing out without having to seek the Trustees' permission or deferring to their assessment of whether the sign is "in good taste."

In sum, there is no provision in the Master Deed, the By-Laws or any rule or regulation adopted in accordance with governing documents that prohibits putting a sign in a window. And, the Trustees' attempt to assert control over the doors based on a mere rule that is not contained in the Master Deed or By-Laws is invalid. Moreover, even if Rule 5 could control windows and doors and even if it purported to preclude a sign in a window, which it does not, Defendants'

[5] The Trust is organized pursuant to G.L. c. 183A, which governs the creation, powers and duties of condominium associations in Massachusetts. G.L. c. 183A, § 6 empowers associations to impose fines on unit owners and establishes that such fines shall become liens on the unit owner's property.

application of Rule 5 to the doors is invalid due to the same lack of written standards to guide discretion for the granting or withholding of permission, and arbitrariness of application, that is discussed in detail below with regard to Rule 11. Therefore, Ms. Jess has a strong likelihood of success on her claims that she has a right under governing documents to hang a sign in her window and on her door.

B. Rule 11, which is applicable to common areas, on its face and as applied by the Trustees, is equitably unreasonable because it is fails to contain written standards to guide Trustees' discretion, is contrary to public policy, and otherwise violates the doctrine of equitable reasonableness.

Condominium Rule 11 provides in relevant part: "No part of the Common Areas and Facilities of the Condominium shall be decorated or furnished by any Unit Owner in any manner without the prior written approval of the Trustees." The grass and shrubbery outside condominium units are part of the common area and hence can be subject to some level of oversight by the Trust. But Rule 11 contains no written standards to guide the Trustees' discretion to grant or withhold permission for signs or other decorations to be placed in the common areas. As Ms. Jess' situation shows, this Rule has been applied to discriminate among unit owners, allowing some to express themselves in the common areas but not others. The Trustees' actions thus violate Section 11.2 of the By-Laws, which requires that permission not unreasonably be withheld.[6] Such restrictions and discrimination also violate the doctrine of equitable reasonableness, including because they implicate constitutionally protected free speech rights and therefore raise serious public policy concerns.

[6] Section 11.2 of the Declaration of Trust provides in full: "Whenever it is provided herein that the permission, approval or consent of a party is required, such permission, approval or consent shall not be unreasonably withheld. The Trustees have the power and authority to waive any provision of this Trust affecting or limiting the rights of a Unit Owner for any cause or reason determined to be reasonable by such Trustees in their discretion."

The interpretation and application of condominium rules and requirements are subject to the doctrine of equitable reasonableness. *Bd. of Managers of Old Colony Vill. v. Preu*, 80 Mass. App. Ct. 728, 731 (2011); *Noble v. Murphy,* 34 Mass. App. Ct. 452, 457, 459 (1993); *Yankovski v. Keller,* 18 Mass. L. Rptr. 431, 2004 WL 2451293 at *2–3 (Mass. Sup. Ct. 2002); *Trustees of Muzzey High Condominium Trust*, 2002 WL 1799736 at *11–12. Under this doctrine, courts will not uphold restrictions if they (1) are "wholly arbitrary in their application," *id.* at 459 (quotation omitted), *or* (2) "violate a right guaranteed by 'any fundamental public policy or constitutional provision'." *Preu*, 80 Mass. App. Ct. at 730 (quoting *Noble*, 34 Mass. App. Ct. at 460). In addition, actions that bar unit owners from engaging in conduct in and around their units must be supported by the language of the rules and, further, must be reasonably related to promoting the health, happiness and peace of mind of association members. *Yankovski,* 2004 WL 2451293 at *3.

i. Rule 11 is unreasonable because it does not contain written standards to guide the Trustees' discretion and the Trustees have applied it arbitrarily.

In *Mazdabrook Commons Homeowners' Association v. Khan*, the Supreme Court of New Jersey emphasized that, in order to pass legal muster, there must be written standards to guide discretion as to when permission for expressive activity will be granted in condominium associations. 210 N.J. 482, 502 (2012). Indeed, even the dissent recognized that if and when associations allow some signs expressing some views but forbid signs expressing alternative views, they violate the association's duty to act reasonably and in good faith. *Id.* at 509 (Wefing, J., dissenting) (citing *Mulligan v. Panther Valley*, 337 N.J. Super. 293, 300 (2001)). Written standards to guide discretion have long been required as a constitutional matter as a prerequisite to restrictions on free speech. *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 129 (1992).

In *Yankoviski*, *supra*, the Massachusetts Superior Court was faced with a situation in which a condominium association denied a unit owner permission to construct an additional wall in a unit for the purpose of creating another bedroom. There, the condominium rules provided that permission for such construction must be obtained from the Trustees but that such permission could not be unreasonably withheld, much as Section 11.2 of the Declaration of Trust provides in this case. The *Yankovski* Court ruled that the Trustees acted inappropriately because the governing documents allowed the unit owners to do renovations in their unit, with approval, and the Trustees' denial of permission was not reasonably related to legitimate objectives of promoting the health, happiness and peace of mind of association members. 2004 WL 2451293 at *4.[7]

Yankovski, in discussing the equitable reasonableness standard, states, "[T]he purposes of the 'reasonableness' standard is to 'somewhat fetter the discretion of the board of directors'." *Id.* at *2 (quoting *Hidden Harbour Estates, Inc. v. Basso,* 393 So. 2d 637, 640 (Fla. 4th DCA 1981)).

Rule 11 is devoid of any written standards to guide discretion, and the Trustees have used their discretion under it in an arbitrary and discriminatory matter. The Rule on its face and as applied therefore it violates the standard of equitable reasonableness, and Ms. Jess has a strong likelihood of success that Defendants' action under Rule 11 is unlawful.

ii. Rule 11 is unreasonable because it is contrary to public policy.

Rule 11, facially and as applied, also fails the test of equitable reasonableness because it "violate[s] a right guaranteed by '[a] fundamental public policy or constitutional provision'." *Preu,* 80 Mass. App. Ct. at 730 (quoting *Noble,* 34 Mass. App. Ct. at 460). *See also Mazdabrook Commons*, 210 N.J. at 507 ("[R]estrictive covenants that unreasonably restrict speech—a right

[7] The Court noted that, as here, the presence of the reasonableness requirement in the condominium rules themselves added to the defendants' burden to justify denying a plaintiff's request for permission. 2004 WL 2451293 at *4.

most substantial in our constitutional scheme—may be declared unenforceable as a matter of public policy." (quotation omitted)); Restatement (Third) of Property (Servitudes) § 3.1 cmt. h (2000) ("Servitudes that unreasonably burden fundamental constitutional rights are invalid.").

Although Plaintiff Jess will argue later in these proceedings that the Condominium's Rules and the actions of the Trustees directly violate the Massachusetts Constitution, the Court need not reach this constitutional question in its equitable reasonableness analysis at the preliminary injunction stage. Rather, the Court should find that Defendants' actions are inconsistent with public policy – the same public policy that undergirds Article 16 of the Declaration of Rights and the First Amendment to the U.S. Constitution. *See id.,* § 3.1 cmt. h (2000) (The rationale is that "the importance accorded by the federal constitution to protection of these rights against governmental action suggests that there is also a public interest in protecting them against private action.").

The First Amendment, applicable to the states through the Fourteenth Amendment, reflects a strong public policy in favor of speech at one's own home, and Article 16 of the Massachusetts Declaration of Rights protects at least as much speech as, and sometimes more than, the First Amendment. *See, e.g.*, *Mendoza v. Licensing Bd. of Fall River*, 444 Mass. 188, 190–91 (2005); *Commonwealth v. Sees*, 374 Mass. 532, 535–37 (1978). [8]

In *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994), the U.S. Supreme Court struck down, as violating the First Amendment, a municipal ordinance that barred virtually all residential signs, including political signs, on private, residential property. The Court found that the

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[8] Relevant both to the public policy and underlying constitutional issues, the Supreme Judicial Court has specifically left open the question of whether Article 16 applies to speech on private property, as the New Jersey free speech provision was found to do in *Mazdabrook, supra*. *See Roman v. Trustees of Tufts Coll.*, 461 Mass. 707, 713 (2012) ("[W]e have rejected the assertion that art. 16 can extend no further than the comparable provisions of the First Amendment . . . . Moreover, we have cited with approval cases in other jurisdictions where courts have concluded that their State Constitutions protect the exercise of free speech rights on private university property against private actors." (quoting *Batchelder v. Allied Stores Int'l, Inc.*, 388 Mass. 83, 89 n.8 (1983) (cleaned up)).

ordinance simply prevented "too much speech," particularly when evaluated against the backdrop of the special respect for individual liberty in the home that has long ungirded American law. *Id.* at 58. The Court highlighted the unique value of posting signs on one's own property to communicate ideas, particularly political ideas, including to one's own neighbors. *Id.* at 56.

It is against this backdrop that the Massachusetts Appeals Court in *Board of Managers of Old Colony Village Condominium v. Preu* specifically recognized that, whether or not there generally is a constitutional right to free speech on private property that runs to members of the general public, a special calculus is required in condominium associations where the unit owners as well as the Association have private property rights. 80 Mass. App. Ct. at 732. Relying on its prior decision in *Noble v. Murphy*, the *Preu* Court ruled that, as a matter of public policy, "a condominium association does not have as free a hand in restricting the speech of unit owners in the common areas in which those owners share an undivided property interest as another property owner might in dealing with a stranger on his or her property." *Id.* at 732 (citing *Noble*, 34 Mass. App. Ct. at 455–456).[9]

In *Ladue,* the Supreme Court ruled that excessive restrictions on speech at one's home are unconstitutional regardless of whether those restrictions are based on the content or viewpoint of the speech. 512 U.S. at 55, 56. But viewpoint-based restrictions are particularly pernicious and hence subject to the strictest of scrutiny under the constitutions. *Reed v. Gilbert,* 576 U.S. 155, 165 (2015); *Benefit v. Cambridge*, 424 Mass. 918, 925 (1997).

Against this backdrop, the Trustees' application of Rule 11, which restricts "too much speech" at one's home and discriminates between viewpoints (e.g., Home of The Free —

[9] Notably, the *Preu* Court also held that when a court enforces speech restrictions within condominium associations, those restrictions must comport with First Amendment requirements. 80 Mass. App. Ct. at 733.

Because of The Brave versus Black Lives Matter) is against public policy and the doctrine of equitable reasonableness.

iii. Rules 11 is unreasonable because it is not reasonably related to promoting the health, happiness, and peace of mind of association members.

Rule 11 and its discriminatory enforcement by the Trustees violates equitable reasonableness for yet another reason: The discrimination is not reasonably related to promoting the health, happiness, and peace of mind of association members. *Yankovski,* 2004 WL 2451293 at *3. Indeed, under Massachusetts law, protecting residents from being exposed to political or moral views with which they may not agree is likely not a legitimate objective of the Association. *See Preu,* 80 Mass. App. Ct. at 732.

A rule containing clear and objective standards governing the number, size, or proximity to the unit of expressive signs or decorations that may be placed by each unit owner in a common area, and which is enforced without discrimination, might reasonably relate to a legitimate interest in preventing clutter. But Rule 11's authorization of *ad hoc* determinations of what is and is not "political" or of what is or is not "in good taste," or what is or is not otherwise allowed, does not. Indeed, restraining political speech likely undermines the happiness and peace of mind of residents who wish to express their views at their home in a reasonable manner. Moreover, while some residents might disagree with the sentiment behind "Black Lives Matter," other residents may disagree with the inherently political sentiment that the United States is "free" because of the actions of the military, e.g. the "Brave," or with the sentiments behind an Irish flag, just as much as – if not more than – some residents might disagree with the sentiment that "Black Lives Matter." Yet, only Ms. Jess' sign has been prohibited.[10]

[10] In the email exchange contained in **Exhibit 2** to the Verified Complaint, Trustee Connors alluded to the Right to Fly the American Flag Act., 4 U.S.C. § 5 Note (2006), which requires homeowners' associations to allow residents to display an American Flag, including a representation of the American flag, broadly defined. Ms. Jess' request to

Even if Rule 11 were reasonably related to a legitimate interest, its selective discriminatory enforcement by the Trustees Trust violates equitable reasonableness. In *White Egret Condominium, Inc. v. Franklin*, 379 So. 2d 346 (Fla. 1979), a case that has been relied upon by the Massachusetts Supreme Judicial Court,[11] and the Appeals Court,[12] the court found that arbitrary and selective enforcement of a generally legitimate rule restricting residency by children rendered the rule unenforceable as to a particular family. So too here, the discriminatory and selective enforcement of Rule 11 to Ms. Jess is equitably unreasonable.

Similarly, in *Trustees of Muzzey High Condominium Trust,* the Court found that a rule that restricted use of parking spaces during weekdays was not reasonably related to a legitimate goal because there was "little evidence" to show that parking was a problem during the weekdays, as opposed to evenings and weekends. 2002 WL 1799736 at *12–13. Hence, the Court found that the rule was unreasonable and could not be enforced with respect to weekdays. *Id*.

Here, the Trustees have denied Ms. Jess the right to post her sign in the common area immediately adjacent to her home, based merely on a generalized assumption that "political" signs should not be allowed, while arbitrarily allowing other signs that are just as much "political" as Ms. Jess' sign. And they have implied that they can deny her the right to post the sign on her door unless they find it "in good taste," even though, under the Master Deed, the

post her original sign was not denied on the grounds that it did not include adequate representations of the American Flag, and the Trust has no written rules limiting common area displays to those suggesting such flags. Further, it is not at all clear that a rule allowing only signs with representations of American Flags would be constitutional or equitably reasonable. But, under the Act, Ms. Jess is entitled to preliminary relief so she can post in the common area outside her unit the sign that has been in her garage, which displays significant traditional red, white and blue bunting and thus is covered by the Act. Verified Complaint ¶ 26, Figure 10.

[11] *See, e.g.*, *Franklin v. Spadafora*, 388 Mass. 764, 771 (1983).

[12] *Woodvale Condominium Trust v. Scheff*, 27 Mass. App. Ct. 530, 533 (1989).

door is hers and even though others have been allowed to have signs showing their patriotism on their doors.

The Trustees simply cannot meet their burden to show that Ms. Jess' request posting of her sign in her garden bed or on her door is "demonstrably antagonistic to the legitimate objectives of the condominium association." *Yankovski,* 2004 WL 2451293 at *3 (quoting *Basso*, 393 So. 2d at 640).

In sum, Rule 11, as applied arbitrarily by the Trustees to Ms. Jess, fails the test of equitable reasonableness.

II. Ms. Jess is suffering irreparable harm from not being able to express her views at her own home.

It has long been established that the loss of the right to express one's views for even minimal periods of time constitutes irreparable injury. *Elrod v. Burns,* 427 U.S. 347, 373 (1976). Here, since at least early June 2020, Ms. Jess has been denied the right to express her view that Black Lives Matter at her own home. This right has been denied even though in September 2020, Ms. Jess tried to point out to the Trustees that she should be allowed to post a Black Lives Matter at least in her window facing out and/or on her door, but was rebuffed. This right has been denied even though the sign is particularly relevant to ongoing local and national discussions about the value of Black lives and the treatment of Black people by law enforcement. With every passing day, Ms. Jess is losing her chance to participate in this discourse. Ms. Jess therefore is clearly is suffering irreparable injury.

III. Defendants will suffer no harm from allowing Ms. Jess to post her sign that can outweigh the injury to her.

There will be *zero* cognizable injury of any kind from allowing Ms. Jess to post her sign in her window or in the common area just outside her condominium without threat of fines and

liens.

Many other residents have decorations or signs in the common areas outside their units and on their doors that express viewpoints, including political viewpoints, e.g. that the United States is the land of the free because of the bravery of its military service members. No one will therefore be injured by Ms. Jess being able to post her tastefully constructed sign expressing the view that "Black Lives Matter" outside her own unit during the pendency of this action.

To the extent that the Association is worried about visual clutter, an interest that may be legitimate but is not compelling enough to justify the discriminatory enforcement of Rule 11, *City of Ladue*, 512 U.S. at 54, the Trust could adopt a reasonable time, place and manner policy that governs how many signs each owner may have in the common area and the maximum size of any such sign. But thus far the Trust has not done this, and instead is discriminating against signs based solely on the content of the message they convey, which is anathema to the public policy underlying the right to express oneself through signs at one's own home.

IV. The public interest will be served, not harmed, by allowing Ms. Jess to post her sign.

While a public interest test technically does not apply when preliminary injunctive relief against a private party is sought, courts are free to take it into account when it supports issuance of injunctive relief. *Doe v. Worcester Public Sch.*, 484 Mass. at 604 n. 12 (preliminary injunction supported by fact it promoted the public interest).

"[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 397 U.S. 64, 74–75 (1964). The Supreme Court "has frequently reaffirmed that speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotation omitted). Political speech, which the Trustees have deemed Ms.

Jess' sign to be, is at the core of constitutional free speech protections. *See, e.g.*, *Citizens United v. Fed. Election Comm'n,* 558 U.S. 310, 329 (2010); *Virginia v. Black*, 538 U.S. 343, 365 (2013). Restrictions on political speech are particularly suspect when they seek to dictate "permissible subjects for public debate" and thereby to "control . . . the search for political truth." *Consolidated Edison Co. of N.Y. v. Public Servo Comm'n of N.Y.*, 447 U.S. 530, 538 (1980). Indeed, it has long been recognized that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ." *West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 642 (1943).

Allowing Ms. Jess to post her sign on her door, in her window and, most importantly, in the common area outside her unit will further the values undergirding these core constitutional principles and the public interest.

CONCLUSION

For all the reasons set forth above, Defendants' refusal to allow Ms. Jess – upon pain of severe penalties and liens – to post a Black Lives Matter sign in her window, on her door, and, as is her preference, in the common area outside her condominium violates the rules of the Trust, is equitably unreasonable, arbitrary, and contrary to public policy, and should be preliminarily enjoined.

Respectfully submitted on behalf of Plaintiff Margery Jess,

By: */s/ William C. Newman*
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