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NO. 58260-7-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

Resident Action Council,

Plaintiff/Respondent,

vs.

Seattle Housing Authority and Tom Tierney, ~~Executive Director~~
of the Seattle Housing Authority, in his Official Capacity,

Defendant/Appellant.

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COURT OF APPEALS
DIVISION ONE

SEP 11 2008

BRIEF OF PLAINTIFF/RESPONDENT
RESIDENT ACTION COUNCIL

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 ORIGINAL

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STATEMENT OF THE STANDARD OF REVIEW

Defendant/Appellant Seattle Housing Authority has appealed from an April 28, 2006, order by the King County Superior Court entitled “Findings of Fact, Conclusions of Law, Judgment & Permanent Injunction.” CP at 222-25. This order was granted pursuant to briefing and oral arguments upon Plaintiff/Appellee Resident Action Council’s Motion for Summary Judgment. CP at 139. Accordingly, the appropriate standard of review is de novo. *Ramey v. Knorr*, 130 Wn. App. 672, 685; 124 P.3d 314 (2005).

STATEMENT OF THE CASE

Defendant-Appellant Seattle Housing Authority (SHA) is a public body (more specifically, a public housing authority or PHA) that owns and operates a number of low-income housing programs and facilities in the City of Seattle, Washington. CP at 27, 157-60, 197. Some of these programs are federally-funded, including the Low-Income Public Housing (LIPH) Program, in which SHA receives a federal subsidy through the U.S. Department of Housing & Urban Development (HUD) to operate low-cost apartment buildings. CP at 157-60, 197; see 42 USC 1437f. SHA owns and manages approximately 5,300 LIPH units in twenty-eight (28) high-rise buildings throughout Seattle. CP at 157-60. These facilities are home to more than 8,800 people. CP at 157, 159-60.

As in common private residential tenancies, lease agreements between SHA and resident households govern tenancies in LIPH facilities. 24 CFR 966.1 et seq. In addition, SHA has historically issued “house rules” for LIPH buildings, which concern various peripheral issues outside the leases themselves. CP at 198, 201-07. SHA drafts and distributes the house rules, and requires LIPH tenants to sign and incorporate the house rules into their leases by reference. CP at 202-07. A tenant’s failure to abide by the LIPH house rules is thus tantamount to a lease violation, which may lead to termination of a resident’s housing subsidy and/or tenancy. CP at 161, 180, 202.

This action concerns one particular house rule (Rule #42) pertaining to tenant signs. CP at 161-62. SHA issued Rule #42 in Fall 2005, with the measure scheduled to take effect December 1, 2005. CP at 161-62. The Resident Action Council (RAC), a nonprofit organization comprised of elected tenant representatives from SHA’s LIPH communities, brought this constitutional and common law challenge to Rule #42 after SHA refused to withdraw or modify the rule. CP at 3-14, 17-24. House Rule #42 reads:

42. SIGNS. SHA's buildings and properties should blend into their surroundings and, to the extent possible, be indistinguishable from other buildings and properties in the neighborhood. Similarly, the interior common areas of SHA's buildings should be inviting and free from clutter.

Signs, flyers, advertisements and other written material, indiscriminately posted on the exterior of buildings and in common areas create a negative appearance which detrimentally affects residents of the building, residents of the surrounding community, and the public generally. For this reason, in all SHA residential properties, no signs, flyers, placards, advertisements or similar material may be posted on exterior walls, interior common area walls and doors, and the surface of unit apartment) doors that face the hall or outside. This rule does not prohibit, restrict, or otherwise limit the rights of residents to post signs, placards, or similar materials in or on the walls, windows, or other surfaces of the resident's unit.

Signs announcing events or activities of interest to the community and building residents may be permitted in designated areas of each building or property with the advance written approval of the community's Senior Property Manager. Signs and other insignia required for health and safety purposes are permitted, but must first be approved by the building's Senior Property Manager.

CP at 162.

On April 28, 2006, King County Superior Court (Hon. Suzanne Barnett) granted RAC's Motion for Summary Judgment, and upon oral arguments, entered a permanent injunction forbidding SHA from enforcing Rule #42's prohibition on any "signs, flyers, placards, advertisements or similar material . . . [on] the surface of unit apartment doors that face the hall or outside." CP at 222-25. SHA has appealed from this ruling. CP at 226-27.

ARGUMENT

This case tests whether a government landlord can lawfully compel low-income tenants to surrender the right to engage in constitutionally-protected free speech as a condition of living in publicly-subsidized housing. For the reasons discussed below, the answer is no.

A. House Rule #42 Impermissibly Infringes upon LIPH Residents' Freedom of Expression.

Rule #42 imposes a near-total ban against residential tenant signs in SHA's low-income public housing properties. CP at 162. The penalty for violating Rule #42 is a tenant's loss of her housing subsidy and/or expulsion from LIPH housing altogether. CP at 161-62, 180. Rule #42 unlawfully conflicts with the free speech guarantees of both Art. I, § 5 of the Washington State Constitution and the First Amendment of the U.S. Constitution.

A-1. *City of Ladue v. Gilleo* Supplies the Applicable Free Speech Analysis for Residential Signs.

Expression by residential signs and posters is pure speech, and is fully protected by the First Amendment (of the U.S. Constitution) and by Art. I, § 5 of the Washington State Constitution. See, e.g., *Baldwin v. Redwood City*, 540 F.2d 1360, 1366 (9th Cir. 1976). The seminal case

regarding speech through residential signs is *City of Ladue v. Gilleo*, 512 U.S. 43; 114 S.Ct. 2038 (1994).

In *Gilleo*, the U.S. Supreme Court ruled that a city ordinance prohibiting residents of Ladue, Missouri, from displaying signs at their homes was an unconstitutional infringement on freedom of speech. See *Gilleo* at 59. In an opinion by Justice Stevens written for a unanimous court,¹ *Gilleo* left no doubt that residential signs are a uniquely critical form of expression protected by the First Amendment. See *Gilleo* at 56-57. Government laws interfering with residential signs are therefore subject to sharp judicial scrutiny, and laws prohibiting residential signs altogether are immediately suspect. See *Gilleo* at 55. Generally, only reasonable “time, manner, or place” restrictions that still allow for the reasonable use of residential signs will withstand constitutional scrutiny. See *Gilleo* at 56-58.

In *Gilleo*, the (City of) Ladue defended its sign ban on the grounds that the ordinance was a reasonable regulation that “merely shifted the time, place, or manner” of expression. See *Gilleo* at 56. Ladue reasoned that city residents could still engage in expression through other means,

¹ Although the decision to strike down the Ladue ordinance was unanimous, Justice O’Connor filed a dissenting opinion expressing a preference that the ordinance be evaluated under the analytical structure applicable to content-based regulations. See *Gilleo* at 59-60.

such as by hand-held signs, letters, leaflets, advertisements, bumper stickers, and speeches, even though residential signs were prohibited. See *Gilleo* at 56. But the court ruled that in prohibiting residential signs altogether, Ladue's ban was not a reasonable time, manner or place regulation, as the law "completely foreclosed an important and distinct medium of expression to political, religious, or personal messages." See *Gilleo* at 56. In other words, the Court held that residential signs are such an essential medium of communication that time, manner, or place regulations may not forbid such signs altogether. See *Gilleo* at 57. Less restrictive time, manner, or place regulations may survive constitutional scrutiny, provided such laws "leave open ample alternative channels for communication." See *Gilleo* at 56, citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293; 104 S.Ct. 3065 (1984).

Key to this holding was Justice Stevens' observation that residential signs are a "venerable means of communication that is both unique and important." *Gilleo* at 54. The court ruled bluntly that there simply are no adequate substitutes for residential signs:

Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute. Even for the affluent, the added costs in money or time of taking out a newspaper advertisement, handing out leaflets on the street, or standing ... with a handheld sign may make the difference

between participating and not participating in some public debate. Furthermore, a person who puts up a sign at her residence often intends to reach *neighbors*, an audience that could not be reached nearly as well by other means.”

Gilleo at 56-57 (internal cites omitted, emphasis in original).

Because there are no satisfactory substitutes for residential signs, any law that imposes a “near total prohibition² of residential signs” is instantly questionable on constitutional grounds. See *Gilleo* at 55 (“prior decisions have voiced particular concern with laws that foreclose an entire medium of expression.”). Such far-reaching intrusions on the right of free speech in the home, Justice Stevens explained, cannot be justified on the basis of the government’s general need to “mediate among various competing uses ... for public streets and facilities.” See *Gilleo* at 58. The Ladue ordinance, which was intended to preserve the visual beauty of the city, maintain property values and prevent safety hazards, could not meet this standard. See *Gilleo* at 47, 58. Even milder laws limiting only the time, manner, or place of expression must still allow reasonable latitude for use of residential signs, or are invalid for failure to leave open ample alternative channels of communication. See *Gilleo* at 56.

A-2. Rule #42 Is Unconstitutional Under *City of Ladue v. Gilleo*.

² Ladue’s ordinance did contain specific exceptions allowing “for sale” signs, “residence identification” signs, and signs warning of safety hazards. See *Gilleo* at 46-47.

Gilleo is directly on-point in the current action and is fatal to Rule #42. Like the Ladue ordinance, Rule #42 is a near-total ban³ that prohibits expression by residential signs and fails to leave open ample alternative channels of communication. See *Gilleo* at 53, 56. Thus, for Rule #42 to stand would require justification by a governmental interest of grand importance – yet SHA’s rationale for Rule #42, being remarkably similar to the generalized aesthetic and public safety concerns the Supreme Court found insufficient in *Gilleo*, fails this test as well. See *Gilleo* at 47, 58. Consequently, as the Superior Court found, Rule #42 unconstitutionally deprives LIPH residents of the right to engage in free speech.

A-2-a. Rule #42 Is Not a Reasonable Time, Manner, or Place Restriction.

Rule #42 imposes a near-absolute ban on tenant door signs. CP at 162. The only exception under Rule #42 is for certain health and safety-related signs. See CP at 162; see *Gilleo* at 54. Rule #42 absolutely prohibits LIPH tenants from using residential door signs to engage in expression, and renders the entire medium “completely foreclosed [from] political, religious, or personal messages” in LIPH buildings. See *Gilleo*

³ Rule #42 contains only one exception: for “signs and other insignia required for health and safety purposes shall be permitted only with the advance written approval of the building’s Senior Property Manager.” CP at 162. This exception is even more narrow

at 54. Such a rule is unacceptable because, as Justice Stevens made clear in *Gilleo*, there are no viable substitutes for residential signs, and also because LIPH tenants have no suitable alternatives to replace their doors as effective platforms for residential signs. See *Gilleo* at 56.

SHA argues that Rule #42 is a valid time, manner, or place restriction because, unlike the Ladue ordinance, Rule #42 does not prohibit signs in windows. CP at 162, 193-96; see App. Br. at 18. Yet in LIPH high rises, even allowing signs in windows does not leave open ample alternative channels for communication. CP at 58-138, 165-67; 194; see *Gilleo* at 56.

For a great many – if not all – LIPH tenants, windows are not a viable platform for placing residential signs. CP at 58-138, 165-167, 194. As SHA concedes, few (if any) window signs would be reasonably visible from high-rise apartment buildings, and some units lack windows facing a street or other publicly-accessible area. CP at 166, 194; see also App. Br. at 19. Thus, for LIPH tenants, the access door is generally the only place to post a residential sign where anyone can see it. CP at 166, 194. And even for tenants who could post window signs visible to the outside, such window signs would not enable effective communication with neighbors,

than the Ladue ordinance's exceptions for "for sale" signs, "residence identification" signs, and signs warning of safety hazards. See *Gilleo* at 46-47.

a critical characteristic of residential signs as Justice Stevens observed.

See *Gilleo* at 57.

SHA counters that “no matter how obscure a window sign may be, there is at least some possibility that such a sign will be seen by the public,” whereas “[t]here is no possibility that a sign on an interior door, facing a corridor, will ever be seen by the general public.” App. Br. at 19. SHA cites no authority for its contention that a sign must be visible to the “general public” to warrant constitutional protection, nor does SHA attempt to define its conception of “general public.” In fact, a door sign visible from a public housing corridor could potentially reach numerous people: SHA staff, maintenance workers or other contractors, delivery persons and other individuals present for business-related purposes, and – as Justice Stevens specifically contemplated -- *neighbors* (i.e., other building residents and their guests). See *Gilleo* at 57. By contrast, a sign placed in a high-rise window, or in a window facing an area inaccessible to the public, may reach no one. CP at 166, 194. And even a sign placed in a reasonably visible window may not enable effective communication with the speaker’s intended audience – particularly neighbors or SHA personnel. CP at 58-138, 166, 194; see *Bay Area Peace Navy v. U.S.*, 914 F.2d 1224, 1229 (9th Cir. 1990).

Courts interpreting “ample alternative channels of communication” have consistently ruled that alternative channels are not sufficient unless the speaker is able to reach her intended audience. See *Bay Area Peace Navy* at 1229 (“an alternative is not ample if the speaker is not permitted to reach the ‘intended audience.’”) (collecting cases). For most LIPH residents, a window sign would not reach *any* audience, and for all LIPH tenants, limiting signs to windows would prevent tenants from reaching their intended audiences (i.e., persons within the LIPH building interiors). CP at 58-138, 166, 194. Thus, Rule #42 does not leave open ample alternative channels of communication. *Bay Area Peace Navy* at 1229.

SHA also argues that Rule #42 is a reasonable time, manner, or place restriction because tenants remain free to post signs on “designated bulletin boards.” CP at 162; see App. Br. at 18. Justice Stevens specifically refuted this same contention in *Gilleo* by explaining how the location of a sign intrinsically affects its message:

Displaying a sign from one’s own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. Precisely because of their location, such signs provide information about the identity of the ‘speaker.’ As an early and eminent student of rhetoric [Aristotle] observed, the identity of the speaker is an important component of many attempts to persuade. A sign advocating “Peace in the Gulf” in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child’s

bedroom window or the same message on a bumper sticker of a passing automobile. An espousal of socialism may carry different implications when displayed on the grounds of a stately mansion than when pasted on a factory wall or an ambulatory sandwich board.

Gilleo at 56-57. Like the bumper stickers and sandwich boards Justice Stevens mentioned, bulletin board postings are not adequate substitutes for residential signs. See *Gilleo* at 56-57. A sign posted on a bulletin board reaches a different audience and conveys different information about the speaker than a sign posted directly on one's home. See *Gilleo* at 56. SHA's argument misses the point entirely: a bulletin board sign is not a residential sign, and there are no adequate substitutes for residential signs. See *Gilleo* at 56.

Furthermore, while bulletin boards are a viable option for some tenant expression, that bulletin boards are available does not establish an independent basis for restricting speech on tenants' doors. See, e.g., *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1154 (9th Cir. 2000) ("One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."), quoting *Schneider v. New Jersey*, 308 U.S. 147, 151-52; 60 S.Ct. 146 (1939).

Because window signs are not reasonably available for reaching LIPH residents' intended audiences – if any audiences – SHA must permit LIPH residents to post such signs on their doors, or will have completely

foreclosed residential signs as a medium of expression in the same way the Ladue ordinance did. See *Gilleo* at 56; see *Bay Area Peace Navy* at 1229. But since Rule #42 does not allow signs on tenant doors, fails to leave open ample alternative channels of communication. See *Gilleo* at 56. Bulletin boards do not save Rule #42 either, as bulletin board postings are qualitatively different from residential signs. See *Gilleo* at 57. Therefore, Rule #42 is not a reasonable time, manner, or place restriction. See *Gilleo* at 56.

A-2-b. Rule #42 Is Not Justified by a Governmental Interest of Sufficient Importance to Surpass Tenants' Free Speech Rights.

Since Rule #42 is not a reasonable time, manner, or place restriction on tenant signs, it is unconstitutional unless justified by some superseding governmental interest. See *Gilleo* at 58. The *Gilleo* court did not articulate precisely how compelling a governmental interest must be (to eclipse the LIPH tenants' free speech rights), but did make clear that "the government's need to mediate among various competing uses, including expressive ones, for public streets and facilities" is not sufficient. See *Gilleo* at 58. More precisely, *Gilleo* held that Ladue's city ordinance did not meet this burden, despite the following justification:

proliferation of an unlimited number of signs ... would create ugliness, visual blight and clutter, tarnish the natural beauty of the landscape as well as the residential and

commercial architecture, impair property values, substantially impinge upon the privacy and special ambience of the community, and may cause safety and traffic hazards to motorists, pedestrians, and children.”

See *Gileo* at 47.

SHA similarly fails to present a justification for Rule #42 that outweighs LIPH tenants’ free speech rights. As Rule #42 itself states, SHA’s objective behind the speech restriction is to prevent tenant door signs from causing “clutter” and a “negative appearance.” CP at 162. SHA later raised additional justifications for Rule #42, including protecting the doors from damage, preventing residents’ expression from offending others, and administrative ease. CP at 179-81, 198-201. While these concerns are perhaps legitimate, they are not adequate to justify a near-total ban on residential signs. See *Gileo* at 58. None of SHA’s proffered justifications for Rule #42 are qualitatively different than any of the aesthetic or generalized public safety concerns *Ladue* advanced in support of its own ordinance. See *Gileo* at 47. And certainly none of SHA’s reasons approaches the standard of a “compelling governmental interest which cannot be protected by any other means” applicable to prior restraints, which of course Rule #42 is. *Rosen v. Port of Portland*, 641 F.2d 1243, 1250 (9th Cir. 1981); see also *State v. Noah*, 103 Wn. App. 29, 41; 9 P.3d 858 (2000) (“Prior restraints are ‘official restrictions imposed

upon speech or other forms of expression in advance of actual publication.”), quoting *State v. Coe*, 101 Wash.2d 364, 372; 679 P.2d 353 (1984).

Not only has SHA failed to present a more pressing need for its sign prohibition than did the City of Ladue, but in the LIPH community the residents’ free speech interests in signs are paramount. LIPH tenants are by definition are speakers “of modest means or limited mobility,” who as a general rule are likely even less capable of utilizing other methods of communication than are members of the general public. CP at 160; see *Gilleo* at 56-57. Accordingly, LIPH residents present an enhanced interest in protecting their right to communicate by signs and posters (on their doors). At the very least, LIPH tenants are certainly entitled to the same “special respect for individual liberty in the home ... that has special resonance when the government seeks to constrain a person’s ability to *speak* there” that Justice Stevens referenced. *Gilleo* at 58 (emphasis in original).

A-3. SHA Could Accomplish Its Governmental Objectives with Reasonable Time, Manner, or Place Restrictions on Tenant Signs.

Although Rule #42 is demonstrably unconstitutional under *Gilleo*, SHA pleads that without the restriction SHA is powerless to preserve the visual beauty of its facilities, protect its doors from damage, or defuse

potential conflicts between ideologically diverse tenants. CP at 179-81, 198-201; see App. Br. at 9-10. Nothing could be further from the truth. SHIA could impose reasonable time, manner or place restrictions to reasonably accomplish its objectives while leaving open adequate alternative channels of communication. See *Gilleo* at 55. An almost universal sign ban is not necessary.

For instance, SHA could prevent tenant signs from damaging doors by restricting use of nails, staples, strong adhesives, or other potentially destructive materials for posting signs.⁴ Such a rule would be lawful and reasonable as long as adequate alternatives, such as Scotch tape or other non-harmful means, were allowed for putting up signs. See *Gilleo* at 55. While some tenant expression inevitably may offend some other residents, SHA could minimize this problem by proscribing certain forms of unprotected speech, such as obscenity, hate speech, or other unlawful content deemed most likely to provoke offense. See generally *State v. Noah* at 41 (prior restraints against non-protected speech are not presumptively unconstitutional). Again, such rules would be lawful time, manner, or place restrictions so long as tenants remained free to post

⁴ Indeed, prior to this litigation, RAC proposed a substitute rule that would allow door signs but forbid posting materials in such a way as to “threaten damage to the premises.” CP at 172-75.

materials containing only protected speech on their doors.⁵ See *Gilleo* at 55. SHA could also address its aesthetic concerns by limiting the size or dimensions of postings to reasonable proportions, and could avoid its anticipated administrative problems by reserving enforcement actions for those truly problematic displays, rather than by “regularly measure[ing] the size of door displays” or attempting to “keep[] track of the number of items displayed on hundreds of doors.” CP at 180, see App. Br. at 9.

SHA makes clear that it considered time, manner, and place restrictions, but decided, in essence, that such nuanced rules were too much of a hassle, and so would simply ban all door signs altogether. CP at 179-81, 198-201; see App. Br. at 9-10. RAC must concede that reasonable time, manner, or place rules may indeed prove more difficult for SHA to implement than an outright ban and that removing all tenant displays would likely preserve doors better than limited restrictions. SHA might even be correct that an absence of tenant signs could foster improved intra-building harmony. But SHA’s objectives, and desire for administrative ease in achieving them, does not give SHA license to simply disregard the constitutional rights of tenants. Even if measured rules are trickier to draft, more cumbersome to enforce, and ultimately do

⁵ RAC’s initial proposed rule would have allowed tenant signs but disallowed material SHA deemed “obscene, unlawful, or to pose a health or safety threat.”

not function quite as well as a full-on ban, such is the cost of living in a free society. See *Gilleo* at 58 (“Whereas the government's need to mediate among various competing uses, including expressive ones, for public streets and facilities is constant and unavoidable, its need to regulate temperate speech from the home is surely much less pressing.”) (internal cites omitted).

There being no meaningful distinction between SHA’s grounds for imposing Rule #42 and the aesthetic and public safety interests underlying the ordinance in *Gilleo*, this Court should affirm the Superior Court’s ruling that Rule #42 is unconstitutional and violates LIPH residents’ constitutional freedoms of expression. *Gilleo* at 47; CP at 222-25.

B. Public Forum Analysis Is Not Appropriate Because the Site of the Expression Is Tenant-Leased and Controlled Property, Not SHA-Controlled Property.

Since *Gilleo* is directly on-point and supplies the applicable legal standard governing speech restrictions on residential signs, and since under *Gilleo* Rule #42 is clearly invalid, SHA’s only hope of saving Rule #42 is to somehow circumvent the *Gilleo* analysis. SHA attempts this by arguing that tenant doors are “public property,” where the constitutional standards governing speech restrictions are sometimes more permissive

than the level of scrutiny applicable to restrictions on residential signs. RAC will closely examine SHA's argument before detailing its flaws.

B-1. Summary of SHA's Argument that Tenant Doors Are "Public Property."

In an attempt to avoid *Gilleo*, SHA argues that tenant doors are not residential property, but "public property." The degree of constitutional protection afforded to speech on "public property" ordinarily depends on whether the property in question is a "public forum," a "non-public forum," or a "limited public forum." See *City of Seattle v. Mighty Movers, Inc.*, 152 Wash.2d 343, 96 P.3d 979 (2004); see also *U.S. v. Kokinda*, 497 U.S. 720, 726; 110 S.Ct. 3115 (1990). In the public housing context, "common areas" of public housing facilities have generally been held to constitute "public property," where speech restrictions are evaluated pursuant to this forum analysis. See, e.g., *De La O v. El Paso Housing Authority*, 417 F.3d 495, 503 (5th Cir. 2005). SHA argues that the exterior surfaces of tenants' apartment doors in LIPH facilities are also "common areas," and therefore "public property," so that tenant expression on such doors is not subject to *Gilleo*, but to a forum analysis.

SHA then proceeds to apply the forum analysis to the doors. SHA argues that doors are "non-public fora," in which speech restrictions are permissible so long as "viewpoint neutral" and "reasonable in light of the

purpose of the forum.” *Mighty Movers* at 350-51. SHA argues that since Rule #42 is viewpoint neutral and reasonable in light of the purpose of doors, that it is constitutional.

There are at least two critical flaws in SHA’s position. The first is that *Gilleo* applies to “residential” signs, and for purposes of analysis it is irrelevant whether the residence (at which a sign is posted) happens to be a privately-owned residence or a publicly-owned facility that is leased to a private tenant. The second flaw in SHA’s position is that LIPH apartment doors are not “public property” at times when the apartments are being leased to private tenants. For these reasons, SHA is incorrect; Rule #42 is not subject to a forum analysis.

**B-2. *Gilleo* Applies to Speech on Residential Property
Regardless of Public or Private Ownership.**

SHA argues that *Gilleo* pertains only to private property, and that SHA-owned apartment units are not private property. See App. Br. at 17. SHA is wrong on both accounts. As discussed below, tenant-leased apartment homes are private property (for purposes of free expression) during live tenancies. But even if LIPH apartment units were “public property” during tenancies, *Gilleo* would still supply the relevant analytical framework for this case because *Gilleo* applies to “residential”

signs, and LIPH apartment doors are indisputably “residential.” See *Gilleo* at 58.

SHA correctly observes that the particular plaintiff who challenged the ordinance in *Gilleo* was a private homeowner who had placed a sign on her privately-owned residence. See *Gilleo* at 45. But the *Gilleo* court drew no distinctions between public or private residential property, nor between owner-occupied residential property or rental residential property, nor any other such classifications. See *Gilleo* at 52. The *Gilleo* court simply ruled that a government body cannot impose a sign ban that completely deprives citizens of the right to put up “residential signs” at their homes (at least without there being a commanding governmental interest at stake). See *Gilleo* at 58. Distinctions as to the public or private origin of particular residences were simply not germane to the reasoning of *Gilleo*, and nothing in the opinion suggests the result would have been any different had the plaintiff had been a tenant renting her home, whether from a private or government landlord. See *Gilleo* at 58.

Thus, no plausible rationale supports SHA’s contention that tenants of government-owned residences should receive less constitutional protection for their signs than occupants of privately-owned homes. SHA argues only that “for First Amendment purposes, private property and public property should be treated differently.” See App. Br. at 17. This

may be true – but to suggest that difference should translate into less constitutional speech protection for tenants of public landlords (than private) is not only counterintuitive, but contrary to established law: tenants of public landlords are entitled to *greater* speech protection, not less. See, e.g., *Port of Longview v. International Raw Materials, Ltd.*, 96 Wn. App. 431, 444; 979 P.2d 917 (1999) (tenant of a government landlord may assert right to free speech as an equitable defense to eviction action brought in retaliation for tenant’s statements, even though same defense would not necessarily exist in a private tenancy).

As such, this Court may not even need to determine whether LIPH unit doors are “private property” or “public property” during the terms of tenants’ leases, because the doors to occupied apartment homes are clearly “residential property” for purposes of free speech analysis. And since Rule #42 imposes a near-total ban on residential signs that transcends reasonable time, manner or place restrictions and is not justified by a sufficiently persuasive governmental interest, Rule #42 is unconstitutional under *Gilleo* regardless whether or the doors are ultimately owned by a public body. See *Gilleo* at 58.

B-3. During Live Tenancies, SHA Is Not Entitled to Control Over Leased Apartment Doors.

If a meaningful point of departure from *Gilleo* does exist, it lies in SHA's role as landlord of the LIPH apartments. *Gilleo*, which involved a speech restriction imposed by municipal ordinance upon all properties within a city's legislative jurisdiction, establishes that a government body cannot lawfully ban signs from residential property by fiat. See *Gilleo* at 58. The City of Ladue, of course, did not actually own the residences to which the sign ordinance pertained. *Gilleo* at 45. SHA does own the LIPH buildings, and accordingly contends that *Gilleo* does not establish limits upon SHA's prerogative to impose speech restrictions. That is, SHA asserts that it can lawfully impose Rule #42 in its capacity as landlord, even though SHA is a state actor and the rule is unconstitutional. *Gilleo* at 58. RAC indulges this circular argument to show that it is similarly unpersuasive.

B-3-a. At Common Law, Control Over Individual Apartment Doors Passes to Tenants with the Right of Possession in a Tenancy.

In Washington, residential rental premises typically consist of two distinct types of areas: "individual areas" and "common areas." Individual areas are those parts of premises expressly or impliedly reserved "for the exclusive use of a single tenant and his invitees." See *Andrews v. McCutcheon*, 17 Wash.2d 340, 345; 135 P.2d 459 (1943); see *City of Seattle v. McCready*, 124 Wash.2d 300, 307-08; 877 P.2d 686 (1994).

Control over individual areas rests with the tenant during a live tenancy, with the landlord's ownership rights subordinated to the tenant's rights of possession at such times. See *McCready* at 305 ("right of possession rather than the right of ownership" determines control over particular place). By contrast, "common areas" are those parts of rental premises that landlords reserve for the use and benefit of all tenants, and over which landlords share "common authority" with tenants. See *Andrews* at 344-45; see *McCready* at 307-08 ("'Common authority rests' on mutual use of the property by persons generally having joint access or control for most purposes.").

Consistent with a landlord's shared control, common areas of government-owned housing facilities, including LIPH buildings, have repeatedly been found to constitute "public property" for purposes of free speech analysis. See, e.g., *Desyllas v. Bernstine*, 351 F.3d 934, 944 (9th Cir. 2003) ("hallways, doorways and columns" of public university campus and dormitory were public property); see also *Crowder v. Atlanta Housing Authority*, 990 F.2d 586 (1993) (library and auditorium were common areas where speech restrictions were subject to forum analysis, but tenant had unfettered free speech rights within her own unit); see also *De La O* at 503-04 (hallways in public housing complex were public property). Accordingly, speech restrictions imposed in such common

areas by public landlords have been evaluated under the forum analysis SHA advocates. See, e.g., *Desyllas* at 943.

The same is not true of tenants' individual areas, however, where the tenant has superior authority and control over the property. See *McCready* at 305 (common areas are under joint control of landlord and tenant but tenant's right to possession is superior to landlord's right of ownership with respect to individual apartments). Accordingly, in no published case concerning speech restrictions in government-operated residential property has a court extended a government landlord's right to control tenant speech beyond the common areas and into individual tenant-leased premises. See, e.g., *Crowder* at 593 (whether or not PHA could forbid tenant from holding Bible study in common area library, no question that tenant could hold Bible study in her own unit); see also *Desyllas* at 944; see also *City of Bremerton v. Widell*, 146 Wash.2d 561, 571; 51 P.3d 733 (2002) (discussing landlord's right to control access of tenant guests to common areas).

There is no dispute that SHA owns the apartment doors in LIPH buildings. CP at 157. Indeed, SHA owns the entire LIPH buildings and the apartments within them. CP at 157. Yet despite SHA's ultimate ownership, individual tenants' possessory interests entitle tenants to superior rights of control over their specific units during their terms of

occupancy. See *McCready* at 305. As such an individual private tenant’s unit is “private” while the unit is leased to the tenant, even though the property may ultimately be publicly owned. See generally *McCready* at 305 (recognizing a private tenant’s privacy interest in a leased public housing unit); see also *Crowder* at 953 (discussing public housing tenant’s right to engage in unfettered free speech in her own unit). Also, that the *Gilleo* court saw no need to limit its holding to private residential property only further suggests that all residential property is implicitly “private” for free speech purposes. See *Gilleo* at 58.

SHA does not appear to even dispute that tenants have superior rights of control over their own units, or that tenant speech within specific units could be regulated under a forum-analysis standard. Rather, SHA argues that apartment doors – or at least the exterior surfaces of apartment doors – are not parts of the premises leased to individual units, but are common areas, and relies on established authority that common areas are “public property.” CP at 182-89. Again, SHA has failed to distinguish how the apartment doors – even if they are common areas as SHA contends – are not also “residential property” subject to *Gilleo*.⁶ Yet even

⁶ That is, were this Court to agree with SHA that the unit doors are common areas, then the Court would need to determine whether to decide this case under the general standards governing speech on public property (i.e., the forum analysis), or under the

apart from this consideration, SHA’s argument fails because the doors are individual tenant areas, not common areas.

Without question, an individual tenant’s apartment door is reserved for that tenant’s exclusive use. As SHA itself makes clear, others, such as neighboring tenants, SHA personnel, or members of the general public, have no shared right of access or common authority over an individual tenant’s apartment door, including both the inside and outside surfaces. (P at 187; see App. Br. at 21 (“Members of the public have no access to residents’ apartment doors, and residents would not consent to public expression on their doors if the public had such access.”)). Unlike common areas, where all tenants (and potentially other members of the public) have similar or identical claims to access and use (hence the name “common areas”), each individual tenant’s door belongs to that specific tenant’s leased apartment home. See *Andrews* at 345. Just as one tenant may not simply open, close, enter or exit through his neighbor’s door at will, neither may he lawfully post signage upon a neighbor’s door over the occupant’s objection. That is because the outside and inside of each tenant’s door is reserved for exclusive use by that tenant, her household members and her guests. See *Andrews* at 345. Tenant doors are distinctly individual tenant areas, not common areas – so they are not “public

more specific standards concerning signs on residential property articulated in *Gilleo*, or

property” where speech restrictions are subject to a forum analysis. See *Desyllas* at 944; see *Crowder* at 953.

Since tenant doors are not common areas, the doors are not public property on which speech restrictions are subject to a forum analysis. See *Crowder* at 593; see *McCready* at 305. This does not mean SHA cannot impose any rules whatsoever on a tenant’s use of his own door – only that such rules, to the extent they infringe upon expression, must constitute reasonable time, manner, or place restrictions as articulated in *Gilleo*. See *Gilleo* at 55.

B-3-b. Control Over Individual Apartment Doors Entails the Right to Engage on Expression on the Outside Surfaces of Doors.

That a tenant’s right to exclusive use and control over her door extends to both the inside and outside surfaces, and includes the right to post signage on the door, also finds support at common law. See *Andrews* at 345. No Washington appellate decision has addressed this specific question, but as the general rule in *Andrews v. McCutcheon* makes clear that areas reserved for the exclusive use of an individual tenant are not common areas, and as both sides of tenant doors are clearly reserved for individual tenants’ exclusive use, the writing is on the wall (or on the door, as the case may be). See *Andrews* at 345.

possibly under some other formulation.

In Massachusetts, the only jurisdiction to have squarely considered this issue, the common law rule is unequivocal: “[i]n the absence of an agreement, both the interior and exterior of windows of the demised premises are controlled by the tenant ... We can see no viable distinction between the windows and access doors of the demised premises.” See *Nyer v. Munoz-Mendoza*, 385 Mass. 184, 187; 430 N.E.2d 1214 (1982); see also *Leominster Fuel Co. v. Scanlon*, 243 Mass. 126; 137 N.E. 271 (1922).⁷ In the *Nyer* decision, a tenant appealed from a lower court injunction (her landlord had obtained) restraining her from posting a sign on the exterior surface of her apartment door. See *Nyer* at 185. The appellate court reversed the injunction, concluding: “We have found no case involving a door to a dwelling unit which would support the ... premise that the landlord had ‘property rights’ in the door leading to the demised premises, and the ‘right to control’ the door[.]” See *Nyer* at 187.

⁷ SHA has inaccurately argued in its brief that Plaintiff/Respondent RAC argued at trial that *Nyer v. Munoz-Mendoza* was “binding authority for the proposition that, in the absence of an agreement to the contrary, apartment entrance doors are the property of the tenant,” and that the Superior Court indeed found *Nyer* to be “binding authority.” See App. Br. at 14. In fact, RAC has at all times argued, and reaffirms here, that *Nyer* is persuasive authority. CP at 151-52. Although the Superior Court correctly found the logic and reasoning of *Nyer* instructive and influential in reaching its decision, and RAC feels this Court should similarly regard *Nyer* as persuasive authority, RAC has at no time contended that in Superior Court or elsewhere that the Massachusetts decision was binding authority, or that any court or other tribunal was or is obligated to follow *Nyer* in this case. There is also no indication in the record or otherwise that the Superior Court itself viewed *Nyer* as binding authority or felt constrained by *Nyer* to rule a certain way. CP at 222-25. RAC relies on *Nyer* and the related Massachusetts decisions because

There is no significant difference between contents of, or the rationale for, the injunction reversed by *Nyer* and the objectionable content of Rule #42. See *Nyer* at 186 (injunction permitted the lessor to “restrict or prohibit the use of the exterior and the roof of the building for signs, for aesthetic, structural or other reasons and to prevent conflict between his tenants.”).

No other jurisdiction has articulated any alternative to *Nyer* as the common law rule regarding the tenant’s right to post signs on the exterior surface of his or her apartment door, and Washington has not deviated from the common law in this general field. See *Andrews* at 345; see *Widell* at 571 (adopting common law rule concerning right of tenants to invite guests to leased property over landlord’s objection). *Nyer* is also consistent with related Washington authority, particularly *Andrews v. McCutcheon* and *City of Seattle v. McCready*, which delineated the differences between individual areas and common areas and the rights of control landlords and tenants enjoy over respective portions of premises. See *Andrews* at 345; see *McCready* at 305. As such, the conclusion is inescapable that tenant doors (including the exterior surfaces), being parts of specific tenants’ leased residences and reserved for tenants’ exclusive use, are under the tenants’ control -- and with that right of control comes

exhaustive legal research has produced no Washington authority on this point, and has found *Nyer* to represent the most applicable case law from a survey of other jurisdictions.

the right to post signs on the door. See *Andrews* at 345; see also *McCready* at 304-06; see also *Widell* at 571; see also *Nyer* at 187.

B-3-c. SHA's Duty to Maintain Rental Premises Does Not Deprive the Tenant of Control Over Individual Tenant Areas.

SHA, relying on various tort law theories, contends that its “responsibility for maintenance and liability for injuries” vests SHA with control over tenant doors. CP at 184, see App. Br. at 12. According to SHA, “If anyone . . . suffers an injury as a result of a defective doors, the Housing authority is liable,” and goes on to argue that exposure to such liability and “full responsibility for maintenance and upkeep of its apartment doors” means SHA must have necessarily retained ownership and control over the doors. See App. Br. at 14. This is a spurious contention and should not lead the Court astray.

First, SHA is not even correct that SHA bears “full responsibility for maintenance and upkeep of its apartment doors,” or that “If apartment doors were the property of each resident, each resident would have discretion to maintain the door or not.” See App. Br. at 14. On the contrary, the duty to maintain the doors is a shared obligation between landlords and tenants. See RCW 59.18 et seq.

Under the Residential Landlord Tenant Act, virtually any landlord of residential property in Washington is responsible for maintaining rental

premises to keep them fit for human habitation. See RCW 59.18.060.

This obligation extends to numerous aspects of physical premises, both inside and outside tenant units, and naturally extends to the access doors. See RCW 59.18.060. But once a unit is rented out, the tenant incurs a corresponding duty to maintain the premises in good repair, to properly use and operate all appliances and fixtures supplied by landlords, and not commit waste. See RCW 59.18.130. In particular, tenants are obligated not to “intentionally or negligently destroy, deface, damage, impair, or remove any part of the structure or dwelling[.]” RCW 59.18.130(4). A tenant who damages or defaces his door, whether by posting signs or otherwise, is liable for the damage and his tenancy may be subject to termination. See RCW 59.12.030(5); RCW 59.18.130. The risk that a tenant might fail to abide by these statutory or contractual obligations is a risk any landlord, SHA included, must bear as a natural incident of renting residential property. This is one of the reasons SHA, like any landlord, may screen tenants and refuse housing to applicants who appear likely to cause damage. See 24 CFR 960.202(a)(2)(iii) (directing public housing authorities to “preclude[e] admission of applicants whose habits and practices reasonably may be expected to have a detrimental effect on the residents or the project environment”).

That tenants are legally obligated to maintain their doors is but one defect in SHA's argument that it cannot take proper care of doors without retaining exclusive control over them. By SHA's logic, virtually nothing within an ordinary rental dwelling could be placed under tenant control without subjecting SHA to an unacceptable risk of liability. Consider fixtures -- landlords customarily provide refrigerators, stoves, toilets, sinks, and other fixtures in rental apartments. Naturally, a tenant who operates her stove improperly places herself, her neighbors, and the building itself at risk of injury or damage. Yet unless a landlord cedes control over the stove to the tenants, the stove is of no use. Clearly it is the tenant, not the landlord, who must necessarily decide when to operate a stove, what to cook on it, by what method of cooking, and so forth. A landlord may prescribe reasonable limitations on such use, yes -- but rules so extensive as to deprive the tenant of effective control would violate the tenant's right to quiet enjoyment of the premises. See, e.g., *Investment Properties Inv. Corp. v. Trefethen*, 155 Wash. 493, 508; 284 P. 782 (1930). Hence, ultimately control over individual tenant areas must rest with tenants, not landlords.

So it is with apartment doors: as a landlord, SHA is ultimately responsible for them, and correctly acknowledges an obligation to provide working doors and keep them in good order. RCW 59.18.060. But when

a tenant moves into an apartment, SHA must cede control of the access door to the tenant, for it is the tenant who must be able to decide when to open, close, enter, or exit through her door. See *Lindbloom v. Berkman*, 43 Wash. 356, 358; 86 P. 567 (1906). SHA rightfully expects the tenant to use the door properly and avoid causing damage, and can take action against tenants who fail to meet these obligations, but SHA cannot feasibly “control” the door. RCW 59.18.130(4). And though restricting tenants from posting signs on the exterior surface of the door may not infringe upon tenants’ rights to quiet enjoyment of the premises, such rules do infringe upon a different distinct right belonging to tenants: the right to free speech.

RAC does not deny that SHA may impose additional rules upon the tenants’ use of their doors. The question is, what legal standards govern the legitimacy of such rules? SHA contends that such rules, to the extent they burden free speech, need only be consistent with standards for speech in “non-public fora.” because SHA’s control over the doors renders them common areas, and therefore “public property” for free speech purposes. But SHA does not and cannot truly control tenant doors, as they are integral parts of specific apartments. Individual apartment doors are not common areas, and rules SHA imposes to prohibit speech on the doors

are properly evaluated under the standards pertaining to speech on private (residential) property. See *Gilleo* at 58.

C. SHA Cannot Lawfully Require Tenants to Surrender Free Speech Rights as a Condition of Access to LIPH Housing.

As discussed above, SHA cannot impose Rule #42 by fiat because the rule impermissibly obstructs free speech. See *Gilleo* at 58. Nor can SHA, at common law, disregard *Gilleo* and impose Rule #42 in its capacity as landlord (consistent with rules concerning speech restrictions on public property) because apartment doors are not common areas, but individual tenant areas subject to tenant control during their lease terms.⁸ See *McCready* at 305, see *Andrews* at 345.

So, in a last-ditch effort to defend Rule #42, SHA argues that it has excluded the right to control the exterior surfaces of the access doors from the property interests conveyed by tenant leases. CP at 182-83; see App. Br. at 12-13 (“It is clear from the circumstances . . . that the Housing Authority has retained ownership and control over entry doors to residents’ apartments.”). In other words, although tenants’ apartment doors are not really common areas, SHA claims that it has effectively transformed the (exterior surfaces of) doors into common areas (and

therefore “public property”) by declining to lease them to tenants. CP at 182-83; see App. Br. at 14. The problem here, however, is that SHA may not lawfully refuse to rent the exterior door surfaces to tenants for the sole purpose of evading tenants’ constitutional speech protections. A closer examination of SHA’s argument shows why this is so.

C-1. SHA Cannot Make a Valid Agreement Excluding Exterior Door Surfaces from Tenant Leases to Prohibit Tenant Speech.

As discussed in *Nyer*, at common law tenants are entitled to control the exterior surfaces of their apartment doors (and thus put signs up), only “in the absence of an agreement.” *Nyer* at 187; see also *Widell* at 572; (in footnote 2, discussing the possibility that lease provisions may restrict tenants from inviting certain guests into common areas of public housing facilities). Thus, it stands to reason that a landlord who wishes to retain control over the exterior surface of an apartment door could do so upon agreement with a tenant. *Nyer* at 187. But there is no such agreement in this case, nor would such an agreement be valid in the LIPH program.

Preliminarily, SHA admits that tenants’ leases do “not specifically state whether residents’ doors are included in the property leased to residents or not.” App. Br. at 12. Where the lease is silent, of course,

⁸ Although, as argued previously, even if the doors were common areas RAC would still maintain that *Gilleo*, and not the public property forum analysis, remains the appropriate

there is no agreement conceding control over the doors to SHA, and the common law rule (i.e., the tenant has control) must prevail. See *Nyer* at 187; see also *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164; 101 S.Ct. 446 (1980) (“a State, by *ipse dixit*, may not transform private property into public property without compensation”).

More importantly, however, any effort by SHA to forge such an agreement would violate the well-established principle that the receipt of a government benefit may not lawfully be conditioned upon the surrender of a constitutional freedom. See *Harris v. McRae*, 448 U.S. 297, 334; 100 S.Ct. 2701 (1980) (“we have heretofore never hesitated to invalidate any scheme of granting or withholding financial benefits that incidentally or intentionally burdens one manner of exercising a constitutionally-protected choice.”). SHA may not lawfully insist tenants give up their right to engage in constitutionally-protected speech as a prerequisite for access to federally-subsidized LIPH units. See *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 511 (9th Cir. 1988) (forcing choice “between exercising right to free speech and foregoing benefits ... or curtailing their speech and obtaining the benefits ... patently transgresses the well-established principle that government may not condition the conferral of a benefit on the relinquishment of a constitutional right.”);

authority for the reason that apartment doors are unquestionably residential property.

It being transparent that SHA's sole purpose for attempting to reserve control over the exterior surfaces of apartment doors is to undermine the legal protections afforded to tenant speech on those doors, any such agreement – whether now existing or later created – would be invalid. See *Widell* at 580 (restrictions on use of state property may not serve an illegal purpose).

C-2. SHA Is a Government Body that Must Operate within Constitutional Constraints Regardless Whether the Same Obligations Would Govern Private Landlords.

Ultimately, SHA's position hinges on its contention that because private landlords do not have to abide by constitutional speech protections when determining the terms and conditions upon which they rent property to tenants, SHA should be free to disregard constitutional considerations as well. CP at 190-91; see App. Br. at 24-25.⁹ That SHA claims such profound autonomy as to operate free of basic constitutional constraints is as disheartening as it is bold. SHA is not a private enterprise, and market

⁹ Remarkably, SHA relies heavily upon *Stephanus v. Anderson*, a case holding that tenants of a private landlord did not assert a viable retaliation defense (against a landlord who sought to evict them) for engaging in First Amendment activities due to the absence of state action. See *Stephanus v. Anderson*, 26 Wn. App. 326, 335; 613 P.2d 533 (1980). Of course, the opposite conclusion is warranted where the landlord is a public entity, such as SHA, because the state action requirement is satisfied. See *Port of Longview v. International Raw Materials, Ltd.*, 96 Wn. App. 431, 444; 979 P.2d 917 (1999).

forces do not place realistic checks upon SHA's practices as upon private landlords. A closer look at the LIPH program demonstrates just why.

Again, SHA's low-income public housing (LIPH) units are home to more than 8,800 residents in over 5,300 units in 28 buildings throughout Seattle. CP at 157-60. Federal statutes and HUD regulations governing LIPH facilities ensure that the units remain affordable. See generally 24 CFR 960.253. The market rental value of SHA's LIPH units is currently estimated around \$750 per month, but tenants are generally entitled to occupy the units at rents roughly targeted to 30% of the household's income. See 24 CFR 5.628. For example, a family of four with income at the 2005 federal poverty level¹⁰ of \$19,350 would pay about \$483.75 per month rent for an LIPH unit. See 24 CFR 5.628(a)(1). A disabled tenant living alone and collecting federal Supplemental Security Income (SSI) would pay less than \$180 per month for a unit. See 24 CFR 5.628(a)(1). These deep subsidies generate huge demand for LIPH units among Seattle's low-income population. CP at 160. There are thousands more qualified applicants to the LIPH program than units available, meaning that families seeking LIPH housing must endure waitlists averaging months, often more than a year in duration. CP at 160, 169.

¹⁰ Per the U.S. Department of Health & Human Services 2005 Poverty Guidelines.

This high demand and inadequate supply produces a dramatic disparity in bargaining positions between SHA and its low-income tenants, giving SHA tremendous practical freedom to dictate the terms and conditions of LIPH housing. LIPH tenants must accept housing on the terms SHA presents, or be instantly replaced by another tenant who will. Consequently, only the legal protections afforded LIPH tenants ensure fair and just policies in their subsidized homes. That SHA has a legitimate need to implement appropriate rules for operating its housing facilities is undeniable, but so too is SHA's obligation to respect the statutory, regulatory, and particularly constitutional limitations on its power.

Precisely because of this conflict – a government landlord's need to establish necessary and appropriate rules for the use and occupancy of its facilities, versus tenants' inability to protect themselves from unfair or unduly oppressive policies through market forces -- Washington has articulated a judicial test that balances these competing concerns: "The State, no less than a private property owner, may control the use of its property so long as the restriction is for a lawful, nondiscriminatory purpose." See *Widell* at 580, citing *State v. Blair*, 65 Wn. App. 64, 67; 827 P.2d 356 (1992). SHA's exclusion of (the exterior surfaces of) unit doors from tenant leases is an invalid exercise of SHA's control over its property because it fails this test – Rule #42 serves an unlawful purpose.

Returning to this instant case, SHA argues that since a private landlord could use a lease provision or other agreement to prohibit tenants from posting signs on their doors, SHA should be able to do the same. See App. Br. at 24-25. SHA's argument is tantamount to a contention that the state and federal constitutions should not apply to SHA because they don't apply to private actors. This argument is quite clearly erroneous. See, e.g., *Port of Longview* at 444. Nor can SHA lawfully designate the exterior surfaces of LIPH apartment doors as "common area" by lease agreement, when the sole purpose for doing so is to impose a speech restriction (Rule #42) SHA knows to be unconstitutional and inconsistent with common law. See *Widell* at 580; see also *Gilleo* at 55.

House Rule #42 runs afoul of free speech, a right practically synonymous with Western notions of liberty. No amount of semantics should distract the Court from the obvious: SHA, by insisting that tenants refrain from constitutionally-protected speech as a requirement for living in federally-subsidized housing units, seeks to impermissibly condition a government benefit upon the capitulation of a constitutional right. See *Bullfrog Films* at 511; see *Harris v. McRae* at 334. This is scarcely a lawful purpose; on the contrary, this is exactly the type of practice the test enunciated in *Widell* is designed to protect tenants against. See *Widell* at 580.

CONCLUSION

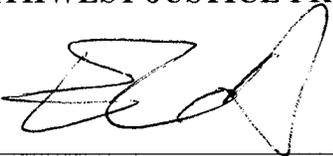
Justice Stevens invoked Aristotle's First Book of Rhetoric in extending First Amendment protection to residential signs as a uniquely valuable form of expression. *Gilleo* at 56-57. Justice Stevens also observed that "special respect for individual liberty in the home has long been a part of our culture and our law; that principle has special resonance when the government seeks to constrain a person's ability to *speak* there." See *Gilleo* at 58 (internal cites omitted; emphasis in original). Surely that special respect for the liberty of free speech in the home applies with equal force to the residents of low-income public housing as to their most affluent counterparts in the private housing market. The freedom of speech is among the most prominent civil liberties associated with a free society, and low-income families must not be forced to hold their tongues on pain of eviction from governmentally-subsidized housing.

For the reasons stated above this Court should find that (i) expression by way of signs and materials posted on exterior surfaces of tenant-leased doors in LI PH facilities is constitutionally-protected speech entitled to heightened judicial scrutiny under *City of Ladue v. Gilleo*; (ii) that SHA's objectives of abating "clutter," preventing doors from damage, preventing tenant disputes, and administrative ease are not sufficiently compelling interests to justify Rule #42's near-absolute restriction on

tenant door signs; (iii) that Rule #42 fails to leave open adequate alternative channels of communication for LIPH residents; (iv) that Rule #42 is therefore unconstitutional; and (v) that SHA's attempt to designate tenant doors as "common areas" outside the scope of tenant leases is invalid as an improper attempt to condition the continued receipt of a government benefit upon the surrender of a constitutionally-protected right. Based on these findings, this Court should affirm the Superior Court's declaration that Rule #42 is unconstitutional and uphold the permanent injunction prohibiting SHA from enforcing Rule #42 against any LIPH resident (so as to restrict the posting of any signs or other expression on tenant-leased doors).

RESPECTFULLY SUBMITTED this 11th day of September, 2006.

NORTHWEST JUSTICE PROJECT

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