Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS
NO. SJC-10822

MARGO ROMAN,
PLAINTIFF-APPELLANT,

v.

TRUSTEES OF TUFTS COLLEGE, A/K/A TUFTS UNIVERSITY,
STEVEN L. ROWELL, ISABEL R. JURK AND SUSAN BROGAN,
DEFENDANTS-APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT, WORCESTER COUNTY

BRIEF OF *AMICI CURIAE* BABSON COLLEGE, BENTLEY UNIVERSITY, BOSTON COLLEGE, BOSTON UNIVERSITY, BRANDEIS UNIVERSITY, EMERSON COLLEGE, REGIS COLLEGE, SIMMONS COLLEGE, STONEHILL COLLEGE, SUFFOLK UNIVERSITY, AND WILLIAMS COLLEGE, IN SUPPORT OF DEFENDANTS-APPELLEES TUFTS UNIVERSITY, STEVEN L. ROWELL, ISABEL R. JURK AND SUSAN BROGAN

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STATEMENT OF INTEREST OF THE *AMICI*

Amici, Babson College, Bentley University, Boston College, Boston University, Brandeis University, Emerson College, Regis College, Simmons College, Stonehill College, Suffolk University, and Williams College (the "*Amici*"), respectfully submit this brief in support of the position of Defendants-Appellees Tufts University, Steven L. Rowell, Isabel R. Jurk and Susan Brogan (collectively, "Tufts").

Amici are private colleges and universities. They range from small liberal arts colleges in rural areas to large, urban universities. Together, they enroll nearly 51,600 undergraduate students and approximately 31,300 graduate students. In addition, *Amici* collectively employ approximately 20,500 faculty and staff. *Amici*, like other private colleges and universities across the Commonwealth and the country, sponsor various educational, artistic, and athletic events on their campuses. From time to time, the public are invited to attend these events. *Amici* vigorously support the free exchange of ideas on their campuses on a wide variety of subjects. *Amici* have no history or intention of silencing debate on their

campuses or excluding people from their campuses solely because of their viewpoints.

Nevertheless, *Amici* have a substantial interest in the outcome of this case. Each of the eleven *Amici* institutions will be directly affected by the Court's answer to the question presented in the *amicus curiae* invitation:

> [W]hether, under the Civil Rights Act, a claim of interference with First Amendment rights, arising from a college's exclusion of the plaintiff from a lecture open to the public, may be stated against such a private actor, or whether such a claim inherently requires State action due to the nature of First Amendment rights.

Amici occasionally issue "no trespass" or "stay away" orders to individuals whose presence on campus is disruptive, harassing, threatens the safety of students and staff, or for other legitimate reasons. *Amici* issue such directives sparingly. If the Court concludes that a claim of interference with First Amendment rights arising from a private property owner's exclusion of an individual from an event open to the public may be stated under the Massachusetts Civil Rights Act, even in the absence of state action, *Amici* are concerned that they will be prevented from exercising their own private property and free speech

rights that are protected from infringement by the United States and Massachusetts Constitutions, as well as state statutory and common law.

Amici submit that on the facts presented here, the Court should affirm the judgment of the Superior Court on non-constitutional grounds and decline to reach the question presented in the *amicus* invitation. However, if the Court does reach the question presented in the *amicus* invitation, it should conclude that a plaintiff cannot state a claim of interference with First Amendment rights under the MCRA arising from a college's exclusion of the plaintiff from a lecture open to the public, because such a claim inherently requires state action. *Amici* therefore respectfully request that the Court affirm the judgment below.

SUMMARY OF THE ARGUMENT

The Superior Court, granting summary judgment to Tufts on Appellant Margo Roman's claim arising under the Massachusetts Civil Rights Act, Mass. Gen. Laws c. 12, §§ 11H, 11I ("MCRA"), held that even if Roman could state a claim under the MCRA for a private defendant's interference with her right to free speech (a question the Superior Court did not reach), Tufts

was not required to "provide a forum to someone who held views on raw food diets for pets that contradicted Tufts' views" on that topic.[1]

The Court should affirm the Superior Court's grant of summary judgment on two independent, non-constitutional grounds. First, Roman's claim for interference with a First Amendment right merely to *attend* the lecture was neither briefed nor argued below. Roman thus waived that claim. The Court should not reach it. (pp. 7-9)

Second, Roman failed to demonstrate that Tufts' articulated reason for excluding her from the lecture was a pretext and that, in fact, she was excluded because of her views on raw food diets for pets. (pp. 9-18)

If, however, the Court reaches the question presented in the *amicus* invitation, the Court should conclude that Roman cannot state a claim of interference with First Amendment rights against a private actor under the MCRA, arising from Tufts'

[1] The Court also granted Tufts' motion for summary judgment on the remaining claims in Roman's Complaint. However, this Court's *amicus* invitation focused exclusively on Roman's claim under the MCRA. Accordingly, this Brief does not address Roman's other claims.

exclusion of her from a lecture open to the public, because such a claim inherently requires state action. (p. 19)

The federal and state constitutions do not create or secure a right to attend a lecture that is open to the public, but held on private property. Moreover, the campuses of the Commonwealth's private colleges and universities do not lose their private character simply because the public is invited to campus events. Hence, Tufts, as a private property owner and private actor, was entitled to exclude Roman from the lecture for any non-discriminatory reason. (pp. 19-36)

Finally, the Legislature did not intend to eliminate the state action requirement in circumstances like these when it enacted the MCRA. (pp. 36-40)

THE SUPERIOR COURT'S OPINION

On October 22, 2009, the Superior Court (Kaplan, J.) granted summary judgment for Tufts. In reaching this decision, the Court assumed, *arguendo*, that Roman could state a claim under the MCRA for a private defendant's interference with her constitutional right

to free speech.[2] Nevertheless, the Court held that even if Tufts' stated reason for excluding Roman from the May 2005 lecture on the "Dangers of Feeding Your Pet a Raw Diet" -- that she had not paid veterinary bills owed to Tufts -- was a pretext, and that, in fact, Tufts excluded Roman in order to prevent her from expressing views at the lecture that were contrary to Tufts' views on the subject of raw food diets, such action would not state a claim under the MCRA.

The Superior Court correctly stated that Tufts is a private university and its decision to make a lecture available to the public does not transform the Tufts campus into a public forum. Superior Court Op. at 9. The Superior Court also correctly stated that as a private actor, Tufts has a right to present topics and information that it chooses to present, and that Tufts also had a right to control the presentation of the lecture from which Roman was excluded. Id. The Court thus concluded that "Tufts did not have to provide a forum to someone who held views

[2] Quoting Redgrave v. Boston Symphony Orch., Inc., 855 F.2d 888, 904 (1st Cir. 1988), the Court explained that "[t]he question of whether the right to free speech can only be interfered with by the state, i.e., is inherently '[t]he right to be free of state regulation,' has not been decided."

on raw food diets for pets that contradicted Tufts' view on the science related to such diets and their safety." Id.

The Superior Court did not consider the question of whether Roman had a constitutionally protected right merely to attend the lecture and "receive information." This issue was not raised in Roman's Complaint and was neither briefed nor argued at the summary judgment stage.

Amici respectfully submit that the Superior Court's holding is a correct statement of Massachusetts and federal law and is consistent with the legislature's intended scope of the MCRA, as well as the public policy of the Commonwealth. This Court should affirm the Superior Court's judgment.

ARGUMENT

I. THE COURT SHOULD AFFIRM THE SUPERIOR COURT'S DECISION GRANTING SUMMARY JUDGMENT FOR TUFTS ON PROCEDURAL GROUNDS.

A party is not entitled to appellate review of a claim or theory not presented to the trial court. *See* Royal Indem. Co. v. Blakely, 372 Mass. 86, 87-88 (1977); *see also* Commonwealth v. Bettencourt, 447 Mass. 631, 633-34 (2006) ("It has long been our rule

that we need not consider an argument . . . raised for the first time on appeal"). The reason for this "fundamental rule of appellate practice is well established: it is important that an appellate court have before it an adequate record and findings concerning a claim to permit it to resolve that claim properly." R.W. Granger & Sons, Inc. v. J & S Insulation, Inc., 435 Mass. 66, 73-74 (2001).

In her Complaint and in her opposition to Tufts' motion for summary judgment, Roman asserted that she had a right, secured by the First Amendment and article 16, to attend the lecture to express her views on the merits of raw food diets. On appeal, however, Roman has entirely abandoned that assertion and now claims *only* that she had a right to attend the lecture to "receive information" and did not intend to express any view on the subject.

The Court should decline to consider Roman's claim that she had a constitutionally secured right to attend the lecture at Tufts and "receive information," because Roman failed to allege such a right in her Complaint or even in her opposition to Tufts' motion for summary judgment. *See* Historic District Comm'n of Chelmsford v. Kalos, 48 Mass. App. Ct. 919, 920 (2000)

(affirmative defenses not raised in opposition to motion for summary judgment deemed waived on appeal). Roman attempted to raise this argument *for the first time* in her Emergency Motion for Leave to Submit Supplemental Legal Memorandum ("Emergency Motion"), which she filed *after* the Superior Court had heard oral arguments on Tufts' motion for summary judgment. In her Emergency Motion, Roman conceded that "[t]he question of whether an individual's right to free speech can be interfered with by denial of the ability to receive speech was not addressed by either party in the motion papers." *See* Emergency Motion at 2.

The Superior Court acted within its discretion in denying Roman's Emergency Motion and confining its opinion solely to Roman's claimed right to express her views at the 2005 lecture. Hence, Roman has waived her "right to receive information" claim and the Court should decline to consider it.

II. ROMAN FAILED TO MEET HER BURDEN OF PROVING THAT HER EXCLUSION FROM THE LECTURE WAS VIEWPOINT-BASED.

The Court has a second, non-constitutional basis on which it should affirm the judgment of the Superior Court. Roman bears the burden of proof on the ultimate

issue of a violation of the MCRA. Therefore, among other elements, she must produce evidence sufficient to support a jury verdict that it was more likely than not that Tufts' articulated reason for excluding her from the 2005 lecture was a pretext, and that, instead, she was excluded from the lecture based on her views concerning raw food diets. *Cf.* Matthews v. Ocean Spray Cranberries, Inc., 426 Mass. 122, 128 (1997); Cordi-Allen v. Conlon, 494 F.3d 245, 250-51 (1st Cir. 2007).

On appeal, Roman appears to argue that "similarly situated" persons -- those who may have owed money to Tufts -- would have been permitted to attend the lecture, and, consequently, Roman's exclusion must have been based on her views concerning the merits of a raw food diet for pets. The Court should reject this speculative argument because Roman has not established that the unnamed and unidentified other persons were similarly situated in all relevant aspects. *See* Matthews, 426 Mass. at 129; Cordi-Allen, 494 F.3d at 250.

In the context of viewpoint discrimination based on disparate treatment, a "class of one" claim, like the claim Roman advances here, is cognizable only when

"a plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Cordi-Allen, 494 F.3d at 250.[3] To survive summary judgment, a "class of one" plaintiff claiming such a violation "must first identify and relate *specific instances* where persons *similarly situated in all relevant aspects* were treated differently." Id. at 250-51 (emphasis in original). To prove substantial similarity, the "plaintiffs must show an extremely high degree of similarity between themselves and the persons to whom they compare themselves." Id. at 251 (quoting Clubside Inc. v. Valentin, 468 F.3d 144, 159 (2d Cir. 2006)); *see also* Buchanan v. Maine, 469 F.3d 158, 178 (1st Cir. 2006). This requirement is "meant to be a very significant burden." Cordi-Allen, 494 F.3d at 250-51 (internal citations omitted). A "court can properly grant summary judgment where it is

[3] Cordi-Allen arose in the context of a zoning dispute. In that case, plaintiffs, whose efforts to improve their property were denied, sued the town, alleging disparate treatment, in violation of their rights under the Equal Protection Clause of the Fourteenth Amendment. 494 F.3d at 248. For the reasons set forth below, *Amici* submit that a "class of one" claim that [cont.] arises in the zoning context is particularly analogous to Roman's claim based on alleged viewpoint discrimination.

clear that no reasonable jury could find the similarly situated prong met." Id. at 252.

Although the applicable standard does not require exact correlation, there must be sufficient proof on the relevant aspects of comparison to warrant a reasonable inference of substantial similarity. Cordi-Allen, 494 F.3d at 251. It is inadequate, however, merely to point to others in a vacuum and leave it to the defendant to disprove conclusory allegations that others are similarly situated. Id.

In Matthews v. Ocean Spray Cranberries, Inc., 426 Mass. 122 (1997), which arose in the employment context, this Court adopted the approach used by the First Circuit in disparate treatment employment discrimination cases: in order to establish that the defendant's stated reasons for an adverse employment action were a pretext, the plaintiff must "identify and relate specific instances where persons similarly situated 'in all relevant aspects' were treated differently." 426 Mass. at 129 (quoting Dartmouth Review v. Dartmouth College, 889 F.2d 13, 19 (1st Cir. 1989)). *See also* Trustees of Health & Hosps. of Boston, Inc., 449 Mass. 675, 682 (2007) ("The test is whether a prudent person, looking objectively at the

incidents, would think them roughly equivalent and the protagonists similarly situated . . .. Exact correlation is neither likely nor necessary, but the cases must be fair congeners," quoting from Dartmouth Review, 889 F.2d at 19); Cordi-Allen, 494 F.3d at 250-51; Buchanan v. Maine, 469 F.3d at 178. It makes both logical and intuitive sense to employ the approach used by this Court in Matthews and by the First Circuit in Cordi-Allen to cases in which, as here, a "class of one" plaintiff alleges not discrimination based on her membership in a protected category, but that the articulated viewpoint-neutral explanation for her disparate treatment was a pretext. In these cases, as in discrimination cases, the plaintiff is challenging the veracity of the defendant's stated reason for its actions and claiming that she was subjected to unfair and disparate treatment. At the summary judgment stage, the plaintiff should not be permitted to rest on conclusory allegations of pretext, but, instead, should be required to point to competent evidence that others with different viewpoints were treated differently.

Applying the tenets of Matthews and Cordi-Allen to this case, Roman did not meet her burden. Roman

refused to pay Tufts for its veterinary services. Appendix at 339-41. Roman admits that she received a letter from Tufts telling her that "[u]ntil and unless this debt is resolved, you will be unable to obtain any medical or other services through the School. This will include any treatment of your own animals, continuing education, or any other service that the School might provide to you personally." Appendix at 339, 390.

Roman presented no evidence that there were other individuals who were informed in writing that they could not come onto campus until they satisfied their debts to Tufts. She also presented no evidence that any person who owed money to Tufts was permitted to attend the lecture. In fact, the *only* evidence that Roman has adduced to establish that there were others who were similarly situated was that Steven Rowell testified hypothetically at his deposition that there were other people who failed to pay a bill to Tufts and, in his view, they could have attended the lecture. This is insufficient to show that these unidentified and unknown "other people" who owed Tufts money under undisclosed circumstances were similarly situated to Roman in all relevant aspects: they owed

money to Tufts, were instructed in writing not to come onto the Tufts campus, but they came to campus for the purpose of attending the lecture, and Susan Brogan, or any other Tufts employee, knowing of their debts to Tufts, permitted these other people to attend the event. Absent such evidence, Steven Rowell's hypothetical testimony does not assist Roman's claim that she was "singled out" for exclusion.[4]

Consequently, Roman has not met her burden of proving that she was excluded from the lecture because of her views on raw food diets rather than because of her refusal to pay her bill. The Court should affirm the decision below on this ground.

III. THE COURT SHOULD NOT INTERPRET THE MCRA TO CREATE A CAUSE OF ACTION ON THESE FACTS.

In interpreting the MCRA, this Court's primary function is to "ascertain the 'intent of the Legislature, as evidenced by the language used, and considering the purposes and remedies intended to be advanced.'" Bally v. Northeastern Univ., 403 Mass.

[4] Moreover, the record facts set forth in Roman's Reply brief fail to create a triable issue on the question of whether Tufts' stated reason for excluding her from the lecture -- that she did not pay her bill and was told specifically not to avail herself of Tufts' "services" -- was a pretext. *See* Reply at 3-6.

713, 718 (1989) (quoting Deas v. Dempsey, 403 Mass. 468, 470 (1988)). In Bally, the Court explained that the MCRA was "intended to provide a remedy for victims of racial harassment." Id. (quoting O'Connell v. Chasdi, 400 Mass. 686, 694 (1987)). The MCRA was "not intended to create, nor may it be construed to establish, a vast constitutional tort." Mancuso v. Massachusetts Interscholastic Athletic Ass'n, Inc., 453 Mass. 116, 131-32 (2009) (internal citations omitted). Instead, "[t]he Legislature passed this statute to respond to a need for civil rights protection under State law. Deprivations of secured rights by private individuals using violence or threats of violence were prevalent at the time that the Legislature considered G.L. c. 12, Secs. 11H and 11I." Batchelder v. Allied Stores Corp., 393 Mass. 819, 822 (1985) ("Batchelder II").[5] Its original purpose, therefore, was to create a right of action

[5] *See also* the Governor's legislative file on 1979 House Bill No. 3135, Chapter 801 of the Acts of 1979, in the State Archives. This file contains the history of 1979 House Bill No. 3135's enactment process and various statements concerning the nature and effect of the proposed law. Batchelder II, 393 Mass. at 821, n.3. "As such, the file is 'an instructive source, indicative of what meaning the legislature intended.'" Id. (quoting 2A C. Sands, Sutherland Statutory Construction § 48.04, at 300 (4th ed. 1984)).

against private actors who engage in racial discrimination or other civil rights violations. *See* Redgrave v. Boston Symphony Orchestra, Inc., 399 Mass. 93, 105 (1987) (O'Connor, J., dissenting) (noting that the legislative history of the MCRA demonstrates "beyond reasonable question that c. 12, § 11I was enacted in response to a concern about the inadequacy of then current law to deal generally with discrimination against minority groups, and more specifically, to deal with racial violence").

As the First Circuit explained in Redgrave, there is "no reason to think that the Massachusetts Legislature enacted the MCRA in an attempt to have its courts, at the insistence of private plaintiffs, oversee . . . *the speech-related activities of private universities* . . .." Redgrave, 855 F.2d at 906 (emphasis added). Rather, the "freedom of mediating institutions, newspapers, universities, political associations, and artistic organizations and individuals themselves to pick and choose among ideas, to winnow, to criticize, to investigate, to elaborate, to protest, to support, to boycott, and even to reject is essential if 'free speech' is to prove meaningful." Id. at 905.

To date, no Massachusetts Court has recognized a right of action under the MCRA for violation of the First Amendment or article 16 by a private actor on private property. In Batchelder v. Allied Stores International, Inc., 388 Mass. 83 (1983)("Batchelder I"), this Court specifically declined to outline the contours of the rights that may arise under article 16 or to determine if there is a "state action" requirement expressed in article 16. The Batchelder I Court explained that, "[i]n limiting our decision to the matter of soliciting signatures on ballot questions, we leave to another day the question of rights that may arise under art. 16 (free speech)." Id. at 91-92. Because answering the question posed in the *amicus* invitation necessarily requires a nuanced examination of complex constitutional issues, and because this case can be resolved without reaching these constitutional issues, the Court should leave this question to another day.

IV. IF THE COURT REACHES THE QUESTION PRESENTED IN THE *AMICUS* INVITATION, IT SHOULD CONCLUDE THAT UNDER THE MCRA, A CLAIM OF INTERFERENCE WITH "FREE SPEECH RIGHTS" MAY NOT BE STATED AGAINST A PRIVATE ACTOR BECAUSE SUCH A CLAIM INHERENTLY REQUIRES STATE ACTION.

A. The Federal and State Constitutions Do Not Secure a Right to Attend a Lecture Offered to the Public, But Held on Private Property.

Roman asserts that she has a constitutional right, "secured" by the First Amendment and article 16 of the Massachusetts Declaration of Rights, to attend a lecture and to "receive information" on the Tufts campus. Appellant's Brief at 20-21. Specifically, Roman contends that a member of the public who seeks to attend a lecture that is open to the public on the campus of a private university is exercising her free speech rights, and that the "speech rights of each individual member of the public responding to Tufts' invitation . . . are embedded within Tufts' voluntary opening of its property for that particular public use."[6] Id. at 21. Roman claims that any attempt to exclude her, if by "threats, intimidation, or

[6] Roman attempts to describe her claimed "right to receive information" as separate and distinct from any free speech rights. The Court should decline Roman's implicit invitation to analyze a "right to receive information" differently than it would analyze traditional free speech claims under the federal or state constitutions.

coercion," would give rise to an MCRA claim because her "rights" are constitutionally "secured." Roman's contentions are legally untenable.

1. Roman Does Not Have a Secured Right to Attend a Lecture and "Receive Information" on Tufts' Private Property.[7]

Roman's contention that she sought only to attend the lecture and did not intend to express a view contrary to Tufts' views on the merits of a raw food diet for pets does not bring her claim within the protections of the First Amendment or article 16.

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[7] Even if Roman had a right to attend a lecture at Tufts and "receive information" that is secured by the First Amendment or art. 16, which she does not, Tufts has a countervailing right: to use its private property in the manner it chooses, free from excessive interference from the government, and to maintain control over who comes onto its campus. As explained in Part IV.A.1.a., *infra*, "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." S.O.C., Inc. v. Mirage Casino-Hotel, 23 P.3d 243, 249 & n.33 (Nev. 2001); *see also* Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979) (recognizing that the "right to exclude" others is universally held to be a fundamental element of the property right); United States v. Pueblo of San Ildefonso, 513 F.2d 1383, 1394 (Ct. Cl. 1975) ("Implicit in the concept of ownership of property is the right to exclude others. Generally speaking, a true owner of land exercises full dominion and control over it; a true owner possesses the right to expel intruders."). Thus, inviting the public to events on campus does not transform Tufts' private property into public space.

Roman's claim ignores the nature of the forum -- Tufts' private property. It is well-settled that the nature of the forum is one of the factors that courts consider in reviewing a person's First Amendment challenge to her exclusion from an event. *See* Startzell v. City of Philadelphia, 533 F.3d 183, 192 (3d Cir. 2008).

Roman seeks to avoid these weaknesses in her argument by asserting that her speech right does not "require Tufts to surrender its own property rights beyond what it had voluntarily chosen to do: permit the public on its property to attend the [l]ecture." Appellant's Brief at 22. The fundamental flaw in this assertion is Roman's assumption that by simply inviting the public onto campus to attend a lecture, Tufts forfeited its rights as a private property owner. As the Supreme Court has explained, "[p]eople assemble in *public places* not only to speak or take action, but also to listen, observe, and learn." Richmond Newspapers, 448 U.S. 555, 578 (1980) (emphasis added). Hence, any claimed right to "receive information" is confined to the receipt of information in a public, not private, forum.

The American Civil Liberties Union of Massachusetts ("ACLUM") argues that this case does not involve the competing First Amendment interests that were implicated in Redgrave, because "it is far from clear that merely allowing Dr. Roman to attend the lecture would have placed any of Tufts' legitimate interests in jeopardy." ACLUM brief at 12-13. ACLUM further argues that "at the summary judgment stage, it cannot be said that allowing Dr. Roman to attend the lecture would have impermissibly infringed upon Tufts' countervailing rights." Id. at 14. This argument ignores Tufts' rights as a private property owner.[8]

This Court and the Supreme Court have both recognized the fundamental right of a private property owner to exclude others. Opinion of the Justices, 365 Mass. 681, 689 (1974) ("If a possessory interest in real property has any meaning at all it must include the general right to exclude others."); PruneYard Shopping Center v. Robins, 447 U.S. 74, 82 (1980)

[8] ACLUM's cited cases are distinguishable. The incident at issue in each case occurred on public property. *See* Mahoney v. Babbit, 105 F.3d 1452, 1457 (D.C. Cir. 1997) (sidewalk of a public street); Gathright v. City of Portland, 439 F.3d 573, 578 (9th Cir. 2006) (public park); Parks v. City of Columbus, 395 F.3d 643, 651-52 (6th Cir. 2005) (festival on public street); Startzell, 553 F.3d at 185 (block party on public streets).

("[O]ne of the essential sticks in the bundle of property rights is the right to exclude others"). In short, identifying the nature of the forum is an essential step in determining if a speech-based right exists. *See, e.g.*, Batchelder I, 388 Mass. at 92 ("The fact that we are dealing with private action on private property and not with public property or with at least direct governmental action is an important consideration.").

a. Tufts' Campus Did Not Lose Its Private Character Because the Public was Invited to Attend the Lecture.

On appeal, Roman also argues that recognizing her "secured right to attend Tufts' Lecture does not work a transformation of Tufts' private property to public, nor does it require that Tufts forfeit property rights entitling it to expel anyone who actually interfered with the Lecture." Appellant's Brief at 36. However, Roman further argues (without any legal support) that because, in her view, Tufts "attributed public significance to the [l]ecture and the speech made available thereby, Tufts has voluntarily implicated a right in the public to peaceably receive that speech," notwithstanding the location of the lecture on Tufts'

private property. Id. at 36-37. The Court should reject these arguments and any claim that Tufts implicated, voluntarily or otherwise, a constitutionally protected "right in the public" to attend the lecture and receive that speech.

In Lloyd Corp. v. Tanner, 407 U.S. 551, 567 (1972), the Supreme Court explained that private property does not "lose its private character merely because the public is generally invited to use it for designated purposes." 407 U.S. at 569; *see also* S.O.C., Inc., 23 P.3d at 248 (holding that privately-owned property "does not lose its private nature because the public traverses upon it"); State v. Wicklund, 589 N.W.2d 793, 798 (Minn. 1999) ("property is not somehow converted from private to public for free speech purposes because it is openly accessible to the public").

Similarly, as this Court has recognized, "[t]he fact that we are dealing with private action on private property and not with public property or with at least direct governmental action is an important consideration." Batchelder I, 388 Mass. at 92.

This case is more similar to the facts presented in Commonwealth v. Hood, 389 Mass. 581, 586-87 (1983),

than to any of the shopping center cases, including Batchelder I, which did not involve art. 16. In Hood, the Court held that the fact that members of the public were allowed to pass through Draper Laboratory's property did not change the essential nature of the premises as private property. Furthermore, the conduct of Draper Laboratory's private business, which included performing work under contract with the federal government, did not implicate the public interest in such a way as to convert its premises into public property. Id. at 587. In short, the fact that a private property owner, like a private college or university, extends an invitation to the public to enter private property does not convert the property into a public forum.

b. Tufts Was Entitled to Exclude Roman from the Lecture for Any Non-Discriminatory Reason.

It is undisputed that Roman did not pay Tufts' veterinary bill and that Tufts informed Roman in writing that she could not avail herself of Tufts' services until her debt was resolved. Nonetheless, even if Tufts' reason for excluding Roman were a pretext (that is, based on her views concerning the

merits of a raw food diet for pets, and not for refusing to pay her bill), Tufts was free to exclude Roman from the lecture for *any* reason, so long as the reason was not her membership in a protected category. To be sure, the MCRA was enacted to prevent discrimination against persons in protected classes. Redgrave, 399 Mass. at 105 (O'Connor, J., dissenting) (the MCRA was "enacted in response to a concern about the inadequacy of then current law to deal generally with discrimination against minority groups, and more specifically, to deal with racial violence"). Roman has not alleged, nor can she prove, that Tufts excluded her on the basis of any protected class that is recognized in the Commonwealth (e.g., race, gender, age, religion, or ethnicity). Advocates of a raw food diet for pets -- or people who want to hear discussion of this subject -- do not constitute a protected class.

Tufts has articulated a legitimate, non-discriminatory reason for excluding Roman from the lecture. Roman has failed to present evidence of pretext or discrimination. Therefore, Roman's claim fails for this reason as well.

2. Under the Federal and State Constitutions, a Violation of Free Speech Rights Inherently Requires State Action.

The constitutional guarantee of free speech, as applied to the states through the fourteenth amendment, "is a guarantee *only against abridgement by government, federal or state*." Hudgens v. NLRB, 424 U.S. 507, 513 (1976) (emphasis added); *see also* Lloyd Corp., 407 U.S. at 567 ("the first and fourteenth amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner of private property used nondiscriminatorily for private purposes only").[9] Simply put, a First Amendment right is, by definition, a right against governmental interference. Id. Recognizing the Supreme Court's teachings, this Court has stated that, "the guarantees of the First and Fourteenth Amendments apply to government action." Hood, 389 Mass. 581 (1983) (citing Hudgens, 424 U.S.

[9] There are very limited exceptions to this general rule, including the rare circumstances where a private actor is performing a function that has traditionally been exclusively performed by the state. *See* Marsh v. Alabama, 326 U.S. 501, 502-03 (1946)(holding that a company-owned town is a state actor because the operation of a town is a public function). None of those circumstances are present in this case.

at 521). Thus, any abridgement of free speech rights must involve some form of government action. Wicklund, 589 N.W.2d at 797.

The significance of these teachings is unmistakable: the First Amendment "guard[s] only against encroachment by the government and erect[s] no shield against merely private conduct." *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 566 (1995). Accordingly, Roman's federal constitutional right to "receive information" is safeguarded only against state action and does not extend to the conduct of private actors such as Tufts on Tufts' private property.

Similarly, although the question has not been definitively answered,[10] the Court should conclude that, in this context, the free speech protections guaranteed by article 16 of the Massachusetts

[10] In Batchelder I, 388 Mass. at 91, this Court specifically declined to decide whether there is a State action requirement under article 16, stating that, "[i]t is important that we carefully define the issue that this case presents. We are concerned with ballot access and not with any claim of a right to exercise free speech apart from the question of ballot access. The Court added, "[i]n limiting our decision to the matter of soliciting signatures on ballot questions, we leave to another day the question of rights that may arise under art. 16 (free speech)." Id. at 91-92.

Declaration of Rights extend no further than the comparable provisions of the First Amendment, and therefore also require state action.[11] Commonwealth v. Noffke, 376 Mass. 127, 134 (1978); *see also* Hosford v. School Committee of Sandwich, 421 Mass. 708, 712 n.5 (1996) (state freedom of speech analysis is guided by the federal analysis of the First Amendment). As the Court explained in Noffke, article 16 protects the rights of free speech "from abridgement by the government," and does not extend to conduct that occurs on the property of a private actor. Id.

In the nearly thirty years since Batchelder I was decided, this Court has resisted all invitations to conclude that rights secured by article 16 can be violated by private actors, and thus expand the reach of the MCRA. *See* Hood, 389 Mass. at 585-86.[12] Indeed, in Ingram v. Problem Pregnancy of Worcester, Inc., 396 Mass. 720 (1986), the Court revisited the cautionary

[11] Article 16 of the Massachusetts Declaration of Rights provides that "freedom of speech shall not be abridged."

[12] The Court has also declined to hold that other provisions of the state constitution can be violated in the absence of state action. *See* Phillips v. Youth Development Program, Inc., 390 Mass. 652, 658 (1983) (explaining that the concept of due process of law, art. 12 of the Massachusetts Declaration of Rights, inherently is concerned with governmental action).

language in Batchelder I and held that there was no federal or state constitutional right to picket or counsel pregnant women in the interior corridors of a private office building, and therefore the private building owner did not violate defendant-tenant's constitutional rights by evicting the tenant. 396 Mass. at 722-23.

Here, the campus of a private university is more like the parking lot of a private hospital at issue in Noffke, the private business in Hood, and the private office building in Ingram, than the common area of a multi-establishment shopping center at issue in Batchelder I, a distinction this Court has recognized. *See* Noffke, 376 Mass. at 134; Hood, 389 Mass. at 585-86; Ingram, 396 Mass. at 723. Because a private university campus is more private than a shopping center, the Court should conclude that Tufts is not a state actor and therefore cannot violate article 16.

Other state courts, construing similar provisions in their own constitutions, have interpreted the relevant free speech language as being co-extensive with that of the First Amendment. For example, the free speech provision of the Minnesota Constitution provides in relevant part that "all persons may freely

speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right." M.S.A. Const. Art. 1, § 3. Minnesota's guarantee, like article 16, does not refer to the state. However, in Wicklund, the Minnesota Supreme Court declined to interpret the language of section 3 more broadly than federal First Amendment protections, and therefore held that state action was required to assert a violation. 589 N.W.2d at 800; *see also* City of West Des Moines v. Engler, 641 N.W.2d 803,805-06 (Iowa 2002) (holding that Iowa constitution's free speech right is coextensive with the First Amendment and requires state action.)

3. Tufts Did Not Engage in State Action When It Excluded Roman From the Lecture.

Roman must establish that Tufts' exclusion of her from the lecture constituted "state action." Yet Roman did not allege in her Complaint and has never argued that Tufts engaged in state action to interfere with her claimed right to attend the lecture.[13]

[13] In fact, in her opposition to Tufts' motion for summary judgment, Roman argued that no state action is required for claims arising under the MCRA.

To support the state action requirement, ACLUM relies on the Appeals Court's opinion in Commonwealth v. Carr, 76 Mass. App. Ct. 41 (2009). This reliance is misplaced. In Carr, the Appeals Court concluded that the actions of the Boston College campus police when they entered a student's room "were actions reasonably undertaken by the police on behalf of the legitimate interests of their employer Boston College, a private institution and not a State Actor." 76 Mass. App. Ct. at 48. The Appeals Court also observed that "the police were acting under the control of their private employer, Boston College," and added that "[t]he resident director enlisted police assistance, not vice versa." Id. at 49.

As in Carr, in this case, Susan Brogan, a private actor, made the decision to exclude Roman from the lecture.[14] Appendix at 239. Roman then approached the Tufts police officer standing nearby -- he did not approach her -- and asked the officer if Brogan could arrest her. Appendix at 242; 245-46. In response, the

[14] In her Complaint, Roman alleged that "Brogan was acting within the scope of her employment with Tufts University when she refused to permit the plaintiff to attend the lecture . . . and when she threatened to have her arrested if she did not leave the property immediately." Compl. ¶ 31. Roman thus does not allege state action.

officer told Roman that the campus was private property and that he would follow Brogan's orders and arrest Roman if Brogan instructed him to do so. *See* Appellant's brief at 10-11; Appendix at 242-43. Thus, the Tufts police officer was acting at the direction of Susan Brogan, a private actor, and his actions were undertaken on behalf of the legitimate interests of their private employer. There was no state action.[15]

4. The Cases Cited By Roman and ACLUM Do Not Establish a Secured Right to Receive Information on Private Property or Protect Against Private Action.

The cases cited by Roman and the ACLUM do not support the claim that she has a constitutional right to attend a lecture sponsored by a private actor on private property. *See* ACLUM Brief at 6-8 & n.1. Rather, the federal and state cases relied upon by

[15] The other tests for determining whether acts by a nominally private entity may constitute state action are: "e.g., if, with respect to the activity at issue, the private entity is engaged in a traditionally public function; is 'entwined' with the government; is subject to governmental coercion or encouragement; or is willingly engaged in joint action with the government." Logidice v. Trustees of Maine Central Institute, 296 F.3d 22, 26 (1st Cir. 2002) (citing Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295-96 (2001)). Roman did not raise these arguments below. Even if considered, under any of these tests, Tufts' decision to exclude Roman from the lecture does not constitute state action.

Roman and the ACLUM each involved some measure of *governmental* interference with or regulation of an individual's First Amendment right to receive information, or arose in the context of a *public* forum, or both.

In Board of Education, Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853, 871-72 (1982), the Supreme Court held that a public school board violated the First Amendment by seeking to remove books from the shelves of a public school library. In Stanley v. Georgia, 394 U.S. 557, 568 (1969), the Supreme Court held that a Georgia statute that punished private possession of obscene materials violated the First Amendment.

Similarly, in Kleindienst v. Mandel, 408 U.S. 753, 769-70 (1972), the Supreme Court held that the Attorney General had validly exercised plenary power delegated to the Executive Branch in denying an alien entry to the United States. The Court stated that the courts would not weigh the Executive's decision against the claimed First Amendment interests of those seeking Mandel's entry so they could listen to his lectures and meet with him. Notably, Justice Marshall's dissent in Kleindienst, on which Roman

relies, focused exclusively on government interference with free speech and noted that the "First Amendment means that *Government* has no power to thwart the process of free discussion, to 'abridge' the freedoms necessary to make that process work." 408 U.S. at 776 (Marshall, J., dissenting) (emphasis added). Finally, in Manfredonia v. Barry, 401 F. Supp. 762 (E.D.N.Y. 1975) the district court held that the plaintiffs' arrests at a lecture in a *public* building by the county police were not made in good faith and deprived plaintiffs of their civil rights.[16]

[16] *See also* Allentown Mack Sales & Serv. v. NLRB, 522 U.S. 359 (1998) (involving regulation of employer polling of employees concerning union support by NLRB, independent agency of federal government); Richmond Newspapers, 448 U.S. at 576 (a trial courtroom is a public place; the First Amendment prohibits government from closing criminal trial courtrooms to the public); Bell v. Wolfish, 441 U.S. 520 (1979) (federally-operated prison's rule limiting inmates' receipt of hardcover books to those mailed directly from publisher, book club or bookstore did not violate First Amendment); Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee, 412 U.S. 94 (1973) (the First Amendment is a restraint on government action, not that of private persons: a broadcaster's refusal to accept editorial advertisements did not constitute governmental action); Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367, 390 (1969) ("It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. *That right may not constitutionally be abridged either by Congress or by the FCC*.") (Emphasis added).

Massachusetts cases on free expression do not assist Roman. In Commonwealth v. Sees, 374 Mass. 532, 536-38 (1978), this Court held that nude dancing in a bar was protected expression under art. 16 and the application of a *city* ordinance to the conduct in question was invalid. Similarly, in Champagne v. Dubois, 1995 WL 733884, *3 (Mass. Super. Ct. Dec. 11, 1995), the Superior Court concluded that a state Department of Correction policy prohibiting male prisoners from wearing earrings does not abridge the art. 16 rights of prisoners.

Roman and ACLUM cite no case supporting her far-reaching proposition that an individual has a constitutionally protected "right to receive information" in the context presented here.

B. The Court Should Find that When the Legislature Enacted the MCRA, It Did Not Intend to Eliminate the State Action Requirement in Circumstances Like These.

To be sure, since the MCRA was enacted, this Court has found, as it did in Bell v. Mazza, 394 Mass. 176 (1985) and in Batchelder I, 388 Mass. 83 (1983), for example, that under certain circumstances there are some cases in which a private actor can violate the MCRA. However, the Court has not yet reached the

conclusion that a private actor may face liability under the MCRA where, as here, the plaintiff alleges that her "free speech" rights (or, alternatively, the right to "receive information") have been violated. For the reasons described above, the Court should decline to do so in this case.

C. Interpreting the MCRA to Provide Roman a Right of Action on These Facts Will Implicate Many Constitutional Questions That This Court Has Not Yet Addressed.

If the Court answers the question presented in the *amicus* invitation in the affirmative, many constitutional questions that the Court has not previously addressed will be implicated.

First, if the Court concludes that a claim of interference with the First Amendment or art. 16 rights can be stated under the MCRA on the facts presented here, where expression-related interests may be present on both sides, the Court would effectively enter the business of deciding which private party's free speech rights are paramount. By permitting MCRA claims to proceed in cases in which a private actor, including, but not limited to, the Commonwealth's private colleges and universities, excludes an individual from private property for non-

discriminatory reasons, the courts would be forced to weigh competing rights and determine which party's rights are entitled to greater protection. *See* Redgrave, 855 F.2d at 904. As the First Circuit has explained, "[t]he courts, noting that free speech guarantees protect citizens against *governmental* restraints upon expression, have hesitated to permit governments to referee disputes between speakers lest such mediation, even when it flies the banner of 'protecting speech,' interfere with the very type of interest it seeks to protect." Redgrave, 855 F.2d at 904.

Recognizing an MCRA claim for violation of free speech rights by a private actor on these facts could potentially create a number of additional thorny questions for courts to resolve. For example, if a private university has issued a "no trespass" order to an individual who has harassed students or staff, or created a safety risk, does that individual nonetheless enjoy a first amendment right to come onto the campus and listen to a lecture or attend an event open to the public? Would such an individual have a right of action under the MCRA if the university threatened to have him removed from the campus? Will

the courts second-guess safety-related "no trespass" orders issued to persons who claim that the First Amendment and art. 16 entitle them to come onto campus to listen to events open to the public? Moreover, if a plaintiff has a constitutionally secured right to receive information on the campus of a private university, and the university cancels the event, has the university violated the plaintiff's right to "receive information" in violation of the MCRA? Would the analysis differ if the event were held at other non-public forums, such as private businesses or in private homes?

Second, recognizing an MCRA claim on the facts in this case could ensure that the Commonwealth's courts would be forced to evaluate the right to free speech or to "receive information" on the one hand against the right of a property owner to decide who is permitted to enter and who is to be excluded from his private property on the other, to determine which rights are entitled to greater protection. *See, e.g.*, Hood, 389 Mass. 581 (1983); Batchelder I, 388 Mass. 83 (1983); Noffke, 376 Mass. 127 (1978).

If the Court adopts Roman's (and ACLUM's) characterization of her constitutionally secured right

to “receive information” on private property and concludes that a plaintiff excluded from an event on private property can state a claim under the MCRA, the distinction -- long recognized -- between private and public property, and between public and private actors, will be lost. If an individual has a right to “receive information” on private property and chooses to attend a political speech on that property, does the homeowner who orders the person to leave face liability under the MCRA?

In short, Roman’s claim raises novel constitutional issues not previously addressed. This Court should not address them, but affirm, instead, on non-constitutional grounds.

CONCLUSION

For all of the foregoing reasons, *Amici* respectfully submit that this Court should affirm the Superior Court's judgment.

Respectfully submitted,

BABSON COLLEGE, BENTLEY UNIVERSITY, BOSTON COLLEGE, BOSTON UNIVERSITY, BRANDEIS UNIVERSITY, EMERSON COLLEGE, REGIS COLLEGE, SIMMONS COLLEGE, STONEHILL COLLEGE, SUFFOLK UNIVERSITY AND WILLIAMS COLLEGE,

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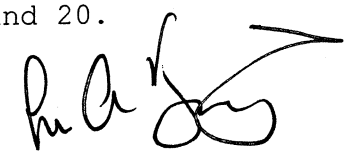
Dated: April 22, 2011

CERTIFICATION PURSUANT TO MASS. R. A. P. 16(k)

Pursuant to Massachusetts Rule of Appellate Procedure 16(k), I hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including Mass. R. A. P. 16(a)(6), 16(e), 16(f), 16(h), 18, and 20.



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