No. 22-612

IN THE

Supreme Court of the United States

MARSHALL SPIEGEL, PETITIONER

v.

1618 SHERIDAN ROAD CONDOMINIUM ASSOCIATION, INC., DR. MARYBETH GERRITY, GENE EPSTEIN, JAN ANDERSON, AND BOARD OF DIRECTORS OF THE 1618 SHERIDAN ROAD CONDOMINIUM ASSOCIATION

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, THIRD DIVISION

PETITION FOR REHEARING

MARSHALL SPIEGEL
pro se

Unit 2
1618 Sheridan Rd.
Wilmette, IL 60091
(847) 853-0993
oscars56@gmail.com

CURRY & TAYLOR ♦ 202-350-9073

PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44, Petitioner Marshall Spiegel petitions for rehearing of this Honorable Court's March 6, 2023 Order denying his petition for writ of certiorari.

1. The issues raised for review warrant certiorari as they involve the First Amendment rights of homeowners living in homeowner's associations. Over half of today's homeowners now reside in associations and are often subjected to an infringement of their First Amendment rights.

2. This petition should be granted as the Question Presented for Review in the petition for certiorari was mistakenly inserted from another case and did not accurately present the issues questions and need for review. As such, the questions for certiorari are set forth on the following page

QUESTION(S) PRESENTED

The Illinois Condominium Property Act forbids any "rule or regulation" that "may impair any rights guaranteed by the First Amendment to the Constitution of the United States." 765 ILCS 605/18.4(h). Any condominium "instrument" that "contains provisions contrary to these provisions shall be void as against public policy and ineffective." 765 ILCS 605/18.4(s).

Here, a condominium association claimed a unit owner gave up his First Amendment rights when agreeing not to post court documents in his window relating to a prior settled lawsuit between them. The Circuit Court of Cook County, Illinois, granted the association's motion to enjoin the unit owner from expressing his First Amendment rights because of this alleged limited contractual waiver.

The Illinois Appellate Court affirmed the decision and the Illinois Supreme Court denied the unit owner's petition for leave to appeal. Can a homeowner's association use State courts to enforce restrictions on First Amendment rights? Alternatively, is an alleged contractual waiver of a First Amendment right governed by Federal, not State, law?

Respectfully submitted,

Marshall Spiegel
Unit 2
1618 Sheridan Road
Wilmette, IL 60091
(847) 853-0993

EXHIBIT

ORIGINAL PETITION SANS QUESTIONS

PARTIES TO THE PROCEEDING

All the parties in this proceeding are listed in the caption.

STATEMENT OF RELATED CASES

None

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

OPINIONS BELOW

The opinions of the Circuit Court of Cook County, Illinois Appellate Court, and Illinois Supreme Court are not reported. They are attached in the Appendix as Exhibits A, B, and C respectively.

JURISDICTION

The Illinois Supreme Court denied review on September 28, 2022. This petition for writ of certiorari it is filed within 90 days of the decision. This Honorable Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

RELEVANT PROVISIONS INVOLVED

U.S. Const., Amendment 1

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

765 ILCS 605/18.4(h)

> However, no rule or regulation may impair any rights guaranteed by the First Amendment to the Constitution of the United States or Section 4 of Article I of the Illinois Constitution including, but not limited to, the free exercise of religion, nor may any rules or regulations conflict with the provisions of this Act or the condominium instruments.

STATEMENT

Twenty-one years ago, Marshall Spiegel and his condominium association and board members (collectively "Association") signed a written settlement agreement ("Agreement") to resolve a lawsuit between them. The trial court retained jurisdiction to enforce the terms.

Among other things, the Agreement required the Association to open the common area pool no later than May 1st of each year. In April 2020, the Association claimed it would not comply. Hence, a month later, Spiegel sought to enforce the Agreement.

The trial court granted Spiegel's motion to enforce. However, the Association filed a counter-petition claiming Spiegel violated the Agreement by placing a Halloween vampire, tombstone, and writings affixed thereto in his unit's window. The Agreement states:

> "Spiegel additionally agrees not to post any documents relating to the 1618 Sheridan Rd. building in the windows of his unit, nor to place any such documents immediately adjacent to any windows of his unit which are adjacent to the front entrance of the building with the intent that such documents be readable to passersby."

The trial court found the Agreement's wording extended to writings on displays and other matters. However, for years the Association never sought or construed the Agreement to cover anything other than the prior court related documents. The trial court

found Spiegel "waived, in this settlement Agreement, his First Amendment rights to post signs in his windows." The trial court later extended the prohibition to remove a "facemask" on the mannequin.

The trial court rejected Spiegel's claim that the items and displays were outside the Agreement's scope and the Association waived or was estopped from asserting a breach of the Agreement by waiting more than six years to raise the issue. Spiegel timely appealed. The Illinois Appellate Court affirmed and the Illinois Supreme Court denied leave to appeal.

REASONS FOR GRANTING THE PETITION

This Honorable Court should grant the writ. Homeowner's associations now govern the majority of homeowners and it is unconstitutional for them to use Illinois courts to deny persons First Amendment rights pursuant to *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948).

I. Homeowners' Assoc. Cannot Use State Courts to Violate 1st Amendment.

More than 355,000 homeowners' associations ("HOA") exist in the United States.[1] HOAs cover over 40 million housing units. *Id.* Over half of today's homeowners (53%) live in HOAs. *Id.* The number will only increase. For example, in 2021, 82.4% of newly constructed homes were part of a HOA. *Id.* The day

[1]https://ipropertymanagement.com/research/hoa-statistics#:~:text=Homeowners'%20associations%20in%20the%20United,homeowners%20live%20in%20HOA%20communities.(last accessed December 18, 2022)

has come where homeowners cannot fly a Thin Blue Line flag to honor their son's death.[2]

The Association's non-governmental status is irrelevant. "[L]egal obligations" enforced in "state courts" restricting First Amendment rights is 'state action.' *Cohen v. Cowles*, 501 U.S. 663, 668 (1991).

For example, "private cause of action for promissory estoppel" seeking enforcement "through the official power of the Minnesota courts" is "enough" to constitute 'state action.' *Id.* Similarly, judicial enforcement of unconstitutional racial land covenants is state action. *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948).

Likewise, defamation law in "civil lawsuit[s] between private parties" can be State action when the courts have applied their common law to decide the case. *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964). "The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised." *Id.*

Here, State power is applied to enforce abridging a person's First Amendment rights. Moreover, it is only by virtue of State law that HOAs can exercise and enforce such broad powers over their members. 765 ILCS 605/1 *et seq.* (Illinois Condo Act).

Outside constitutional claims, an association's demands or rules seeking to "restrict speech" may be

---

[2]https://www.washingtonpost.com/nation/2022/12/15/thin-blue-line-flag-lawsuit-father/ (last accessed December 18, 2022).

"declared unenforceable as a matter of public policy." *Mazdabrook v. Khan*, 210 N.J. 482, 507 (N.J. 2012).

For example, uttering "profanities at a Board meeting[,]" leaving messages on a member's "answering machine uttering profanities[,]" "calling" a member a 'Nazi'," raising the "middle finger" at others, and "writing insulting messages in the memo section of [] Condominium fee checks[,"] is also "protected under the First Amendment." *Board v. Preu*, No. 0900310, at *139 (Mass.Ct. Oct. 21, 2009).

Expressive conduct cannot be penalized unless the law withstands strict scrutiny. *Masterpiece v. Colorado*, 138 S.Ct. 1719, 1745 (2018). The First Amendment "generally prevents government from proscribing speech" or "even expressive conduct" because "of disapproval of the ideas expressed." *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992). "Content-based regulations are presumptively invalid." *Id.* Hence, "[d]isplays containing abusive invective, no matter how vicious or severe, are permissible." *Id.* at 391.

For example, "burning a cross in someone's front yard is reprehensible" but protected First Amendment activity. *Id.* at 396. Likewise, picketing a dead soldier's funerals with signs stating: "Thank God for IEDs," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "God Hates Fags," "You're Going to Hell," and "God Hates You" is protected speech. *Snyder v. Phelps*, 562 U.S. 443, 448 (2011). Similarly, a union's using an inflatable "giant rat" that may "cause[] distress to the executives of the car dealership that the rat is picketing." *Construction v. Grand Chute*, 834 F.3d 745, 759-60 (7th Cir. 2016).

II. Waiver is an Issue of Federal Law, not State Contract Law.

Alternatively, review should be granted to ensure that "the question of a waiver of a federally guaranteed constitutional right is" "a federal question controlled by federal law." *Brookhart v. Janis*, 384 U.S. 1, 4 (1996).

Hence, whether a party waives its First Amendment rights in a written agreement is not governed by State contract law. *Sambo's v. Ann Arbor*, 663 F.2d 686, 690 (6th Cir. 1981). For example, courts should not use "Michigan contract law as the standard for waiver." *Id.*

Also, "[t]here is a presumption against the waiver of constitutional rights[,]" especially First Amendment ones. *Brookhart* at 4. The Association did not prove by "clear and compelling" that such rights were waived and wrongly applied State law. *Curtis v. Butts*, 388 U.S. 130, 145 (1967). "Courts must "indulge every reasonable presumption against a waiver." *Aetna v. Kennedy*, 301 U.S. 389, 393 (1937).

The Illinois Condominium Property Act also forbids any "rule or regulation" that "may impair any rights guaranteed by the First Amendment to the Constitution of the United States." 765 ILCS 605/18.4(h). The Association could not demand Spiegel give up his First Amendment rights nor could this Agreement do so. Any condominium "instrument" that "contains provisions contrary to these provisions shall be void as against public policy and ineffective." 765 ILCS 605/18.4(s).

III. Displays are Not Fighting Words Exception to First Amendment.

Any displays were protected First Amendment speech. "[S]peech inflicting psychic trauma alone — without any tendency to provoke responsive violence or an immediate breach of the peace — does not lose constitutional protection under the fighting-words doctrine." *Purtell v. Mason*, 527 F.3d 615, 624 (7th Cir. 2008).

Fighting words require a tendency to "incite an ***immediate*** breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942)(emphasis added). Invariably, this requires the "type of personal, face-to-face, abusive and insulting language likely to provoke a violent relation." *Gooding v. Wilson*, 405 U.S. 518, 530 (1972)(dissent agreeing with *Chaplinsky*).

The "fighting words" exception to the First Amendment is inapplicable. For example, a "Halloween display — wooden tombstones with epitaphs describing, in unflattering terms, the demise of their neighbors — [is] constitutionally protected speech." *Purtell* at 617.

Even if the tombstones cause "embarrassment, anger, resentment, and for some, fear" they do not "incite an *immediate* breach of the peace." *Id.* at 625.(emphasis in original). As here, being "on display for weeks without violence or disruption" evidenced the displays lack any tendency for an "immediate" breach of the peace. *Id.*

The displays and objects here are on a Halloween vampire and a tombstone in Spiegel's window protesting things like the slashing of Spiegel's pool chair, other resident's actions, board abuse, imprudent spending, excessive noise, improper maintenance, and broken elevators. A "Halloween display — wooden tombstones with epitaphs describing, in unflattering terms, the demise of their neighbors — [is] constitutionally protected speech." *Purtell* at 617.

CONCLUSION

This Honorable Court should grant the petition for a writ of certiorari to ensure homeowner's associations that are formed and derive their power for State laws cannot restrict Federal First Amendment rights of their members and ensure that any alleged waiver, if allowed, is an issue of Federal law.

Respectfully Submitted,

Marina Tramontozzi
Counsel of Record

40 Country Club Rd
N. Reading, MA 01864
mtramontozzi@tramontlaw.com
978-664-1671

John S. Xydakis
Suite 402
30 North Michigan Ave.
Chicago Illinois, 60602
(312) 488-3497
johnxlaw@gmail.com