UNION TRESPASSERS ROAM THE CORRIDORS OF CALIFORNIA HOSPITALS: IS A RETURN TO THE RULE OF LAW POSSIBLE?

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I. INTRODUCTION

On any given day, it is likely that somewhere in California union organizers are roaming around a hospital, nursing home, or other health care facility to solicit support from nurses or other health care workers.[1] The organizers may be covert operatives who elude hospital

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1. *See e.g. Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334 (D.C. Cir. 2003); *Hillhaven Oakland Nursing & Rehab. Ctr. v. Health Care Workers Union, Loc. 250*, 49 Cal. Rptr. 2d 11, 11-14 n. 4 (Cal. App. 1st Dist. Div. 2 1996). In other cases, union

security by dressing in scrubs and conducting their surreptitious activities in the evening or at night when most hospital managers are absent from the facility. Or they may take over part of the hospital cafeteria, brazenly resisting the demands of administrators to vacate the premises.[2] In any event, when confronted these organizers boldly assert that they are immune from all trespass laws and are thus entitled to roam hospital corridors with impunity.

Union attorneys facilitate this conduct by arming the organizers with threatening letters that falsely declare hospitals to be public property and predict grave consequences if a security guard or police officer should dare to eject the organizers from the facility or arrest them for trespass.[3] The letters also claim, contrary to clearly established precedent, that the organizers have a right to enter the hospital at will under the *National Labor Relations Act* (*NLRA*).[4] These erroneous letters are then presented to city attorneys who advise local police agencies.

The police are often intimidated because of the political influence that labor unions enjoy at the local government level. And, at times, the police may be sympathetic to the organizers because they themselves are members of labor unions. In any event, police protection from trespassing by union organizers is typically inadequate in California.

Without adequate support from the police, hospital security guards are often unable to cope with trespassing union organizers and the devious tactics they employ. Even when union trespassers are apprehended, security guards cannot make a citizen's arrest or use

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agents take over private property in front of hospital entrances to protest the presence of nonunion contractors. *E.g. Community Regl. Med. Ctr. v. Carpenters Union, Loc. 701*, 2008 WL 4933760 (E.D. Cal. 2008).

For brevity this article generally uses the term "hospital" to include acute care hospitals, nursing homes, and all other types of health care facilities. However, the article does not apply to facilities operated by governmental agencies. In addition, the statements made in this introductory section that are not footnoted are based on the author's anecdotal experience representing hospitals in labor matters.

2. *See e.g. NLRB v. S. Maryland Hosp. Ctr.*, 916 F.2d 932, 933-34 (4th Cir. 1990); *Oakwood Hosp. v. NLRB*, 983 F.2d 698, 699-700 (6th Cir. 1993); *Baptist Medical System v. NLRB*, 876 F.2d 661, 661-62 (8th Cir. 1989).

3. *See e.g.* Ltr. from Bruce A. Harland, Weinberg, Roger & Rosenfeld APC, To Whom It May Concern, *Right to Enter Private Property to Perform Lawful Union Activity* (March 20, 2008) (copy on file with *Whittier Law Review*).

4. 29 U.S.C. §§ 151-69 (2006).

physical force to eject them because of the risk of a lawsuit for wrongful arrest.[5] And it is more difficult than in the usual trespass case to obtain an injunction against these union encroachments on private hospital property because of an anti-injunction law enacted by the California legislature at the behest of labor unions.[6]

This article has two basic objectives. The first is to debunk the myth that union organizers have an unfettered legal right under California law and the *NLRA* to conduct their activities on the private property of hospitals. The second is to enlist the support of law enforcement officers, city attorneys, and the judiciary in restoring the rule of law to California hospitals by enforcing the same laws of civilized society that apply to all other residents of California.

II. *HISTORY OF UNION ACCESS TO PRIVATE PROPERTY IN CALIFORNIA*

The law of union access to private property in California is a tangled web of decisions under the United States Constitution, the *NLRA*, the California Constitution, state criminal trespass statutes, local criminal trespass ordinances, the common law tort of trespass, and state anti-injunction statutes. In order to untangle this web and thus understand the law of union access to private property in this state, it is necessary to go back to 1946, when the United States Supreme Court first authorized encroachments on privately owned property to engage in "expressive activities."[7] The following summary traces the significant case law developments from that date to the present time.

A. *EARLY DECISIONS OF THE UNITED STATES SUPREME COURT:* MARSH V. ALABAMA *AND* NLRB V. BABCOCK & WILCOX CO.

In *Marsh v. Alabama*,[8] the United States Supreme Court held that under the First and Fourteenth Amendments to the Federal Constitution a state could not impose criminal punishment on a person distributing

5. Such a risk materialized in *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772 (9th Cir. 2001). There, union representatives brought a lawsuit against a construction company president for placing them under citizen's arrest when they entered his construction site on three occasions. *Id.* at 778-79.

6. Cal. Lab. Code Ann. §§ 1138-38.5 (West 2003). This law, enacted in 1999 as AB1268, was sponsored by the California Labor Federation, AFL-CIO. *See* Assembly Bill Analysis of AB1268, as amended September 3, 1999.

7. *Marsh v. Ala.*, 326 U.S. 501, 503, 508-09 (1946).

8. *Id.* at 501.

religious literature on the private property of a company-owned town.[9] The Court emphasized that the town operated a "business block [that served] as the community shopping center and [was] freely accessible and open to the people in the area and those passing through."[10] As shown below, this decision, which was based on extremely rare facts, has inspired generations of union attorneys and judicial activists to "push the envelope" far beyond what the Supreme Court initially intended.

A decade after *Marsh v. Alabama*, the United States Supreme Court addressed the question whether an employer could lawfully prevent union organizers from distributing literature on company parking lots under the *NLRA*.[11] In *NLRB v. Babcock & Wilcox Co*.,[12] the Court held that the employer could prohibit such distribution because: (1) The union could still communicate with the employees using other available channels, and (2) the employer did not discriminate against unions by permitting other organizations to distribute materials on its property.[13] Even though traffic safety prevented union organizers from distributing leaflets to employees entering and exiting the parking lot, the Court noted that other available channels of communication like mail, telephone calls, and home visits were open to the union.[14]

B. *EARLY DECISIONS OF THE CALIFORNIA SUPREME COURT: FROM* IN RE ZERBE *TO* IN RE LANE

The California Supreme Court first addressed the question of union activity on private property in a 1964 criminal case, *In re Zerbe*.[15] The Court held that a union representative could not be arrested for trespass when he entered a railroad's right-of-way during a strike at a manufacturing plant and picketed "at or near the junction of the spur track and the main line."[16] The union representative had been prosecuted under California's general trespass statute, Penal Code

9. *Id.* at 509.
10. *Id.* at 508 (internal quotation marks omitted).
11. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 106, 109 (1956).
12. *Id.* at 105.
13. *Id.* at 112.
14. *Id.* at 107, 112.
15. *In re Zerbe*, 388 P.2d 182 (Cal. 1964).
16. *Id.* at 184, 186.

section 602.[17] At that time the statute did not include an exception for union activity.[18] The Court nevertheless relied on an exception for union activity in a separate statute, Penal Code sections 552-555.5, that prohibited trespassing on posted industrial property.[19]

The *Zerbe* opinion was soon followed by the California Supreme Court's decision in *Schwartz-Torrance Investment Corp. v. Bakery & Confectionary Workers' Union, Local 31*.[20] In this case, the Court held that the owner of a shopping center could not enjoin as trespass the peaceful picketing by a union of premises leased by an employer at the shopping center.[21] The Court emphasized that the California legislature had declared that the public policy of the state favors collective bargaining, and an exception to the criminal trespass statute facilitated this public policy.[22] It also noted that the shopping center had a "public character" because the owner had opened it to the entire community.[23] The infringement of the owner's property interest was therefore deemed to be "largely theoretical" and "technical rather than substantial."[24] The Court concluded that when premises are opened up for use by the general public, a property owner's rights become circumscribed by statutory and First Amendment rights.[25]

Three years later, the California Supreme Court decided *In re Hoffman*,[26] which held that a group of individuals had a right under the

17. *Id.* at 183 (citing Cal. Penal Code Ann. § 602 (West 2006)).

18. § 602 (According to the Historical and Statutory Notes, the California legislature added a union exception, subdivision (n)(2), in 1978. The exception was subsequently relettered to the current § 602(o)).

19. *Zerbe*, 388 P.2d at 184 (quoting Cal. Penal Code Ann. § 522.1 (West 1983)).

20. *Schwartz-Torrance Inv. Corp. v. Bakery & Confectionary Workers' Union, Loc. 31*, 394 P.2d 921 (Cal. 1964).

21. *Id.* at 921-92. In an earlier case, *Nahas v. Loc. 905, Retail Clerks Intl. Assn.*, 301 P.2d 932, 933 (Cal. App. 2d. Dist. Div. 2 1956), *overruled by Schwartz-Torrance*, 324 P.2d 921, the California Court of Appeal ruled that a tenant of a shopping center could not enjoin union picketing on the sidewalks and parking areas adjacent to his store. *Id.* at 933-35. The court of appeal also found that the tenant could not exert a sufficient possessory interest to maintain the trespass action because, under the lease, he only had a right to use the sidewalks and parking areas in common with other tenants. *Id.* at 938-40.

22. *Schwartz-Torrance*, 394 P.2d at 922 (citing Cal. Lab. Code Ann. § 923 (West 1963); Cal. Penal Code Ann. § 552.1).

23. *Id.* at 924.

24. *Id.* (quoting *Zerbe*, 388 P.2d at 185).

25. *Id.* at 926.

26. *In re Hoffman*, 434 P.2d 353 (Cal. 1967).

First Amendment to distribute handbills protesting the Vietnam War in a privately owned railroad station, and therefore the group could not be convicted under a trespass ordinance enacted by the City of Los Angeles.[27] The Court stated that under federal constitutional law "a regulation of First Amendment activities in streets and parks must be supported by a valid municipal interest."[28] In addition, the Court stated that, under *Marsh v. Alabama* and *Tucker v. Texas,* "[t]his rule applies whether the owner of the [property] is a government body or a private [entity]."[29] The Court also decided that "a railway station is like a public street or park" because "[n]oise and commotion are characteristic of the normal operation" of such a station and railroads seek "neither privacy within nor exclusive possession of their station."[30]

In 1969, the "envelope pushing" accelerated in California when the State Supreme Court decided *In re Lane*.[31] In this case, the Court held that a union representative had a First Amendment right to distribute handbills on a private sidewalk just outside an entrance to a large grocery store that was not part of a shopping center.[32] Thus, what began as a First Amendment right to distribute literature on the business block of a company town—which was indistinguishable from the shopping district of any other town—had become a right to distribute handbills on a private sidewalk in front of an ordinary retail store.[33] The Court justified this further extension of the company town rationale by reasoning that the sidewalk was "not private in the sense of not being open to the public" since the public was invited to use it in entering and leaving the store.[34] In the Court's view, it was "a public area in which members of the public may exercise First Amendment rights."[35] As explained below, however, the precedent established in *In re Lane* has been undermined by later decisions.

27. *Id.* at 353-56.

28. *Id.* at 355.

29. *Id.* at 356 (citing *Marsh v. Ala.*, 326 U.S. 501, 509 (1946); *Tucker v. Tex.*, 326 U.S. 517, 520 (1946)).

30. *Id.*

31. *In re Lane*, 457 P.2d 561 (Cal. 1969).

32. *Id.* at 562.

33. *Marsh v. Ala.*, 326 U.S 501, 503, 507-08 (1946); *Lane*, 457 P.2d at 562.

34. *Lane*, 457 P.2d at 565.

35. *Id.*

C. *THE SHOPPING CENTER AS A "PUBLIC FORUM" FOR EXPRESSIVE ACTIVITIES: FROM* LOGAN VALLEY PLAZA *TO* PRUNEYARD

The judicial "envelope pushing" trend that followed the company town decision in *Marsh v. Alabama* found its way, albeit briefly, to the United States Supreme Court in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc*.[36] Applying the precedent in *Marsh*, the Court in *Logan Valley* held that a shopping center that was "freely accessible and open" to the public was functionally the equivalent of a business block under the First Amendment.[37] Thus, the picketing by a labor union in the shopping center could not be enjoined.[38] As explained below, however, this decision would be short-lived.

Following the lead of the United States Supreme Court, the California Supreme Court concluded in *Diamond v. Bland*[39] (*Diamond I*) that individuals had a First Amendment right under *Marsh v. Alabama* and *Logan Valley Plaza* to use shopping center premises to solicit signatures and disseminate information relating to anti-pollution initiative petitions.[40] As explained below, this decision was overruled by the California Supreme Court in *Diamond v. Bland*[41] (*Diamond II*), but later effectively reinstated in the Court's *Robins v. Pruneyard Shopping Center*[42] decision.

Only four years after issuing *Logan Valley Plaza*, the United States Supreme Court decided that the case had gone too far in diminishing private property rights. In *Lloyd Corp. v. Tanner*,[43] the Court distinguished and limited *Logan Valley*, holding that a shopping center was not dedicated to public use so as to entitle persons to exercise a First Amendment right to distribute handbills protesting the

36. *Amalgamated Food Employees Union Loc. 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 318-19, 325 (1968), *overruling recognized by Hudgens v. NLRB*, 424 U.S. 507, 518 (1976).

37. *Id.* at 319 (quoting *Marsh* 326 U.S. at 508).

38. *Id.* at 309.

39. *Diamond v. Bland* (*Diamond I*), 477 P.2d 733 (Cal. 1970).

40. *Id.* at 734, 737, 741.

41. *Diamond v. Bland* (*Diamond II*), 521 P.2d 460 (Cal. 1974), *overruled*, *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980).

42. *Pruneyard*, 592 P.2d 341.

43. *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

Vietnam War.[44] The Court emphasized that the federal right of private property under the Fifth and Fourteenth Amendments, while not absolute, was an important factor in its decision.[45] In this regard, the Court recited the guarantee of the Due Process Clauses under both the Fifth and Fourteenth Amendments: "No person shall . . . be deprived of life, liberty, or property, without due process of law."[46] It also relied on the "proscription in the Fifth Amendment against the taking of 'private property . . . for public use, without just compensation.' "[47] Later in its opinion, the Court reiterated that "the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected."[48]

The Court also emphasized that the protestors had misapprehended the scope of the shopping center's invitation extended to the public, since it was merely an invitation to do business with the shopping center's tenants and not an unconditional right to use the property "for any and all purposes."[49] The Court reasoned that the nature of the invitation was not altered by the fact that the shopping center was used by outside groups, as the purpose of their presence was "to bring potential shoppers to the [shopping center], to create a favorable impression, and to generate goodwill."[50] Finally, the Court noted that an argument that the shopping center was " 'open to the public' would apply in varying degrees to most retail stores and service establishments across the country"[51]—the Court reiterated later in the decision that property does not "lose its private character merely because the public is generally invited to use it for designated purposes."[52]

In addition, the Court's opinion anticipated and rejected attempts to extend the constitutional right of free speech to standalone stores, stating that: "Few would argue that a free-standing store, with abutting

44. *Id.* at 556, 563-64, 567, 570.

45. *Id.* at 567-68.

46. *Id.* (quoting U.S. Const. amends. V, XIV, § 1) (internal quotation marks omitted).

47. *Id.* (quoting U.S. Const. amend. V).

48. *Id.* at 570.

49. *Id.* at 564-65.

50. *Id.* at 565-66.

51. *Id.* at 565.

52. *Id.* at 569.

parking space for customers, assumes significant public attributes merely because the public is invited to shop there."[53]

In 1974, the California Supreme Court reconsidered *Diamond I*, its earlier shopping center decision, in *Diamond II*.[54] The Court found no basis for distinguishing *Diamond II* from the United States Supreme Court's decision in *Lloyd Corp. v. Tanner*.[55] Thus, applying the rationale of *Lloyd*, the California Supreme Court held that the private property interests of the owner of the shopping center outweighed the interests of individuals who sought to exercise First Amendment rights on the center's premises.[56] As explained below, however, *Diamond I* was effectively reinstated by the California Supreme Court's subsequent *Pruneyard* decision.[57]

In *Hudgens v. NLRB*,[58] the United States Supreme Court completed what it started four years earlier in *Lloyd Corp. v. Tanner* by overruling *Logan Valley Plaza*, its original shopping center decision.[59] In holding that striking warehouse employees did not have a right under the First Amendment to enter a shopping center to picket at a retail store operated by their employer, the Court explained that the rationale of *Logan Valley* had not survived its decision in *Lloyd* and that the constitutional guarantee of free speech had no part to play in such a case.[60]

The California Supreme Court came full circle on the shopping center issue in 1979 by deciding *Robins v. Pruneyard Shopping Center*,[61] which overruled its earlier decision in *Diamond II*.[62] In *Pruneyard*, the California Court held that the United States Supreme Court's decision in *Lloyd Corp. v. Tanner* did not identify a federally protected property right that prevented it from ruling that the state

53. *Id.*

54. *Diamond v. Bland* (*Diamond II*), 521 P.2d 460, 461 (Cal. 1974), *overruled*, *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980).

55. *Id.* at 461.

56. *Id.* at 463.

57. *Infra* nn. 61-66 and accompanying text.

58. *Hudgens v. NLRB*, 424 U.S. 507 (1976).

59. *Id.* at 518.

60. *Id.* at 518, 520-21.

61. *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980).

62. *Id.* at 347.

constitution creates broader speech rights as to private property than does the Federal Constitution.[63] Having surmounted that hurdle, the Court also held that the California Constitution protects "speech and petitioning" at shopping centers.[64] It declared: "The California Constitution broadly proclaims speech and petition rights. Shopping centers to which the public is invited can provide an essential and invaluable forum for exercising those rights."[65] Moreover, the Court emphasized that shopping centers are important as places where groups of citizens can congregate, and it characterized such centers as "miniature downtowns."[66]

The owner of the shopping center at issue in *Pruneyard* appealed the decision to the United States Supreme Court, which ruled in *PruneYard Shopping Center v. Robins*[67] that the state court's decision permitting the exercise of free speech and petition rights on the private property of the shopping center did not violate the owner's property rights under the Fifth and Fourteenth Amendments, nor its free speech rights under the First and Fourteenth Amendments.[68] Unions may contend that this decision implicitly narrowed the United States Supreme Court's holding in *Lloyd Corp v. Tanner* that the Fifth and Fourteenth Amendment property rights were relevant to that shopping center case and "must be respected and protected."[69] But Justices Marshall, White, and Powell each pointed out in separate concurring opinions in *PruneYard* that the decision was limited to a shopping center; and Justices White and Powell emphasized that the case did not involve a stand-alone retail store.[70]

63. *Id.* at 344, 347.

64. *Id.* at 347.

65. *Id.*

66. *Id.* at 347 n. 5 (quoting *Diamond v. Bland* (*Diamond II*), 521 P.2d 460, 468 (Cal. 1974) (Mosk, J., dissenting), *overruled*, *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980)) (citations and internal quotation marks omitted).

67. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

68. *Id.* at 82-88.

69. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 570 (1972).

70. *PruneYard*, 447 U.S. at 89, 94 (Marshall, J., concurring); *see id.* at 95 (White, J., concurring in part and concurring in the judgment); *id.* at 96 (Powell & White, JJ., concurring in part and concurring in the judgment.)

D. *UNITED STATES SUPREME COURT REFUSES TO EXTEND FIRST AMENDMENT TO RETAIL STORE PARKING LOTS*

On the same day as *Lloyd Corp. v. Tanner*, the United States Supreme Court decided *Central Hardware Co. v. NLRB*,[71] which concluded that *Logan Valley Plaza* did not apply to solicitation by union organizers on the parking lots of standalone retail stores.[72] The Court rejected the argument that the retail store parking lots had "acquired the characteristics of a public municipal facility" because they were "open to the public,"[73] since this would "constitute an unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments"[74] In addition, the Court emphasized that the same "argument could be made with respect to almost every retail and service establishment in the country, regardless of size or location."[75] Ultimately, the case was remanded for a determination under *Babcock*,[76] which requires an accommodation between a union's organizing rights and an employer's property rights.[77]

E. *UNITED STATES SUPREME COURT HOLDS THAT STATUTORY EXCEPTIONS FOR LABOR UNION PICKETING ARE UNCONSTITUTIONAL*

Just a few days after deciding *Lloyd Corp.* and *Central Hardware*, the United States Supreme Court issued a decision that has not been widely recognized in California, but is likely to have a profound impact on union access to private property in this state. In *Police Department of Chicago v. Mosley*,[78] the Court held that a city ordinance that prohibited picketing within 150 feet of a school, but excepted picketing in a labor dispute, was a violation of both the First Amendment and the Equal Protection Clause of the Fourteenth

71. *C. Hardware Co. v. Natl. Lab. Rel. Bd.*, 407 U.S. 539 (1972).

72. *Id.* at 540-41, 547.

73. *Id.* at 547 (internal quotation marks omitted).

74. *Id.* These rights were explained in greater detail by the United States Supreme Court in *Lloyd*. 407 U.S at 567-68, 570.

75. *C. Hardware*, 407 U.S. at 547.

76. *Id*. at 548. *Babcock* was later reaffirmed in *Lechmere, Inc. v. Natl. Lab. Rel. Bd.*, 502 U.S. 527, 533 (1992).

77. *See supra* nn. 12-14 and accompanying text.

78. *Police Dept. of Chi. v. Mosley*, 408 U.S. 92 (1972).

Amendment because of its "impermissible distinction between labor picketing and other peaceful picketing."[79] The Court found this distinction to be unconstitutional content discrimination.[80]

Eight years later, the United States Supreme Court decided *Carey v. Brown*,[81] in which it invalidated an Illinois statute that, like the Chicago ordinance in *Police Department of Chicago v. Mosley*, provided special protection for the expressive activities of labor unions.[82] The statute prohibited picketing of residences or dwellings but exempted picketing of a place of employment in a labor dispute.[83] The Court found this to be "constitutionally indistinguishable" from the Chicago ordinance and held that by exempting only picketing in a labor dispute the statute "discriminate[d] between lawful and unlawful conduct based on the content of the . . . communication."[84] Accordingly, the statute was ruled unconstitutional under the First and Fourteenth Amendments.[85]

Although the United States Supreme Court had recently ruled for the second time, in *Carey v. Brown*, that a state cannot constitutionally carve out an exception to a criminal statute to protect the expressive activities of labor unions, the California Supreme Court did exactly that in a 1981 decision, *In re Catalano*.[86] In that case, the California Court concluded that two union representatives who entered a construction jobsite to investigate safety conditions and prepare a steward's report did not violate a criminal trespass statute.[87] The union representatives were arrested for violating a subsection of the state's general trespass statute, Penal Code section 602, which prohibits refusals to leave certain types of lands.[88] At the time of the arrest the provision in question did not contain an exception for union agents, but the court relied on an exception for "lawful union activity" in a separate statute, Penal Code sections 552-555.5, which prohibits trespass on "posted

79. *Id.* at 92-93, 94, 96, 102.
80. *Id.* at 102.
81. *Carey v. Brown*, 447 U.S. 455 (1980).
82. *Id.* at 458-61.
83. *Carey*, 447 U.S. at 459 (citing Ill. Comp. Stat. § 21.1–2 (1977).
84. *Id.* at 460-61.
85. *Id.* at 459-60.
86. *In re Catalano*, 623 P.2d 228 (Cal. 1981).
87. *Id.* at 228-30.
88. *Id.* at 229 (citing Cal. Penal Code Ann. § 602(k) (West 2006)).

industrial property."[89] In addition, the court relied on a recent amendment to another subsection of the general trespass statute, which included an exception for "lawful labor union activities which are permitted to be carried out on the property . . . by the *National Labor Relations Act*."[90] The Court concluded that this exception "merely codifie[d] existing law" under *NLRB v. Babcock & Wilcox*,[91] even though this conclusion was, in fact, in direct conflict with the holding in *Babcock*.

In explaining its decision, the *Catalano* Court stated that a labor union representative who enters upon private property to engage in "lawful union activity" does not violate the state's criminal trespass statutes.[92] But the Court limited its decision to jobsites in the unionized construction industry, explaining that in determining whether the activities of the union representatives constituted "lawful union activity" it must "look to the customary and accepted practices of the construction industry, and to a balance of the respective interests of the union and the landowner."[93] Employing this bifurcated analysis, the Court found that both of these inquiries indicated that their activities were lawful.[94]

First, the Court reasoned that safety inspections and reports by stewards were "customary in the industry," and that the union in question "had entered into agreements with three subcontractors authorizing such inspections and reports."[95] It also noted that union representatives "had visited the jobsite for such purposes on many occasions," and that the owner of the property was aware of that fact and "of the custom in the construction industry of permitting such entry by union representatives."[96] Second, the Court emphasized that it was important to allow "employees and their representatives to bargain for, and police, safe and healthful workplaces."[97] It also stated:

89. *Id.* at 234 (citing § 552.1).

90. *Id.* at 236 (citing § 602(n)) (internal quotation marks omitted). This provision has been relettered as § 602(o).

91. *Id.* (quoting *Sears, Roebuck & Co. v. San Diego Co. Dist. Council of Carpenters* (*Sears II*), 599 P.2d 676, 685-86 n. 9 (Cal. 1979) (plurality)).

92. *Id.*

93. *Id.* at 235-37.

94. *Id.*

95. *Id.* at 237.

96. *Id.*

97. *Id.*

"Collectively bargained safety and health provisions have little meaning if employee representatives can be ousted from the jobsite. Such a bar cannot be erected in an industry such as construction where working conditions may be extremely hazardous."[98] Finally, the court stated that under state policy "union agents may not be subjected to criminal liability for protecting workers against dangers such as these."[99]

F. *UNITED STATES SUPREME COURT DECIDES THAT STATE TRESPASS COMPLAINTS ARE GENERALLY NOT PREEMPTED BY THE* NLRA

Shortly after the United States Supreme Court's decision in *Hudgens*, the California Supreme Court opened a new chapter in the controversy over union access to private property in California. In *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters* (*Sears I*),[100] the California court held that the *NLRA* preempted an action filed in state court to enjoin trespassing by union pickets on parking lot areas adjacent to walkways abutting the sides of a standalone department store.[101] The Court determined that the picketing was "arguably protected by section 7" of the *NLRA*, and that it was also "arguably prohibited by section 8" of that statute, resulting in federal preemption of the injunction action.[102]

The United States Supreme Court, however, reversed the decision in *Sears I*.[103] Although the Supreme Court agreed with the California Court that the union's picketing was arguably prohibited by the *NLRA*, it held that there was no preemption of the state court action because the controversy in that case was not the same as the controversy that could have been presented to the NLRB by filing an unfair labor practice charge.[104] Thus, the Court concluded that "permitting the state court to adjudicate Sears' trespass claim would create no realistic

98. *Id.* (footnote omitted).

99. *Id.*

100. *Sears, Roebuck & Co. v. San Diego Co. Dist. Council of Carpenters* (*Sears I*), 553 P.2d 603 (Cal. 1976), *rev'd*, 436 U.S. 180 (1978).

101. *Id.* at 605, 613.

102. *Id.* at 610.

103. 436 U.S. 180.

104. *Id.* at 198, 204-05.

risk of interference with the primary jurisdiction" of the NLRB to prevent unfair labor practices.[105]

Moreover, although the United States Supreme Court also agreed with the California Supreme Court that the picketing was arguably protected by the *NLRA*, it concluded that there was no preemption for two primary reasons.[106] First, Sears could not invoke the NLRB's jurisdiction to obtain a ruling on whether the picketing was protected because the union did not file an unfair labor practice charge with that agency to obtain such a ruling.[107] Second, the assertion of state jurisdiction did not create a significant risk that the state court would prohibit protected conduct because "the balance struck by the [NLRB] and the courts under the *Babcock* accommodation principle has rarely been in favor of trespassory organizational activity" and therefore "a trespass is far more likely to be unprotected than protected."[108]

In 1991, the NLRB provided the answers to questions that the Supreme Court did not decide in the *Sears* decision: (1) Whether an employer's state court action to enjoin union trespassing is preempted by the *NLRA* if the NLRB's jurisdiction has been invoked by filing an unfair labor practice charge, and (2) if so, when preemption occurs.[109] These questions were answered in *Makro, Inc. & Renaissance Properties Co*.,[110] in which the NLRB concluded: (1) The state court action is not preempted by the mere filing of a charge; but, (2) it is preempted if and when the agency's General Counsel, after conducting an investigation and concluding that the charge appears to have merit, issues a formal complaint alleging that the *NLRA* has been violated.[111]

Five years later, in *Hillhaven Oakland Nursing & Rehabilitation Center v. Healthcare Workers Union, Local 250*,[112] the California Court of Appeal reached the same result under the unusual circumstances in which the employer, instead of the union, had invoked

105. *Id.* at 198.

106. *Id.* at 196-97.

107. *Id.* at 200-02.

108. *Id.* at 203, 205.

109. *Makro, Inc. & Renaissance Props. Co.*, 305 N.L.R.B. 663, 669-70 (NLRB 1991).

110. *Id.* at 663.

111. *Id.* at 670.

112. *Hillhaven Oakland Nursing & Rehab. Ctr. v. Heathcare Workers Union, Loc. 250*, 49 Cal. Rptr. 2d 11 (Cal. App. 1st Dist. Div. 2 1996).

the jurisdiction of the NLRB.[113] In that case, twenty-five to thirty union trespassers entered a nursing home through the back door and dispersed throughout the building, creating noise, disrupting patient care and seriously disturbing many of the elderly patients.[114] The employer filed an unfair labor practice charge against the union as a result of this conduct.[115] After investigating the charge, the Regional Director of the NLRB (acting on behalf of its General Counsel) issued a formal complaint against the union.[116] In addition, the employer "sought and obtained a preliminary injunction" in state court restricting the union representatives' access to the nursing home.[117] But the California Court of Appeal reversed the injunction on *NLRA* preemption grounds.[118] Despite acknowledging that "the state has a significant interest in protecting convalescent home residents, employees, and others from the type of disruptive conduct" caused by the union, it found that "once the matter was placed before the NLRB" by the employer's charge and the Regional Director "had issued the complaint, further state court action was preempted" by the *NLRA*.[119]

G. *CALIFORNIA SUPREME COURT DECIDES THAT PICKETING ON THE PRIVATE SIDEWALK OF A RETAIL STORE IS PROTECTED BY THE STATE* MOSCONE ACT

Just six months after deciding *Pruneyard*, a three-justice plurality of the California Supreme Court issued a decision on remand from the United States Supreme Court in the *Sears I* case.[120] In that opinion, known as *Sears II*, the Court ruled for the second time that the union's picketing on a private sidewalk surrounding a standalone department store could not be enjoined.[121] But instead of relying on the constitutional theory recently adopted in *Pruneyard*, the plurality in *Sears II* took a different tack, ruling that the picketing was protected

113. *Id.* at 11, 13, 18-20.
114. *Id.* at 12-13.
115. *Id.* at 13.
116. *Id.* at 13-14 n. 5.
117. *Id.* at 11, 13.
118. *Id.* at 14.
119. *Id.* at 17.
120. *Sears, Roebuck & Co. v. San Diego Co. Dist. Council of Carpenters (Sears II)*, 599 P.2d 676, 679, 687 (Cal. 1979) (plurality) [hereinafter *Sears II*].
121. *Id.* at 687.

from an injunction by the state *Moscone Act*, which had recently been enacted by the state legislature.[122] The plurality emphasized that the *Moscone Act* prohibits an injunction against picketing " 'in any place where any person or persons may lawfully be' " and provides that this language must be " 'strictly construed in accordance with existing law governing labor disputes.' "[123] Furthermore, the plurality concluded that the "existing law" referred to in the new statute was set forth in the court's earlier decisions in *Schwartz-Torrance* and *In re Lane*, and that these cases established that "picketing on privately owned [sidewalks] outside [a retail store] is not subject to an injunction."[124]

The plurality opinion in *Sears II* acknowledged, however, that the language of the *Moscone Act* "cannot be taken literally" because "a strict reading might appear to authorize picketing in the aisle of the Sears store or even in the private offices of its executives."[125] Indeed, it noted that "at some such point even peaceful picketing might represent so intrusive an invasion of Sears' use of its property as to compel judicial intervention."[126]

The plurality opinion also emphasized that while the *Pruneyard* decision was based on provisions of the California Constitution, the decision in *Sears II* rested on the terms of the *Moscone Act*.[127] In expressly declining to hold that the union had a right under the state constitution to picket on Sears' private property, the plurality stated that "we express no opinion on whether the California Constitution protects the picketing here at issue."[128]

As explained below, the decision in *Sears II* has been undermined by later decisions. In any event, the plurality opinion in *Sears II* is not entitled to deference as precedent and the doctrine of stare decisis does not apply because the opinion was signed by only three members of the state Supreme Court.[129]

122. *Id.* at 679.

123. *Id.* at 680-82 n. 3 (quoting Cal. Civ. Proc. Ann. § 527.3(a), (b)(1) (West 1975)).

124. *Id.* at 682 -83.

125. *Id.* at 681.

126. *Id.*

127. *Id.* at 683 n. 5.

128. *Id.*

129. *E.g. Bd. of Supervisors v. Loc. Agency Formation Comm.*, 838 P.2d 1198, 1207 (Cal. 1992).

H. *FOURTH CIRCUIT HOLDS THAT A STATE'S POLICY OF WITHDRAWING THE PROTECTION OF STATUTES DURING A LABOR DISPUTE IS PREEMPTED BY THE* NLRA

Between 1991 and 1994, the Fourth Circuit Court of Appeals issued three decisions that seriously undermine California's policy of withdrawing the protection of state laws from an employer during a labor dispute.[130] All three of the decisions were issued in a single case, *Rum Creek Coal Sales, Inc. v. Caperton*.[131] In *Rum Creek I*, the Fourth Circuit concluded that a state's policy of withdrawing the general protection of its trespass statute from an employer during a labor dispute conflicted with and was preempted by the *NLRA*.[132] In *Rum Creek II*, the court concluded that the state's neutrality statute, under which police officers could not aid or assist either party to a labor dispute, likewise violated the federal policy governing labor relations and was therefore preempted by the *NLRA*.[133] Finally, in *Rum Creek III*, the court summarized these holdings[134] and required the state to pay the employer's attorney's fees.[135]

The second *Rum Creek* decision was relied upon by the United States Supreme Court in a 1994 case, *Livadas v. Bradshaw*.[136] In summarizing the *Rum Creek II* holding, the Court noted that a state "may not, consistently with the *NLRA*, withhold protections of state antitrespass law from [an] employer involved in a labor dispute, in an effort to apply a facially valid 'neutrality statute.' "[137]

130. This policy is expressed, for example, in the *Moscone Act* and the *Sears II* decision discussed *supra* nn. 122-28; the criminal trespass exceptions involved in *In re Zerbe* and *In re Catalano,* discussed *supra* nn. 15-19 and 86-99; and the anti-injunction statute involved in *Waremart Foods v. United Food & Commercial Workers*, discussed *infra* nn. 277-81.

131. *Rum Creek Coal Sales Inc. v. Caperton* (*Rum Creek III*), 31 F.3d 169 (4th Cir. 1994); *Rum Creek Coal Sales Inc. v. Caperton* (*Rum Creek II*), 971 F.2d 1148 (4th Cir. 1992); *Rum Creek Coal Sales Inc. v. Caperton* (*Rum Creek I*), 926 F.2d 353 (4th Cir. 1991).

132. *Rum Creek I*, 926 F.2d at 365-66.

133. *Rum Creek II*, 971 F.2d at 1154.

134. *Rum Creek III*, 31 F.3d at 173.

135. *Id*. at 181.

136. *Livadas v. Bradshaw*, 512 U.S. 107, 120 n. 13 (1994).

137. *Id.* at 119 (citing *Rum Creek II*, 971 F.2d at 1154).

I. *UNITED STATES SUPREME COURT REAFFIRMS THE RIGHT OF EMPLOYERS TO EXCLUDE UNION AGENTS FROM PRIVATE PROPERTY*

In a 1992 decision, *Lechmere, Inc. v. NLRB*,[138] the United States Supreme Court reaffirmed its holding many years earlier in *Babcock* that as a general rule an employer has a right under the *NLRA* to bar nonemployee union organizers from its property.[139] The Court noted that to gain access under the *Babcock* standard, a union must show either "that no other reasonable means of communicating its organizational message to the employees exists or that the employer's access rules discriminate against union solicitation."[140] The Court emphasized that this burden is a heavy one, as

> evidenced by the fact that the balance struck by the Board and the courts under the *Babcock* accommodation principle has rarely been in favor of trespassory organizational activity. . . . [I]n practice, nonemployee organizational trespassing had generally been prohibited except where 'unique obstacles' prevented nontrespassory methods of communication with the employees.[141]

Focusing on the first *Babcock* exception, the Court held that nonemployee organizers do not have a right to enter an employer's property "except in the rare case where 'the inaccessibility of employees makes ineffective the reasonable attempts by [the union] to communicate with them through the usual channels.' "[142] The Court stressed that this is a narrow exception applying only if " 'the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them.' "[143] To illustrate the narrow scope of the exception, the Court used classic examples, including "logging camps, mining camps, and

138. *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

139. *Id.* at 536 (quoting *Sears, Roebuck & Co. v. San Diego Co. Dist. Council of Carpenters*, 436 U.S. 180, 205 (1978)). The Court later clarified the legal source of an employer's right to exclude union organizers from its private property, explaining that the right "emanates from state common law, and while this right is not superseded by the *NLRA*, nothing in the *NLRA* expressly protects it." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 217 n. 21 (1994).

140. *Lechmere*, 502 U.S. at 535 (citing *Sears*, 436 U.S. at 205) (emphasis removed).

141. *Id.* (quoting *Sears*, 436 U.S. at 205, 205 n. 41).

142. *Id.* at 537 (quoting *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)).

143. *Id.* at 539 (quoting *Babcock*, 351 U.S. at 113) (emphasis removed).

mountain resort hotels."[144] The Court also emphasized that this exception protects the rights of employees "who, by virtue of their employment, are isolated from the ordinary flow of information that characterizes our society."[145] It noted that a union's burden of establishing that employees are isolated to this extent is a heavy one, and stated that because the employees did not reside on the property of the company in that case, they were presumptively not beyond the reach of the union's message.[146]

In addition, the *Lechmere* opinion reaffirmed the Supreme Court's holding in the *Sears* case that arguable claims under Section 7 of the *NLRA* "do not pre-empt state trespass law, in large part because the trespasses of nonemployee union organizers are 'far more likely to be unprotected than protected.' "[147]

The *Lechmere* decision did not elaborate on the second *Babcock* exception, known as the "nondiscrimination rule." But in a 1996 decision, *Lucile Salter Packard Children's Hospital v. NLRB*,[148] the D.C. Circuit Court of Appeals explained that there are two exceptions to this rule.[149] First, an employer's decision to permit solicitations by outside organizations does not violate the rule if they are limited to " 'a small number of isolated "beneficent acts" that constitute narrow exceptions to the employer's otherwise absolute policy against outsider solicitations.' "[150] Second, there will be no violation if the solicitations relate to the employer's business functions and purposes.[151]

During a four-year period starting in 1989, the federal appellate courts applied the principles of *Babcock* and *Lechmere* in a series of decisions holding that union agents did not have a right under the *NLRA* to conduct their activities in a hospital cafeteria. In the first of these decisions, *Baptist Medical System v. NLRB*,[152] the Eighth Circuit Court of Appeals concluded that a hospital had a right to exclude union representatives from an eating area that was open to employees,

144. *Id.* at 541 (citations omitted).

145. *Id.* at 540.

146. *Id.* (quoting *Sears*, 436 U.S. at 205; *Babcock*, 351 U.S. at 113).

147. *Id.* at 535 (quoting *Sears*, 436 U.S. at 205). For further information on the *Sears* case, *see supra* nn. 103-08 and accompanying text.

148. *Lucile Salter Packard Children's Hosp v. NLRB*, 97 F.3d 583 (D.C. Cir. 1996).

149. *Id.* at 587.

150. *Id.* (quoting *Hammary Mfg. Corp.*, 265 N.L.R.B. 57, 57 n. 4 (NLRB 1982)).

151. *Id.* at 587-88.

152. *Baptist Med. Sys. v. NLRB*, 876 F.2d 661 (8th Cir. 1989).

patients, and the general public.[153] In so holding, the court stated that "*Babcock* teaches that an employer does not have an affirmative duty to allow the use of its facilities by nonemployees for organizational purposes."[154] The court stated that this principle does not become inapplicable because the organizers seek to enter an area of a hospital that has been designated for public use.[155] It concluded: "By inviting the public to use an area of its property, the employer does not surrender its right to control the uses to which that area is put."[156]

Following the *Baptist Medical System* decision, the Fourth Circuit Court of Appeals reached the same result in *NLRB v. Southern Maryland Hospital Center*.[157] The court held that under *Babcock*, a hospital could bar union organizers from its cafeteria even though family members of employees, employees themselves, patients, patients' visitors and medical staff were allowed to use the cafeteria.[158] Furthermore, the opinion confirmed that it was not unlawful surveillance under the *NLRA* when hospital officials kept a "close eye" on organizers who "gained entrance to the cafeteria."[159] After concluding that the hospital could completely prohibit solicitation by the organizers in the cafeteria, the court found that the hospital also had "the lesser right to conduct surveillance of union activities to determine if the rightly prohibited activity [was] taking place."[160]

The Sixth Circuit Court of Appeals also reached the same result in *Oakwood Hospital v. NLRB*,[161] where court stated that the United States Supreme Court's *Lechmere* decision "leaves no room for doubt" that under the *NLRA* a hospital was entitled to prohibit a union organizer from conducting his activities in its cafeteria.[162] The court reasoned that "[i]f the owner of an outdoor parking lot can bar nonemployee union organizers, it follows *a fortiori* that the owner of

153. *Id.* at 662, 665.

154. *Id.* at 664 (citing *Natl. Lab. Rel. Bd. v. Babcock & Wilcox Co.*, 351 U.S. 105, 114 (1956)).

155. *Id.*

156. *Id.*

157. *NLRB v. S. Maryland Hosp. Ctr.*, 916 F.2d 932, 938 (4th Cir. 1990).

158. *Id.* at 937.

159. *Id.* at 938.

160. *Id.* at 939.

161. *Oakwood Hospital v. Natl. Lab. Rel. Bd.*, 983 F.2d 698, 699 (6th Cir. 1993).

162. *Id.* at 703; *see supra* nn. 138-47 and accompanying text.

an indoor cafeteria can do so."[163] Thus, as the court concluded, "the hospital was entitled to decide for itself whether its cafeteria could be used for this purpose.[164]

Finally, in *Stanford Hospital & Clinics v. NLRB*,[165] the D.C. Circuit Court of Appeals, relying on *Lechmere,* upheld a hospital's eviction of a union organizer from its exterior premises after it had "previously kicked him out of the cafeteria and other parts of the hospital."[166] The court described the organizer as "a self-confessed serial violator of Stanford's solicitation and distribution rules."[167]

These decisions firmly establish that if a hospital has a property right under state law to exclude union organizers, the *NLRA* does not prohibit excluding them from a hospital cafeteria, even though members of the public are allowed to use it.

J. *COURTS ADOPT A NARROW MEANING OF "PUBLIC FORUM" IN APPLYING* PRUNEYARD

1. *Medical Centers*

During a span of four years starting in 1991, the California Court of Appeal issued four decisions that have substantially narrowed the scope of the California Supreme Court's shopping center decisions in *Pruneyard* and *Schwartz-Torrance*, the stand-alone retail store decision in *In re Lane*, and the railroad station decision in *In re Hoffman*.[168] In all of these cases, the court held that protesters did not have a right under the state constitution to picket on the private property of a medical center.

In *Planned Parenthood v. Wilson*,[169] the court held that the private parking areas of a medical center were not the equivalent of a traditional public forum, and therefore individuals did not have a constitutional right of access to the property for free speech activity.[170]

163. *Oakwood Hosp.*, 983 F.2d at 703.
164. *Id.* at 699.
165. *Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334 (D.C. Cir. 2003).
166. *Id.* at 345-46.
167. *Id.* at 346.
168. *See supra* nn. 20-35, 61-66, and accompanying text.
169. *Planned Parenthood v. Wilson*, 286 Cal. Rptr. 437 (Cal. App. 4th Dist. Div. 1 1991).
170. *Id.* at 433, 435.

The court emphasized that, unlike large shopping malls, parks, streets or public sidewalks, the medical center had not "acquired the attributes of a public forum."[171] Specifically, the court noted that the medical center did not provide a "significant opportunity to disseminate ideas," and that it was "not the functional equivalent of a public place."[172] In addition, the court pointed out that "[a]lthough members of the public are invited to avail themselves of the particular services performed by specific tenants providing medical services, they are not invited to congregate, relax, visit, seek out entertainment, browse and shop."[173] Thus, it concluded that the medical clinic was more closely akin to the "modest retail establishment" referred to as the exception in *Pruneyard* than it was to the regional shopping center at issue in that case.[174]

The court reached the same decision in *Allred v. Shawley*[175] under similar facts. In that case the trespassers relied on the *In re Lane* decision to support their asserted right to picket on the medical center's parking area.[176] The court held, however, that the medical center was not a "retail store, which holds out an invitation to the entire buying public in general"; that it provided services mainly to a "prearranged clientele"; that its facilities were "not fully open to the local community"; and that it did not offer "services which were essential to all community members," such as a mall or supermarket.[177] Finally, the court noted that retail sales were not permitted on the premises.[178]

In *Allred v. Harris*,[179] the appellate court upheld an injunction against picketing in the parking lot and other exterior premises of a medical center.[180] The court declared: "As a general rule, landowners and tenants have a right to exclude persons from trespassing on private

171. *Id.* at 433.

172. *Id.* (quoting *City of Sunnyside v. Lopez*, 751 P.2d 313, 318 (Wash. App. Div. 3 1988)) (internal quotation marks omitted).

173. *Id.* (citing *City of Sunnyside*, 751 P.2d at 318).

174. *Id.* (quoting *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 347 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980)) (internal quotation marks omitted).

175. *Allred v. Shawley*, 284 Cal. Rptr. 140, 147 (Cal. App. 4th Dist. Div. 3 1991).

176. *Id.* at 146.

177. *Id.* at 146-47 (citing *In re Lane*, 457 P.2d 561 (Cal. 1969); quoting *Schwartz-Torrance Inv. Corp. v. Bakery & Confectionary Workers' Union Loc. No. 31*, 394 P.2d 921, 924 (Cal. 1964)).

178. *Id.* at 147.

179. *Allred v. Harris*, 18 Cal. Rptr. 2d 530 (Cal. App. 4th Dist. Div. 1 1993).

180. *Id.* at 533, 535.

property; the right to exclude persons is a fundamental aspect of private property ownership." And that "[a]n injunction is an appropriate remedy for a continuing trespass."[181]

The court distinguished the California Supreme Court's *Pruneyard* decision, finding that the property of the medical center was "private in character and lacks the attributes of a public forum."[182] Specifically, the court found that the medical center was not "a place where the general public congregated," and instead that it "provides services to a specific clientele."[183] In addition, it found that the parking lot of the medical center was not open to the general public.[184] The court further observed that the medical center had "more in common with a small retail establishment than a large regional shopping center and thus is not constitutionally compelled to allow access to its private property for First Amendment purposes."[185]

The court also distinguished the California Supreme Court's *In re Lane* decision, describing that case as "a preshadowing of the *Pruneyard* decision 10 years later and not a case holding that any private business locale even partially open to the public becomes a public forum for expressive activities related to the business conducted there."[186]

Finally, in *Feminist Women's Health Center v. Blythe*,[187] the court of appeal once again distinguished the *Pruneyard* decision, holding that free speech rights did not extend to a two-story building with several tenants, including physicians and a pharmacy, and a forty-space parking lot reserved for tenants, their clients, and their visitors.[188] The court found that the exception for "modest retail establishments" in *Pruneyard*'s free speech analysis applied to this facility, despite the fact that the general public could patronize the pharmacy.[189] In addition, it declared that "[v]iolence or the threat of

181. *Id.* at 533

182. *Id.* at 534.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 535.

187. *Feminist Women's Health Ctr. v. Blythe*, 39 Cal. Rptr. 2d 189 (Cal. App. 3d Dist. 1995).

188. *Id.* at 198-99.

189. *Id.* at 198-99 (citing *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 347 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980)).

violence is not a necessary prerequisite to the issuance of an injunction."[190]

2. *Bank Building*

Continuing a trend of decisions that limit the scope of *Pruneyard* and *In re Lane*, the California Court of Appeal upheld an injunction in 1996 against a church whose members were soliciting donations on a private sidewalk in front of a standalone, two-story bank building.[191] In *Bank of Stockton v. Church of Soldiers of the Cross*,[192] the court concluded that when compared with the large shopping center in *Pruneyard* and the large grocery store in *Lane*, the bank building qualified for the *Pruneyard* exception for modest retail establishments.[193] In reaching this conclusion, the court emphasized that the bank was not a place where the general public could congregate; that "security issues" precluded having the general public present; and that only those people who had business to transact with the bank were generally invited to the property.[194] And the court found that the bank did not resemble the twenty-one acre shopping center in *Pruneyard*.[195]

In addition, the court held that the injunction did not violate the solicitors' First Amendment rights.[196] In doing so it relied on the United States Supreme Court's pronouncement in *Lloyd Corp. v. Tanner*:

> [P]roperty [does not] lose its private character merely because the public is generally invited to use it for designated purposes. Few would argue that a freestanding store, with abutting parking space for customers, assumes significant public attributes merely because the public is invited to shop there. . . . Fifth and

190. *Id.* at 195.

191. *Bank of Stockton v. Church of Soldiers of the Cross*, 52 Cal. Rptr. 2d 429, 430, 434 (Cal. App. 3d Dist. 1996).

192. *Id.* at 429.

193. *Id.* at 434 (citing *Pruneyard*, 592 P.2d at 346; *In re Lane*, 457 P.2d 561, 562 (Cal. 1969)).

194. *Id.*

195. *Id.* (citing *Pruneyard*, 592 P.2d at 342).

196. *Id.* (citing *Lloyd Corp. v. Tanner*, 407 U.S. 551. 570 (1972)).

> Fourteenth Amendment rights of private property owners . . . must be respected and protected.[197]

3. *Retail Stores*

Three years later, again limiting the scope of *Pruneyard* and *In re Lane*, the California Court of Appeal affirmed a trespass injunction barring an organization from soliciting initiative signatures at a stand-alone grocery store. In *Trader Joe's Co. v. Progressive Campaigns, Inc.*,[198] the court found that the invitation to the public by Trader Joe's to visit its store was more limited than the invitation in *Pruneyard* because the store invited people "to come and shop," not "to meet friends, to eat, to rest, or to be entertained"; nor were they invited to congregate at the store.[199] Other factors noted included the fact that the store was "a single structure, single-use store" and that it "contains no plazas, walkways, or central courtyard where patrons may congregate and spend time together"; nor did it include restaurants, places to sit and eat, a cinema, or any other places of entertainment.[200] The court went on to state that although the store attracted "large numbers of people" they came "for a single purpose—to buy goods."[201] Moreover, the court observed that "because the store is a stand-alone structure there could be no contention that [its] relationship to other establishments transforms it into a public forum."[202]

In addition, the court held that the store was "not a public meeting place" and that society did not have an interest in using it as a place to meet; therefore, it was "not a public forum uniquely suitable as a place to exercise free speech and petitioning rights."[203] The court also declared that the store had not lost "its private character merely because the public was generally invited to use it for designated purposes," and that unlike shopping centers, the store did not have a "public character."[204]

197. *Id.* at 432 (quoting *Lloyd Corp*, 407 U.S. at 569-70).

198. *Trader Joe's Co. v. Progressive Campaigns, Inc.*, 86 Cal. Rptr. 2d 442 (Cal. App. 1st Dist. Div. 2 1999).

199. *Id.* at 448.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 448-49.

204. *Id.* at 449 (quoting *Bank of Stockton v. Church of Soldiers of the Cross*, 52 Cal.

The court found that *In re Lane* was inapposite to this case for several reasons.[205] First, the court pointed out that in *Lane* a union had engaged in picketing and the store was involved in the dispute.[206] The *Lane* court decided that the store should not be allowed to "[insulate itself] from public comment for [its] role in the labor dispute."[207] Second, the *Lane* court had "based its holding on federal Supreme Court precedent which was subsequently overruled."[208] And finally, the court stated that, although the *Pruneyard* opinion had cited *Lane*, that reference was "brief and collateral," and the California Supreme Court did not hold in that case that the constitution of California "protects free speech and petitioning rights at . . . stand-alone grocery stores."[209]

Just one month after the California Court of Appeal's decision in *Trader Joe's*, the Ninth Circuit Court of Appeals reached a contrary result in *NLRB v. Calkins*.[210] In that case the Ninth Circuit affirmed an NLRB decision holding that: (1) The owner of a stand-alone supermarket could not exclude union representatives from the store's walkway and parking lot because it did not have a property right to do so under California law and, therefore, (2) the owner had violated the *NLRA* by threatening to have the representatives arrested for handbilling and picketing on those areas in furtherance of a consumer boycott.[211] The court relied on the California Supreme Court's decisions in *In re Lane* and *Sears II*, concluding that "California law prohibits owners of . . . supermarket stores from excluding speech activity on their private adjacent sidewalks and parking lots."[212]

The Ninth Circuit erroneously concluded in this case that *In re Lane* was decided after *Pruneyard*, when in fact the *Lane* decision "preceded *Pruneyard* by approximately ten years."[213] As a result, the Ninth Circuit incorrectly read *Lane* as extending the *Pruneyard*

Rptr. 2d 429, 432 (Cal. App. 3d Dist. 1996)).

205. *Id.* at 450.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *NLRB v. Calkins*, 187 F.3d 1080 (9th Cir. 1999).

211. *Id.* at 1083.

212. *Id.* at 1090.

213. *Id.*; *Slevin v. Home Depot*, 120 F. Supp. 2d 822, 834 n. 8 (N.D. Cal. 2000).

shopping center precedent to a standalone grocery store.[214] In addition, the Ninth Circuit failed to recognize that, just six months after issuing the *Pruneyard* decision, the California Supreme Court had expressly declined to rule on whether a union had a right under the state constitution to picket on the private property of a retail store.[215] Furthermore, the Ninth Circuit failed to mention in *Calkins* the contrary result reached in the *Trader Joe's* decision by the California Court of Appeal, discussed above, although it did acknowledge an obligation to rely on California appellate court decisions in interpreting state law.[216]

A subsequent Ninth Circuit decision, *United Brotherhood of Carpenters & Joiners of America Local 848 v. NLRB*,[217] has undermined the authority of *Calkins* as precedent in determining the scope of *Pruneyard*. The court did not disagree in that case with an argument that *Calkins* had been "discredited" because it had relied on cases that were later overruled.[218] Moreover, the court stated that it had reached the decision in *United Brotherhood* "despite the weaknesses in *Calkins*."[219] The D.C. Circuit also disagreed with the *Calkins* decision in *Waremart Foods v. NLRB*,[220] and the NLRB changed its interpretation of California law with respect to the right of standalone supermarkets to prohibit expressive activities on their private property in *Albertson's, Inc.*[221]

Less than one year after the Ninth Circuit's *Calkins* decision, a United States District Court in California reached a contrary result in another retail store case, *Slevin v. Home Depot*.[222] In *Slevin*, the district court found that the area in front of a Home Depot store was not a public forum for expressive activities under *Pruneyard*.[223] The area at issue contained a hot dog stand with seating for up to twelve persons

214. *Slevin*, 120 F. Supp. 2d at 834 n. 8.

215. *Sears II*, 599 P.2d 676, 683 n. 5 (Cal. 1979) (plurality).

216. *Calkins*, 187 F.3d at 1089 (citing *Ariz. Elec. Power Coop., Inc. v. Berkeley*, 59 F.3d 988, 991 (9th Cir. 1995)).

217. *United Bhd. of Carpenters & Joiners of America Loc. 848 v. NLRB*, 540 F.3d 957 (9th Cir. 2008).

218. *Id.* at 963-64 n.2.

219. *Id.*

220. *Waremart Foods v. NLRB*, 354 F.3d 870, 875-76 (D.C. Cir. 2004).

221. *Albertson's, Inc.*, 351 N.L.R.B. 254, 376-77 (NLRB 2007).

222. *Slevin v. Home Depot*, 120 F. Supp. 2d 822 (N.D. Cal. 2000).

223. *Id.* at 835.

and a "public forum area" sign posted outside the store, which was situated in a shopping center; however, the center did not contain common plazas, courtyards, or entertainment areas.[224] The court concluded that the presence of an eating area in front of the store was a sidelight to the store's operations and that it did not "transform the Home Depot store into the hub of activity envisioned in *Pruneyard*."[225] Moreover, the store's "implementation of an application procedure for individuals desiring to engage in noncommercial speech activity . . . [did] not transform the area into a public forum," nor did the presence of a "public forum" sign in the area in front of the store.[226] The court distinguished *In re Lane* and *NLRB v. Calkins* on the basis that the petitioning activities in the case did not implicate the Home Depot store or involve union issues.[227]

The district court criticized the Ninth Circuit's erroneous conclusion in *NLRB v. Calkins* that *In re Lane* was decided after *Pruneyard* and that *Lane* had extended the shopping center decision of *Pruneyard* to the standalone grocery store setting.[228] In addition, the district court pointed out the Ninth Circuit's failure in *Calkins* to consider the contrary decision of the California Court of Appeal in *Trader Joe's*.[229]

4. *Apartment Building*

In *Golden Gateway Center v. Golden Gateway Tenants Association*,[230] a three-justice plurality of the California Supreme Court clarified the *Pruneyard* decision by holding that a tenants association did not have a right under the California Constitution to distribute a newsletter in a privately owned apartment complex.[231] The plurality reasoned that state action was necessary for a violation of the

224. *Id.* at 834.
225. *Id.*
226. *Id.* at 834-35.
227. *Id.* at 835.
228. *Id.* at 834 n. 8.
229. *Id.*
230. *Golden Gateway Ctr. v. Golden Gateway Tenants Assn.*, 29 P.3d 797 (Cal. 2001).
231. *Id.* at 810, 812.

California free speech clause but that no state action existed in this case because the apartment complex was not fully open to the public.[232]

The plurality opinion also emphasized that *Pruneyard* had relied heavily on the fact that the shopping center was functionally equivalent to a "downtown or central business district," which is a traditional public forum; that the public had been invited to "congregate freely"; and that the property had a "public character."[233] It also concluded that private property must be public in character before California's free speech clause may apply, and that under that clause a private property owner's actions will constitute state action "only if the property is freely and openly accessible to the public."[234] In addition, the opinion approved earlier Courts of Appeal decisions holding that privately-owned medical centers were not the functional equivalent of a traditional public forum for purposes of the state constitution's free speech clause.[235]

5. *Retail Stores Following Clarification of* Pruneyard

The California Supreme Court's decision in *Golden Gateway Center* was followed by three more cases involving retail stores. In a 2001 decision, *Costco Cos. v. Gallant*,[236] the California Court of Appeal held that Costco's standalone retail stores were not public forums that must permit expressive activity on private property.[237] The court stated that, in light of the decision in *Golden Gateway Center*, "it is now clear expressive activity may be prohibited on private property where access to the property has been restricted," but that "even where private property, such as a stand-alone retail store, is open to the public expressive activity may be prohibited"; this requires balancing "the competing interests of the property owner and of the society with respect to the particular property or type of property at issue."[238]

232. *Id.* at 809-10.

233. *Id.* at 809 (citing *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 346-47 n.5 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980)) (internal quotation marks omitted).

234. *Id.* at 809-10.

235. *Id.*

236. *Costco Cos. v. Gallant*, 117 Cal. Rptr. 2d 344 (Cal. App. 4th Dist. Div. 1 2002).

237. *Id.* at 355.

238. *Id.* (citations omitted).

Furthermore, the *Costco* court found that the public was invited to the stores only to purchase goods and services, and that they did not expect to meet friends, or to be entertained, dine or congregate. [239] Because the Costco stores offered only the narrow activity of buying goods and services, the court reasoned that they were not "miniature downtowns."[240] Finally, the court stated that, unlike the shopping center in *Pruneyard*, "Costco's stand-alone stores are not essential or invaluable forums for the general exercise of free speech."[241]

In another case that further limited the scope of the *Pruneyard* decision, *Albertson's, Inc. v. Young*,[242] the California Court of Appeal held in 2003 that individuals did not have a right to solicit signatures on a private walkway outside the entrances to an Albertson's supermarket—*even though it was located in a shopping center*—because the store had not become the functional equivalent of a traditional public forum.[243] The court explained that "the *Pruneyard* holding is premised upon its finding that large retail shopping centers now serve as the functional equivalent of the traditional town center business district, where historically the public's free speech activity is exercised,"[244] and "that smaller privately owned commercial establishments that do not assume the societal role of a town center may prohibit expressive activity unrelated to the business enterprise."[245]

In clarifying that the Supreme Court's *Golden Gateway Center* decision did not mean that a "large business establishment is a public forum for expressive activity" simply because it is "freely . . . accessible to the public," the court noted that this is simply "a

239. *Id.*

240. *Id.* (quoting *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 347 n. 5 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980)) (internal quotation marks omitted).

241. *Id.* (quoting *Pruneyard*, 592 P.2d at 347); *see Trader Joe's Co. v. Progressive Campaigns, Inc.*, 86 Cal. Rptr. 2d 442, 448-49 (Cal. App. 1st Dist. Div. 2 1999). The *Costco* court also observed in dicta that "where the property owner itself is the subject of a public dispute or controversy—as for instance a labor dispute—its property may as a practical matter be the only available forum to effectively express views on the controversy and it may be required to give its opponents access to its property." *Costco*, 117 Cal. Rptr. 2d at 355 n. 1.

242. *Albertson's Inc., v. Young*, 131 Cal. Rptr. 2d 721 (Cal. App. 3d Dist. 2003).

243. *Id.* at 733-34.

244. *Id.* at 728 (citing *Pruneyard*, 592 P.2d at 347 n. 5).

245. *Id.* at 728 (citing *Planned Parenthood of San Diego and Riverside Co. v. Wilson*, 286 Cal. Rptr. 427, 432 (Cal. App. 4th Dist. Div. 1 1991)).

'threshold requirement' for establishing that actions of a private property owner constitute state action for purposes of California's free speech clause."[246] Instead, the test "is whether, considering the nature and circumstances of the private property, it has become the functional equivalent of a traditional public forum."[247]

The court found that the Albertson's store did not contain any "plazas, walkways or courtyards for patrons to congregate and spend time."[248] It also stated that the store had no restaurants, theaters, or other forms of entertainment, and that it did "not invite the public . . . to eat, to rest, to congregate or to be entertained."[249] Thus, the court concluded that the store's location in the shopping center did not impress it with the character of a public forum.[250] Among other factors, the court also emphasized that there were no enclosed walkways, picnic areas, bars or other facilities for entertainment, recreation, training, or education.[251]

The court declared *In re Lane* "inapposite for two reasons."[252] First, *Lane* "was based on the federal Constitution and federal precedent," which had later been overruled.[253] Second, *Lane* "involved expressive activity specifically related to the business use of the property," and the Supreme Court had observed that, in that case, "the market should not be allowed to immunize itself against . . . public criticism."[254] The court stated that *Lane* "simply stands for the proposition that private property rights in a store open to the public are not absolute but are subject to a balancing process in determining the right of access."[255]

246. *Id.* at 729-30 (quoting *Golden Gateway Ctr. v. Golden Gateway Tenants Assn.*, 29 P.3d 797, 810 (Cal. 2001)) (internal quotation marks omitted).

247. *Id.* at 724.

248. *Id.* at 732.

249. *Id.*

250. *Id.* at 733-34.

251. *Id.* at 733.

252. *Id.* at 734.

253. *Id.* (citing *Lloyd Corp. v. Tanner*, 407 U.S. 551, 568-70 (1972)).

254. *Id.* (citing *In re Lane*, 457 P.2d 561, 562, 564 (Cal. 1969)).

255. *Id.* at 735 (citing *Union of Needletrades, Indus. & Textile Employees v. Super. Ct. of L.A. Co.*, 65 Cal. Rptr. 2d 838, 852 (Cal. App. 2d Dist. Div. 4 1997)).

Finally, in a 2007 case, *Van v. Home Depot*,[256] which involved hundreds of Target, Wal-Mart and, Home Depot stores located throughout California, the Court of Appeal decided: (1) That "the California Constitution protects expressive activity in the common areas of a large, privately owned shopping center," and (2) that the holding in *Pruneyard* "does not apply to the area immediately surrounding the entrance of an individual retail store that does not itself possess the characteristics of a public forum, even when that store is part of a larger shopping center."[257] Thus, the court denied injunctive relief to a class of individuals who gathered voter signatures for ballot initiatives and registered voters for elections.[258]

The court explained that "the *Pruneyard* balancing test focus[es] on whether private property serves as the functional equivalent of a public forum," and that "courts have consistently concluded that modest and individual commercial and retail establishments lack the characteristics" of such a forum.[259] Furthermore, it noted that "[c]ourts have reached the same balance when considering the interests of individual retailers within larger shopping centers."[260] It also recognized that "[t]o establish a right to solicit signatures at the entrance to a specific store, it must be shown that the particular location is impressed with the character of a traditional public forum for purposes of free speech," and that a store "will be considered a quasi-public forum only when it is the functional equivalent of a . . . place where people choose to come and meet and talk and spend time."[261] The court emphasized that "neither *Pruneyard* nor its progeny has ever characterized an individual retailer as a public forum" and that the California Supreme Court had emphasized in that case that

256. *Van v. Home Depot, U.S.A., Inc.*, 66 Cal. Rptr. 3d 497 (Cal. App. 2d Dist. Div. 2 2007) (citing *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 347 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980)).

257. *Id.* at 498.

258. *Id.* at 498-99.

259. *Id.* at 503 (citing *Pruneyard.*, 592 P.2d at 347 n. 5; *Albertson's, Inc. v. Young*, 131 Cal. Rptr. 2d 721, 728, 733 (Cal. App. 3d Dist. 2003); *Feminist Women's Health Ctr. v. Blythe*, 39 Cal. Rptr. 2d 189, 198 (Cal. App. 3d Dist. 1995)).

260. *Id.* at 504.

261. *Id.* at 505 (quoting *Albertson's, Inc.*, 131 Cal. Rptr. 2d at 733-34) (internal quotation marks omitted).

in modern society shopping centers are becoming "miniature downtowns."[262]

In applying this test, the court found that the area immediately surrounding the Target, Wal-Mart, and Home Depot stores lacked the "characteristics of a public forum" and did not act as the "functional equivalent" of such a forum.[263] The court emphasized that neither the stores themselves nor the apron and perimeter areas of the stores were comprised of courtyards, plazas, or other places designed to encourage patrons to spend time together or be entertained.[264] Indeed, the stores were designed to encourage shopping as opposed to meeting friends, congregating, or lingering. [265] Although "many stores contained restaurants" and "some contained video arcades or community bulletin boards," the court found that these amenities were not "designed to encourage patrons to congregate" there or to use the stores as a meeting place.[266] Rather, the stores were intended to "facilitate the ease of patrons' shopping experience," and the restaurants and video games did not transform the stores into the "hub of activity" envisioned in *Pruneyard*.[267] The court also emphasized that the "stores—including the store apron and perimeter areas—are not designed as public meeting spaces." [268] It noted that the "invitation to the public is to purchase merchandise and no particular societal interest is promoted by using the stores for expressive activity."[269] It therefore concluded that the store owners' "interest in maintaining control over the area immediately in front of their stores outweighs society's interest in using those areas as public fora."[270]

The court rejected an argument that "the presence of [the] stores in larger, *Pruneyard*-type shopping centers alters this balance."[271] It did so even though the shopping centers contained plazas and courtyards where people congregated, restaurants, movie theatres and community events, and even though the stores themselves served as

262. *Id.* at 509 (quoting *Pruneyard*, 592 P.2d at 347 n. 5).
263. *Id.* at 508-09.
264. *Id.*
265. *Id.* at 508.
266. *Id.* at 507.
267. *Id.*
268. *Id.* at 508.
269. *Id.*
270. *Id.*
271. *Id.*

"shopping center anchors."[272] In this regard, the court found that "[t]he fact that the common areas of the shopping center where . . . stores are located may serve as the functional equivalent of a public forum does not alter the nature of the 'particular location' immediately surrounding [the] stores."[273]

6. *Mini Mall*

In a 2003 decision, *Slauson Partnership v. Ochoa*,[274] the California Court of Appeal upheld an injunction against church members who protested on the premises of a mini-mall against one of the mall's tenants, the operator of a strip club.[275] The court characterized the strip club as "more like a stand-alone store than a store within a mall."[276] Although the court decided that the protesters could not be completely excluded from the strip mall because it included more than one store, it held that the injunction was nevertheless justified because they had engaged in tortious conduct, including using whistles and bullhorns and defacing property.[277]

K. *CALIFORNIA APPELLATE COURT UPHOLDS STATE ANTI-INJUNCTION STATUTE*

In a 2001 decision, *Waremart Foods v. United Food & Commercial Workers Union, Local 588*,[278] the California Court of Appeal upheld the constitutionality of a new anti-injunction statute that creates numerous hurdles for an employer in seeking an injunction against trespassing and other unlawful union conduct during a labor dispute.[279] The court found that the new statute was not preempted by the *NLRA*; not a taking of private property under the Fifth Amendment;

272. *Id.* (internal quotation marks omitted).

273. *Id.* at 508-09 (quoting *Albertson's, Inc. v. Young*, 131 Cal. Rptr. 2d 721, 734 (Cal. App. 3d Dist. 2003)).

274. *Slauson Partn. v. Ochoa*, 5 Cal. Rptr. 3d 668 (Cal. App. 2nd Dist. Div. 7 2003).

275. *Id.* at 670-71, 687.

276. *Id.* at 686.

277. *Id.* at 686-87.

278. *Waremart Foods v. United Food & Commercial Workers Union, Loc. 588*, 104 Cal. Rptr. 2d 359 (Cal. App. 3d Dist. 2001); *see also United Food & Commercial Workers Union, Loc. 324 v. Super. Ct. of L.A. Co.*, 99 Cal. Rptr. 2d 849 (Cal. App. 2d Dist. Div. 3 2000).

279. *Id.* at 365-69 (citing Cal. Lab. Code Ann. §§ 1138-38.5 (West 2003)).

and not a violation of the Equal Protection Clause of the Fourteenth Amendment.[280] But with respect to the preemption issue the court did not consider the precedent established by the Fourth Circuit Court of Appeals in the *Rum Creek* decisions. And the court acknowledged that under established United States Supreme Court precedent, a state law "cannot grant special preference to the location at which picketing occurs in a labor dispute."[281]

L. *D.C. CIRCUIT AND NLRB DECIDE CALIFORNIA PROPERTY LAW IN LIGHT OF THE FIRST AMENDMENT*

The controversy over access to private property for expressive activities in California took a dramatic turn in 2004 in a decision from an unlikely source—the D.C. Circuit Court of Appeals—in *Waremart Foods v. NLRB*.[282] That court became enmeshed in this California issue because the NLRB and the federal appellate courts are responsible for determining the scope of state property rights under the United States Supreme Court's *Lechmere* decision.[283] The D.C. Circuit had certified two questions to the California Supreme Court that presented an issue involving access to the private property of a California grocery store in a case arising under the *NLRA*, but the California Supreme Court refused to consider them.[284] Thereafter the D.C. Circuit took on the task of deciding the property law of California, but it did so "in light of the First Amendment to the [Federal] Constitution."[285] Rejecting California Supreme Court precedent established many decades earlier, the court held "that under California law, union organizers have no right to distribute literature on a stand-alone grocery store's private property."[286]

The circuit court first addressed the plurality opinion of the California Supreme Court in *Sears II*, which had held that a union had a right to picket on the sidewalks of a stand-alone retail store.[287] As

280. *Id.* at 366-68.

281. *Id*. at 367-68.

282. *Waremart Foods v. NLRB*, 354 F.3d 870 (D.C. Cir. 2004).

283. *Id.* at 871.

284. *Id.* at 871; *see Waremart Foods v. NLRB*, 333 F.3d 223, 249 (D.C. Cir. 2003) (certifying questions to the California Supreme Court).

285. *Waremart Foods*, 354 F.3d at 871.

286. *Id.*

287. *Id.* at 874.

explained above, the decision in *Sears II* "rested on the *Moscone Act*'s special protection for labor activity."[288] The D.C. Circuit stated that *Sears II* could not "reflect current California law because the rule it embraces violates the First Amendment to the Constitution."[289] The court relied for this conclusion on the United States Supreme Court's decisions in *Police Department of Chicago v. Mosley* and *Carey v. Brown*, where the United States Supreme Court held that an "exemption for labor picketing" in a local ordinance and a state law "constituted content discrimination in violation of the First Amendment."[290] Thus, the D.C. Circuit determined that "under California law labor organizing activities may be conducted on private property only to the extent that California permits other expressive activity to be conducted on private property."[291]

The circuit court also explained that the NLRB and the union had no longer relied on *Sears II* in the *Waremart Foods* appeal, but that the NLRB had relied instead on the California Supreme Court's earlier decision in *In re Lane*.[292] And it noted that the decision in *Lane* did not rest on California law but rather on an interpretation of the United States Constitution that the United States Supreme Court had overruled in *Hudgens v. NLRB*.[293]

The D.C. Circuit refused to follow the holding of the Ninth Circuit in *NLRB v. Calkins*, which was based on *Sears II* and *In re Lane*, explaining that neither of these earlier California Supreme Court decisions reflected current California law.[294] Finally, the court concluded that *Pruneyard* did not give the union a right to conduct its organizing activities on the store's private property.[295] In reaching this conclusion, it found that the store was not a traditional public forum

288. *Id.* (citing *Sears II*, 599 P.2d 676, 686-87 (Cal. 1979) (plurality)). For a discussion of *Sears II*, *see supra* nn. 120-28 and accompanying text.

289. *Id.* at 875.

290. *Id.* (citing *Carey v. Brown*, 447 U.S 455, 466 (1980); *Police Dept. of Chi. v. Mosley*, 408 U.S. 92, 94-95 (1972)).

291. *Id.*

292. *Id.* (citing *In re Lane*, 457 P.2d 561 (Cal. 1969)).

293. *Id.* (citing *Hudgens v. NLRB*, 424 U.S. 507, 518-21 (1976)).

294. *Id.* at 875-76 (citing *NLRB v. Calkins*, 187 F.3d 1080, 1083 (9th Cir. 1999)).

295. *Id.* at 876 (citing *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980)).

because it had not become the "functional equivalent of a town center."[296]

After the D.C. Circuit's decision in *Waremart Foods*, the forum for litigation over expressive activities on private property in California shifted for the next three years to the NLRB. The first NLRB case to follow the lead of the D.C. Circuit was *Macerich Management Co.*,[297] which involved union handbilling and picketing at two shopping centers.[298] The case involved the validity of several "time, place, and manner" regulations adopted by the shopping centers under *Pruneyard*.[299] The property owner relied on one of the regulations to bar the union from handbilling and picketing on the *exterior sidewalks* of the shopping centers, which were private property.[300] The union contended, however, that under *Sears II* the shopping centers "had no [state law] property right to exclude . . . union activity from the exterior sidewalks."[301] The NLRB rejected the union's argument, holding that *Sears II* could not "be relied on as controlling California precedent."[302] The Board explained: (1) That it relies on "[s]tate law to determine whether an employer has a property right" that justifies excluding union representatives; (2) that the "most . . . definitive statement of California law was made in *Waremart*, where the [D.C. Circuit Court] declared unequivocally that *Sears* [*II*] does not represent California law" because "the special protection for labor-related expressive activity embodied in *Sears* [*II*] constitutes impermissible content discrimination in violation of the First Amendment"; and, (3) that it was not aware of any California court that had disagreed with the D.C. Circuit's statement of California law.[303]

The Ninth Circuit Court of Appeals, in a 2-1 decision, denied enforcement of the NLRB's *Macerich* decision on the issue of union access to the exterior sidewalks of the shopping center.[304] But the

296. *Id.* (citing *Pruneyard*, 592 P.2d at 347).

297. *Macerich Mgt. Co.*, 345 N.L.R.B. 514 (NLRB 2005).

298. *Id.* at 514-15.

299. *Id.* (citing *Pruneyard*, 592 P.2d at 346-47).

300. *Id.* at 514-15.

301. *Id.* at 516-17.

302. *Id.* at 517.

303. *Id.* at 517 n. 6.

304. *See United Bhd. of Carpenters & Joiners of Am. Loc. 586 v. Natl. Lab. Rel. Bd.*, 540 F.3d 957, 972 (9th Cir. 2008). The majority opinion in *United Brotherhood* incorrectly stated that *In re Lane* involved a private sidewalk surrounding a shopping

court did not disagree with the NLRB's conclusion that *Sears II* is no longer controlling California precedent, nor with the D.C. Circuit's determination on that issue. Moreover, while the Ninth Circuit's holding would control as the "law of the case" in *Macerich*, the NLRB's precedent established in that case has not changed.

The next NLRB decision to follow the D.C. Circuit's decision was an extremely important one for hospitals, *Southern Monterey County Hospital*.[305] In this case the NLRB upheld the right of a California hospital to exclude union representatives from its private property.[306] The hospital had adopted a rule that prohibited nonemployees from soliciting or distributing written materials on its premises, and the NLRB found the rule lawful under California law—and therefore permissible under *Lechmere*.[307] The NLRB explained that the California Constitution limits the right of a private property owner to exclude persons who seek access to the property to exercise free speech rights "if the property is freely and openly accessible to the public."[308] But the NLRB also stated that this "constitutional provision applies to places which are the functional equivalent of a public forum, e.g., a shopping mall," and that it "does not apply to properties such as the [employer's] private medical facility," which was not a public forum.[309]

The NLRB acknowledged that under *Sears II*, the *Moscone Act* "arguably does apply" to private property that does not qualify as a public forum, but it concluded that *Sears II* is not controlling California precedent as a result of the D.C. Circuit's decision in *Waremart*.[310]

mall, when in fact it involved a sidewalk in front of a standalone grocery store. *Id.* at 970 n. 11; *In re Lane*, 457 P.2d 561, 562 (Cal. 1969). The majority also incorrectly stated that one of the shopping centers involved in the case is located in Santa Monica, California, when in fact it is located hundreds of miles away from that city in Capitola, California. *United Bhd. of Carpenters*, 540 F.3d at 960; *Macerich Mgt. Co.*, 345 N.L.R.B. at 514.

305. *S. Monterey Co. Hosp.*, 348 N.L.R.B. 327 (NLRB 2006).

306. *Id.* at 331.

307. *Id.*

308. *Id.* (quoting *Golden Gateway Ctr. v. Golden Gateway Tenants Assn.*, 29 P.3d 797, 810 (Cal. 2001)) (internal quotation marks omitted).

309. *Id.* (citing *Planned Parenthood v. Wilson*, 286 Cal. Rptr. 427, 428 (Cal. App. 4th Dist. Div. 1 1991)).

310. *Id.* at 331 n. 22 (quoting *Macerich Mgt. Co.*, 345 N.L.R.B. 514, 517 (NLRB 2005); *Sears II*, 599 P.2d 676, 686-87 (Cal. 1979) (plurality)).

In another important decision, *Albertson's, Inc.*,[311] a union unsuccessfully challenged no-solicitation rules that applied to 435 Albertson's stores located in California.[312] The rules prohibited nonemployees from soliciting or distributing literature or information on store property.[313] The NLRB concluded that the agency's General Counsel (who prosecutes unfair labor practice complaints under the *NLRA*) had failed to show that the Albertson's stores were functionally equivalent to public forums under California law.[314] In addition, the NLRB reiterated that it could not rely on the *Sears II* decision as controlling California precedent.[315]

M. *CALIFORNIA SUPREME COURT REAFFIRMS THE* PRUNEYARD *DECISION*

In a 4-3 decision, *Fashion Valley Mall, LLC v. NLRB*,[316] the California Supreme Court held in 2007 that the owner of a shopping mall could not enforce a rule prohibiting a union from distributing leaflets in front of a Robinsons-May department store in the mall.[317] The disputed rule prohibited persons from urging customers not to purchase the merchandise or services offered by a store.[318] The majority decided that the rule was not a valid time, place, or manner regulation under *Pruneyard* because it was content-based.[319] A strong dissenting opinion supported by three of the justices advocated overruling *Pruneyard* as an anomaly in American law,[320] but the majority refused to reconsider that decision.[321]

In defending the *Pruneyard* doctrine, the majority opinion provided a detailed history of the California law involving access to private property for expressive activities.[322] Despite the length of this

311. *Albertson's, Inc.*, 351 N.L.R.B. 254 (NLRB 2007).
312. *Id.* at 257.
313. *Id.*
314. *Id.* at 258.
315. *Id.* at n. 16 (citing *Sears II*, 599 P.2d at 680-81 (plurality); quoting *Macerich*, 345 N.L.R.B. at 517).
316. *Fashion Valley Mall, LLC v. NLRB*, 172 P.3d 742 (Cal. 2007).
317. *Id.* at 754.
318. *Id.* at 744.
319. *Id.* at 751.
320. *Id.* at 754-55, 763 (Chin, Baxter & Corrigan, JJ., dissenting).
321. *See id.* at 745-46 (majority).
322. *Id.* at 745-49.

historical account, however, it may be as significant for what it omits as for what it states. In this respect, the opinion is puzzling.

One enigmatic part of the majority opinion is its discussion of the court's earlier decision in *In re Lane*, which the dissent dismissed as an ancient case.[323] In its historical account, the majority noted that the Court had concluded in *Lane* that "a union had a right to distribute handbills on a privately owned sidewalk outside a business," and that in *Diamond I* the Court had cited *Lane* as an example of a case recognizing "the right of a union to picket a business and advocate a boycott."[324] As the dissent pointed out, however, the recent Court of Appeal decisions in *Albertson's* and *Trader Joe's* had "definitively held that *Pruneyard* does *not* extend to stand-alone stores like the one in *Lane*" because they are not public forums,[325] and the D.C. Circuit had reached the same conclusion in *Waremart Foods v. NLRB*.[326] In addition, the dissent observed that the "majority opinion carefully says nothing casting doubt on the recent cases involving stand-alone stores, and they are surely correct."[327] Furthermore, the Court of Appeal had reached the same decision in yet another case involving hundreds of stand-alone stores shortly before the *Fashion Valley* decision: *Van v. Home Depot, U.S.A.*[328] As the dissent suggests, it appears that the majority simply intended to use *Lane* as an example of a case that had recognized the right of a union to picket a business and advocate a boycott.[329] Any other interpretation would be difficult to understand as it would be an implied rejection of all of the recent cases holding that *Pruneyard* does not apply to stand-alone stores because they are not public forums.[330]

323. *Id.* at 762 (Chin, Baxter & Corrigan, JJ., dissenting).

324. *Id.* at 747, 750 (majority).

325. *Id.* at 761-62 (Chin, Baxter & Corrigan, JJ., dissenting) (citing *Trader Joe's Co. v. Progressive Campaigns, Inc.*, 86 Cal. Rptr. 2d 442, 444, 451 (Cal. App. 1st Dist. Div. 2 1999); *Albertson's, Inc. v. Young*, 131 Cal. Rptr. 2d 721, 724 (Cal. App. 3d Dist. 2003)).

326. *Id.* (citing *Waremart Foods v. NLRB*, 354 F.3d 870, 871 (D.C. Cir. 2004)).

327. *Id.* at 762 (citing *Waremart Foods*, 354 F.3d 870).

328. *Van v. Home Depot, U.S.A.*, 66 Cal. Rptr. 3d 497, 498-99 (2007).

329. *Fashion Valley Mall, LCC*, 172 P.3d at 761 (Chin, Baxter & Corrigan, JJ., dissenting) (referencing *id.* at 747, 750 (majority)).

330. *See Waremart Foods*, 354 F.3d at 871; *Slevin v. Home Depot*, 120 F. Supp. 2d 822, 830-31, 835 (N.D. Cal. 2000); *Trader Joe's Co.*, 86 Cal. Rptr. 2d at 443-44; *Van v. Home Depot, U.S.A.*, 66 Cal. Rptr. 3d 497, 509 (Cal. App. 2d Dist. Div. 2 2007); *Albertson's, Inc. v. Young*, 131 Cal. Rptr. 2d at 724.

Another perplexing aspect of the *Fashion Valley* decision is the omission from the majority's detailed historical account of any reference to the earlier decision in *Sears II*, in which a plurality of the Court had held that the *Moscone Act* authorized a union to picket on the privately owned sidewalk surrounding a stand-alone department store.[331] This omission seems to be an implied recognition that *Sears II* and the *Moscone Act* are unconstitutional as content discrimination under the First Amendment, as the D.C. Circuit held in *Waremart Foods* by relying on the United States Supreme Court's decisions in *Police Department of Chicago v. Mosley*[332] and *Carey v. Brown*.[333] And the majority opinion in *Fashion Valley* did not disturb the previous holding of the California Court of Appeal in *Waremart Foods v. United Food & Commercial Workers*, where that court had expressly acknowledged that these United States Supreme Court decisions "stand for the proposition that state laws cannot grant special preference to the location at which picketing occurs in a labor dispute."[334]

Also conspicuously absent from the majority's historical account in *Fashion Valley* is any mention of the court's earlier decisions in *In re Catalano*[335] and *In re Zerbe*,[336] which held that certain types of union activity were exempt from the state's criminal trespass statutes.[337] This may indicate a concern that the decisions in *Catalano* and *Zerbe*—as well as the exemptions in the trespass statutes for union activity—are also vulnerable to a claim of unconstitutionality under *Police Department of Chicago v. Mosley* and *Carey v. Brown*.

III. RESTORING THE RULE OF LAW TO CALIFORNIA HOSPITALS

When unions attempt to justify trespassing by their organizers on the private property of California hospitals, they typically claim that the organizers have an unfettered legal right to enter hospital property under one or more of the following:

331. *Sears II*, 599 P.2d 676, 679, 687 (Cal. 1979) (plurality).

332. *Waremart Foods*, 354 F.3d at 875-76 (citing *Police Dept. of the City of Chi. v. Mosley*, 408 U.S. 92, 100-03 (1972)).

333. *Id.* (citing *Carey v. Brown*, 447 U.S. 452, 471 (1980)).

334. *Waremart Foods v. United Food & Commercial Workers Union, Loc. 588*, 104 Cal. Rptr. 2d 359, 367-68 (Cal. App. 3d Dist. 2001).

335. *In re Catalano*, 623 P.2d 228 (Cal. 1981).

336. *In re Zerbe*, 388 P.2d 182 (Cal. 1964).

337. *In re Catalano*, 623 P.2d at 238; *In re Zerbe*, 388 P.2d at 184, 186.

1. The *National Labor Relations Act* as interpreted by the Ninth Circuit in *NLRB v. Calkins* and by the NLRB in various outdated decisions.

2. The state constitution as interpreted by the California Supreme Court in *Pruneyard*.

3. The state constitution as interpreted by the California Supreme Court in *In re Lane*.

4. The state *Moscone Act* as interpreted by the California Supreme Court in *Sears II*.

5. Exceptions to the state criminal trespass statutes as interpreted by the California Supreme Court in *In re Zerbe* and *In re Catalano*.

6. Preemption of state trespass laws by the *NLRA* as decided by the California Court of Appeal in *Hillhaven v. Healthcare Workers Union*.

7. The state anti-injunction statute, California Labor Code sections 1138-1138.5, as interpreted by the California Court of Appeal in *Waremart Foods v. United Food & Commercial Workers*.

As shown below, however, these claims are incorrect.

A. NATIONAL LABOR RELATIONS ACT

Any claim that union organizers have a general right to enter a hospital's private property under the *NLRA* is erroneous and predicated on outdated precedent. As explained above, the NLRB definitively held in *Southern Monterey County Hospital* that a hospital has a right to exclude union organizers from its private property under the *NLRA*.[338] That decision was based on the United States Supreme

338. *S. Monterey Co. Hosp.*, 348 N.L.R.B. 327, 349 (NLRB 2006); *see supra* nn.

Court's *Lechmere* decision as interpreted by the D.C. Circuit in *Waremart Foods*.[339] In light of these authorities, there is no room for a good faith argument that the *NLRA* gives union organizers a right to conduct their activities on the private property of a hospital.

In addition to citing a number of outdated NLRB decisions that no longer reflect current law under the *NLRA*, unions also rely on the Ninth Circuit's decision in *NLRB v. Calkins*. That decision, however, is also outdated because it enforced an NLRB holding that no longer reflects that agency's interpretation of California law and the law under the *NLRA*; moreover, the Ninth Circuit relied in that decision on *In re Lane* and *Sears II*, which are no longer reliable authority in California for the reasons explained above.[340]

Furthermore, *Calkins* is unreliable as precedent because the Ninth Circuit made a serious error in that decision. As the United States District Court later pointed out in *Slevin v. Home Depot*, the Ninth Circuit erroneously referred to *In re Lane* as a case arising after the *Pruneyard* decision—while in fact *Lane* preceded *Pruneyard* by approximately ten years—and, as a result, the court implicitly read *Lane* as extending *Pruneyard* from the shopping center setting to the stand-alone grocery store setting.[341] In addition, *Calkins* is unreliable as precedent because, as explained above, the Ninth Circuit overlooked the fact that, many years after issuing *Lane*, the California Supreme Court declined to rule on whether a union had a legal right under the state constitution to picket on the private property of a retail store.[342] Moreover, as the district court also pointed out in *Slevin*, the Ninth Circuit ignored the recent decision of the California Court of Appeal in *Trader Joe's*, thus disregarding its obligation to consider decisions of California appellate courts in interpreting state law.[343]

Finally, the authority of *Calkins* as precedent was further undermined by a recent Ninth Circuit decision, *United Brotherhood of Carpenters & Joiners v. NLRB*. The Ninth Circuit did not disagree with an argument in *United Brotherhood* that *Calkins* had been

305-09 and accompanying text.

339. *See id.* at 331 n. 22; *see supra* nn. 282-96 and accompanying text.

340. *Waremart Foods v. NLRB*, 354 F.3d 870, 875-76 (D.C. Cir. 2004).

341. *Slevin v. Home Depot*, 120 F. Supp. 2d 822, 832 (N.D. Cal. 2000).

342. *Sears II*, 599 P.2d 676, 681 (Cal. 1979) (plurality).

343. *See Slevin*, 120 F. Supp. 2d at 834 n. 8.

"discredited" by later decisions, and stated that its decision had been reached "despite the weaknesses in *Calkins*."[344]

Despite the precedent set forth above, union organizers often claim that they have a right under the *NLRA* to take over part of a hospital's cafeteria to conduct their organizing activities because it is "open to the public." But the right of a hospital to exclude union organizers from its property under *Babcock* and *Lechmere*—as recognized by the NLRB in *Southern Monterey County Hospital*—includes the hospital's cafeteria. This right exists under the *NLRA* even if patients, visitors, and the general public are allowed to use it. This principle has been emphasized repeatedly by the federal courts, including the Fourth, Sixth, Eighth, and District of Columbia Circuits, as cited above.[345] As the Sixth Circuit succinctly stated in the *Oakwood Hospital* decision: "If the owner of an outdoor parking lot can bar nonemployee union organizers, it follows *a fortiori* that the owner of an indoor cafeteria can do so."[346] And the D.C. Circuit has acknowledged that a hospital could treat an organizer as a "serial violator" of its solicitation and distribution rules and "kick[] him out of the cafeteria."[347]

Notwithstanding the overwhelming precedent established by these decisions of the federal appellate courts, unions may point to the fact that the NLRB has never formally overruled pre-*Lechmere* case law holding that organizers cannot be prohibited from soliciting in a restaurant if their conduct is consistent with the other patrons of the restaurant.[348] In fact, the NLRB did initially overrule this precedent in light of *Lechmere* in a 1998 decision, *Farm Fresh, Inc t/a Nicks'*.[349] But that decision was reversed by the D.C. Circuit on unrelated

344. *United Bhd. of Carpenters & Joiners of Am. Loc. 586 v. NLRB*, 540 F.3d 957, 963-64 n. 2 (9th Cir. 2008).

345. *NLRB v. S. Maryland Hosp. Ctr.*, 916 F.2d 932 (4th Cir. 1990); *Oakwood Hosp. v. NLRB*, 983 F.2d 698 (6th Cir. 1993); *Baptist Med. Sys. v. NLRB*, 876 F.2d 661 (8th Cir. 1989); *Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334 (D.C. Cir. 2003). *See supra* nn. 152-67 and accompanying text.

346. *Oakwood Hosp.*, 983 F.2d at 703.

347. *See Stanford Hosp.,* 325 F.3d at 345-46.

348. *Montgomery Ward & Co.*, 288 N.L.R.B. 126, 127 (NLRB 1998), *overruled on other grounds by Ark Las Vegas Restaurant Corp.*, 335 N.L.R.B 1284, 1290 (NLRB 2001).

349. *Farm Fresh, Inc. t/a Nicks'*, 326 N.L.R.B. 997 (NLRB 1998), *rev'd in part and enforcement granted in part sub nom. United Food and Commercial Workers Intl. Union Loc. 400 v. NLRB*, 222 F.3d 1030 (D.C. Cir. 2000).

grounds, and the NLRB has not had another opportunity to consider this issue.[350]

Although the validity of the NLRB's pre-*Lechmere* precedent on restaurant access for solicitation purposes may thus still technically be an open issue, it seems unlikely that the NLRB would attempt to revive that old precedent in light of the emphatic decisions of four federal circuit courts described above. In any event, this issue might not be presented to the NLRB for consideration, as the agency's General Counsel, relying on the *Southern Monterey County Hospital* precedent, refused in a 2007 case to issue an unfair labor practice complaint against a hospital for ejecting a union organizer from its exterior premises.[351] In view of this decision, it would be completely incongruous for the General Counsel to decide that organizers are entitled to solicit in a hospital's cafeteria.

The foregoing conclusions assume that *Lechmere* applies at a given hospital and, pursuant to that decision, hospitals may not discriminate against a union by permitting other organizations to use its facilities.[352] But as the D.C. Circuit explained in detail in the *Lucile Salter Packard Children's Hospital* decision, *Lechmere* does not preclude a hospital from allowing solicitation by outside organizations: (1) If they consist of "a small number of . . . beneficent acts," or (2) if they relate to the hospital's "business functions and purposes."[353]

B. ROBINS V. PRUNEYARD SHOPPING CENTER

When unions claim that their organizers have a constitutional right under *Pruneyard* to enter hospital property, they seriously distort

350. *United Food and Commercial Workers Intl. Union Loc. 400*, 222 F.3d at 1034, 1039. On remand from the D.C. Circuit following this decision, the NLRB reaffirmed its earlier decision in *Farm Fresh* but on the basis of a different rationale. *Farm Fresh, Inc.*, 332 N.L.R.B. 1424, 1425 (NLRB 2000). In a subsequent case, an administrative law judge concluded that the pre-*Lechmere* precedent had been overruled, but the NLRB found it unnecessary to decide this issue for procedural reasons. *Ark Las Vegas Restaurant Corp*., 335 N.L.R.B. at 1290.

351. Memo. from Barry J. Kearney, Assoc. Gen. Counsel for NLRB, to James F. Small, Acting Regl. Dir. of NLRB, *St. Jude Medical Center Case 21-CA-37748* (Aug. 13, 2007) (available at http://www.nlrb.gov/shared_files/Advice%20Memos/2007/21-CA-37748.pdf).

352. *See generally Lechmere, Inc. v. Natl. Lab. Rel. Bd.*, 502 U.S. 527 (1992).

353. *Lucile Salter Packard Children's Hosp. v. NLRB*, 97 F.3d 583, 587-88 (D.C. Cir. 1996) (internal quotation marks omitted).

and misrepresent the law under the California Constitution. As the California Supreme Court explained in *Pruneyard*, that decision was predicated on the conclusions that shopping centers have a public character; that they are an "invaluable forum" through which the public can exercise free speech and petition rights; that they are important as a place for large groups to congregate; and that they are "miniature downtowns."[354] Similarly, the California Supreme Court concluded in *Hoffman* that the railroad station in that case was "like a public street or park."[355] And in *Golden Gateway* the plurality opinion emphasized that *Pruneyard* had relied heavily on the fact that a shopping center is functionally equivalent to a traditional public forum—a "downtown" or "central business district."[356] It had further relied on "the shopping center's open and unrestricted invitation to the public to congregate freely" and on the "public character of the property."[357]

As a result of these pronouncements by the California Supreme Court, the California Courts of Appeal have held in numerous cases that *Pruneyard* does not apply to medical centers, banks and retail stores—*including stores located in a shopping center*. For example, in the most recent of these cases, *Van v. Home Depot, U.S.A.*, the court held that *Pruneyard* did not apply to the areas surrounding the entrance of an individual retail store, *even though the store was located in a shopping center*.[358] The court emphasized that *Pruneyard* does not apply unless it is "shown that the particular location is impressed with the character of a traditional public forum for purposes of free speech," and that "it is the functional equivalent of . . . a place where people choose to come and meet and talk and spend time."[359] In addition, the Court of Appeal reached the same decision in an earlier case, *Albertson's v. Young*, which also involved a store located in a shopping center.[360]

354. *Robins v. Pruneyard Shopping Ctr.*, 592 P. 2d 341, 347 n. 5 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980) (internal quotation marks omitted).

355. *In re Hoffman*, 434 P.2d 353, 356 (Cal. 1967).

356. *Golden Gateway Ctr. v. Golden Gateway Tenants Assn.*, 29 P.3d 797, 809 (Cal. 2001) (quoting *Pruneyard*, 592 P.2d at 347 n. 5) (internal quotation marks omitted).

357. *Id.*

358. *Van v. Home Depot, U.S.A.*, 66 Cal. Rptr. 3d 497, 502-03, 509 (Cal. App. 2d Dist. Div. 2 2007).

359. *Id.* at 505 (quoting *Albertson's, Inc. v. Young*, 131 Cal. Rptr. 2d 721, 733-34 (Cal. App. 3d Dist. 2003)) (internal quotation marks omitted).

360. *Albertson's, Inc.*, 131 Cal. Rptr. 2d at 724-25.

Moreover, this limitation on the scope of the *Pruneyard* precedent has also been recognized by the Ninth Circuit. In its recent *United Brotherhood* decision, that court noted the distinction for "stand-alone stores, which have not taken on the functional equivalence of a traditional public forum that was found to be the compelling reason for extending free speech rights in shopping malls in *Pruneyard*."[361]

Of particular significance here is the approval in *Golden Gateway* of the Court of Appeal decisions finding that medical centers do not fall within the scope of *Pruneyard*.[362] The plurality opinion stated that it was following the line of Court of Appeal cases "consistently [holding] that privately owned medical centers and their parking lots are not functionally equivalent to a traditional public forum for purposes of California's free speech clause."[363]

It is significant that no court has ever held that individuals have a constitutional right under *Pruneyard* to enter the *interior* of an establishment to engage in expressive activities. This is important because the most egregious trespass violations committed by union organizers on hospital property occur in the corridors, nursing units, patient treatment areas, and other interior parts of the hospital. Although some shopping centers are enclosed structures, as was the railroad station in *Hoffman*, these are vast facilities not at all comparable to a retail store, medical center, hospital, or other establishment that serves members of the public. In fact, the rationale of *Pruneyard* was that a shopping center replaces the streets and sidewalks of the central business district of a town or city and is thus a "miniature downtown."[364] In the same vein, the railroad station in *Hoffman* was considered to be "like a public street or park."[365]

Nor does it matter under *Pruneyard* that hospitals contain cafeterias patronized by patients and their visitors. As the Court of Appeal explained in *Van v. Home Depot, U.S.A.*, many of the hundreds of Target, Wal-Mart and Home Depot stores throughout California contain restaurants, and some even include video arcades and community billboards, but these amenities are not designed to

361. *United Bhd. of Carpenters & Joiners of Am. Loc. 586 v. NLRB*, 540 F.3d 957, 963-64 n. 2 (9th Cir. 2008) (citing *Pruneyard*, 592 P.2d at 347 n. 5).

362. *Golden Gateway Ctr.*, 29 P.3d at 810.

363. *Id.*

364. *Pruneyard*, 592 P.2d at 347, n. 5 (internal citations omitted).

365. *In re Hoffman*, 434 P.2d 353, 356 (Cal. 1967).

encourage patrons to congregate or to be used as a gathering place.[366] Instead, the court found that restaurants and other amenities are mere sidelights to a store's operation and do not transform the store into the hub of activity envisioned in *Pruneyard*, which involved a 21-acre shopping center with dozens of stores, many restaurants, and a movie theatre.[367] Similarly, the cafeteria in a hospital is a sidelight to the hospital's operation; it is not designed to encourage patrons to congregate or to be used as a gathering place, and it certainly does not transform the hospital into the hub of activity envisioned in *Pruneyard*.

In addition, a hospital does not become a public forum for expressive activities under *Pruneyard* simply because it might allow some community organizations to use its facility for meetings. In *Van v. Home Depot, U.S.A.*, some of the Target stores had implemented "time, place and manner" regulations, and some of the Wal-Mart stores had posted signs designating areas where individuals could engage in soliciting and petitioning.[368] Moreover, in *Slevin v. Home Depot*, the store had implemented an application procedure for individuals desiring to engage in expressive activities.[369] As the court stated in *Slevin*, "[t]he mere fact that a store implements time, place, and manner regulations does not transform the area into a public forum."[370] The same reasoning must apply to a hospital that permits community organizations to hold meetings in its conference rooms.

Finally, in light of the numerous cases discussed above holding that the sidewalks, parking lots, and other exterior areas of medical centers, banks and retail stores are not public forums to engage in constitutional free speech under *Pruneyard—not even retail stores that are located in shopping centers*—it should be obvious that the comparable exterior area of a hospital is not a public forum.

Thus it seems evident that no California court would conclude that unions have a right under the state constitution to organize in the corridors of a hospital or on its sidewalks and parking lots. Yet union organizers continue to roam the corridors of California hospitals, intrude into patient treatment areas, station themselves in hospital

366. *Van v. Home Depot, U.S.A.*, 66 Cal. Rptr. 3d 497, 499, 500, 507 (Cal. App. 2d Dist. Div. 2 2007).

367. *Id.* at 502, 507.

368. *Id.* at 507 n. 3.

369. *Slevin v. Home Depot*, 120 F. Supp. 822, 825, 826 (N.D. Cal. 2000).

370. *Id.* at 835.

cafeterias, and take over hospital sidewalks and parking lots—and union lawyers incorrectly proclaim on their law firm letterheads that the organizers have a right to do so under the California Constitution.

C. IN RE LANE

The California Supreme Court's *In re Lane* decision involved union handbilling on a sidewalk *outside* a retail store.[371] No court has ever applied that precedent to the *interior* of a store. Thus, when unions claim that *Lane* justifies roaming by their organizers around the corridors of a hospital building or stationing themselves in the hospital's cafeteria, they are clearly in error.

Furthermore, *In re Lane* is no longer authoritative with respect to activity on private sidewalks in front of retail stores, as it was effectively overruled by the United States Supreme Court's decision in *Central Hardware*.[372] The Supreme Court rejected a union's argument in that case that organizers had a right to solicit on the parking lots of standalone stores because they were "open to the public."[373] The Court pointed out that this "argument could be made with respect to almost every retail and service establishment in the country, regardless of size or location."[374] It held that allowing solicitation by union organizers on the privately owned parking lots of retail stores would "constitute an unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments."[375] Accordingly, standalone stores in California have a property right under the Federal Constitution to exclude union organizers and any California decision that infringes on that right would be unconstitutional. Although the United States Supreme Court reached a contrary result with respect to the scope of federal property rights under the unique circumstances of a shopping center in *PruneYard Shopping Center v. Robins*,[376] its precedent in the

371. *In re Lane*, 457 P.2d 561, 562 (Cal. 1969).

372. *Supra* nn. 71-77 and accompanying text.

373. *C. Hardware Co. v. NLRB*, 407 U.S. 539, 547 (1972) (internal quotation marks omitted).

374. *Id.*

375. *Id.*

376. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980).

standalone store context, as decided in *Central Hardware*, remains intact.[377]

Moreover, as the D.C. Circuit held in *Waremart Foods*, *Lane* was based on federal precedent that has since been discredited.[378] Unions can be expected to point out that the majority opinion of the California Supreme Court in *Fashion Valley* relied on *Lane* and rejected an argument that it no longer had vitality because it was based on discredited federal precedent.[379] However, as the dissent in *Fashion Valley* explained, the majority was focusing on a different issue when it cited *Lane*, as any other interpretation would reject by implication all of the recent California Court of Appeal decisions holding that *Pruneyard* does not apply to the exterior of a stand-alone store because it is not a public forum.[380] As the dissent in *Fashion Valley* also noted, the "majority opinion carefully says nothing casting doubt on the recent cases involving stand-alone stores, and they are surely correct."[381]

It is also significant that *Lane* was followed ten years later by the plurality opinion in *Sears II*, which found that the state *Moscone Act* protected picketing on the private sidewalk of a standalone store.[382] In that case the plurality opinion emphasized that the decision rested on the terms of the *Moscone Act*, and stated that "we express no opinion on whether the California Constitution protects the picketing here at issue."[383] This disclaimer negates any argument that *Lane*'s protection of handbilling on the store's sidewalk somehow retroactively acquired a foundation in the state constitution.

In addition, as the court of appeal pointed out in *Trader Joe's*, although the California Supreme Court cited *Lane* in its *Pruneyard* decision, that "reference to *Lane* was brief and collateral; the [C]ourt did not expressly or implicitly hold that our state constitution protects free speech and petitioning rights at privately owned stand-alone grocery stores."[384] The same is true of the Supreme Court's references

377. *See generally C. Hardware Co.*, 407 U.S. at 544-47.

378. *Waremart Foods v. NLRB*, 354 F.3d 870, 875 (D.C. Cir. 2004).

379. *See generally Fashion Valley Mall, LLC v. NLRB*, 172 P.3d 742, 747-54 (Cal. 2007)

380. *Id.* at 761-62 (Chin, Baxter & Corrigan, JJ. dissenting).

381. *Id.* at 762.

382. *Sears II*, 599 P.2d 676, 684 (Cal. 1979) (plurality).

383. *Id.* at 683 n. 5.

384. *Trader Joe's Co. v. Progressive Campaigns, Inc.*, 86 Cal. Rptr. 442, 450 (Cal. App. 1st Dist. Div. 2 1999).

to *Lane* in *Fashion Valley*. They, too, were brief and collateral, and did not expressly or implicitly hold that the state constitution protects the right to engage in such activity at stand-alone stores.[385]

In any event, even assuming that *Lane* remains good law with respect to the sidewalk outside a *retail store*, unions are incorrect when they claim that it applies as well to the private sidewalks, parking lots and other grounds outside a *hospital*. As the plurality opinion pointed out in *Golden Gateway*, the California Courts of Appeal have consistently held that the parking lots and sidewalks of privately owned medical centers "are not functionally equivalent to a traditional public forum for purposes of California's free speech clause because, among other things, they are not freely open to the public."[386] And there is no material distinction between the parking lots and sidewalks in the medical center cases approved in *Golden Gateway* and the parking lots and sidewalks surrounding a hospital. As in those cases, a hospital's property is private in character and lacks any attributes of a public forum. Likewise, the hospital does not provide a place for the general public to congregate but instead provides services to a specific clientele—the patients of the hospital—and it is used for specific business purposes by its physicians, employees, patients and their visitors. Furthermore, the parking lots and sidewalks are not generally open to the public but instead are intended for the use of people with direct business with the hospital.

D. *CALIFORNIA'S* MOSCONE ACT *AND* SEARS II

When unions claim that their organizers have a right under the *Moscone Act* and *Sears II* to roam around the corridors of a hospital, they ignore the fact that the plurality opinion in *Sears II* acknowledged that a union would not have a right to conduct its activities *inside* a retail store.[387] Although the Court was not required to decide that specific issue because the case involved picketing on a private sidewalk surrounding the store, the plurality opinion recognized that "picketing in the aisles" of the store would "represent so intrusive an invasion of Sears' use of its property as to compel judicial intervention."[388] Thus,

385. *See Fashion Valley Mall,* LLC, 172 P.3d 742.

386. *Golden Gateway Ctr. v. Golden Gateway Tenants Assn.*, 29 P.3d 797, 810 (Cal. 2001).

387. *Sears II*, 599 P. 2d at 681 (plurality).

388. *Id.*

the *Moscone Act* and *Sears II* provide no support for a claim that union organizers have a right to roam around the *interior* of a California hospital.

Unions also rely on the *Moscone Act* and *Sears II* to justify trespassing by organizers on private sidewalks, parking lots, and other grounds surrounding hospital buildings. This argument, however, fails for several reasons. First, it is in direct conflict with the right of private property protected by the Federal Constitution, as enunciated by the United States Supreme Court in *Central Hardware*.[389]

Second, the D.C. Circuit determined in *Waremart Foods* that: (1) The *Moscone Act* is unconstitutional under the First Amendment because of its special protection for expressive activities by labor unions, and (2) *Sears II* is no longer current California law because of its reliance on that statute.[390] In addition, the NLRB has reached the same conclusion in several cases while ascertaining the extent of California law in deciding whether employers could lawfully exclude union organizers under *Lechmere*.[391] One of those cases—*Southern Monterey County Hospital*—involved union access to a hospital.[392] And the California Supreme Court did not express any disagreement with the D.C. Circuit's *Waremart Foods* holding in its recent *Fashion Valley* decision.[393] In fact, although the Court in *Fashion Valley* provided a detailed history of the law concerning access to private property for expressive activities, it entirely omitted any reference to the D.C. Circuit's decision or to the *Moscone Act* or *Sears II*. These omissions seem to be an implied recognition that the D.C. Circuit's decision was correct.

Third, the California Court of Appeal has acknowledged that in light of the United States Supreme Court's decisions in *Police Department v. Mosley* and *Carey v. Brown*, a California statute "cannot grant special preference to the location at which picketing occurs in a labor dispute."[394] This decision further undermines the *Moscone Act* and *Sears II* because both did exactly that by giving unions a special

389. *C. Hardware Co. v. NLRB*, 407 U.S. 539, 547 (1972).

390. *See Waremart Foods v. NLRB*, 354 F.3d 870, 874-75 (D.C. Cir. 2004).

391. *E.g. S. Monterey Co. Hosp.*, 348 N.L.R.B. 327, 331 n. 22 (NLRB 2006).

392. *Id.* at 327.

393. *See Fashion Valley Mall, LLC v. NLRB*, 172 P.3d 742 (Cal. 2007).

394. *Waremart Foods v. United Food & Commercial Workers Union, Loc. 588*, 104 Cal. Rptr. 2d 359, 368-69 (Cal. App. 3d Dist. 2001).

preference in picketing on the private property of a retail store during a labor dispute.

Fourth, as the California Court of Appeal held in *Allred v. Harris*, "landowners and tenants have a right to exclude persons from trespassing on private property; the right to exclude persons is a fundamental aspect of private property ownership."[395] Furthermore, the court held that "[a]n injunction is an appropriate remedy for a continuing trespass."[396] If the *Moscone Act* and *Sears II* establish a state policy of withdrawing these fundamental protections from retail stores during a labor dispute, as the unions claim, they are preempted by the *NLRA* under the Fourth Circuit's *Rum Creek* precedent, discussed above, which was approved by the United States Supreme Court in *Livadas v. Bradshaw*.[397] And if that state policy is extended to California hospitals, as the unions claim, the *Moscone Act* and *Sears II* would be preempted by the *NLRA* in that context also.

Fifth, a plurality opinion signed by only three justices, such as the opinion in *Sears II*, lacks authority as precedent and the doctrine of stare decisis does not require deference.[398]

Finally, even assuming that, despite their numerous deficiencies, the *Moscone Act* and *Sears II* are good law, they are not applicable to a *hospital* because the sidewalks, parking lots, and other grounds surrounding a hospital are *not* freely open to the public. It would be completely incongruous to approve appellate court decisions holding that the privately-owned parking lot of a medical center is not a "public forum" under the state constitution because it is not freely open to the public—as the California Supreme Court did in *Golden Gateway*[399]—while at the same time concluding that picketing is permitted on the sidewalks or parking lots of a hospital under the *Moscone Act*.

395. *Allred v. Harris*, 18 Cal. Rptr. 2d 530, 533 (Cal. App. 4th Dist. Div. 1 1993).

396. *Id.*

397. *Livadas v. Bradshaw*, 512 U.S. 107, 119 (1994) (citing *Rum Creek Coal Sales Inc. v. Caperton* (*Rum Creek II*), 971 F.2d 1148, 1154 (4th Cir. 1992)); *see supra* nn. 131-35 and accompanying text.

398. *E.g. Bd. of Supervisors v. Loc. Agency Formation Comm.*, 838 P.2d 1198, 1207 (Cal. 1992).

399. *Golden Gateway Ctr. v. Golden Gateway Tenants Assn.*, 29 P.3d 799, 810 (Cal. 2001).

E. IN RE ZERBE *AND* IN RE CATALANO

When unions claim that organizers have an unfettered right to conduct their activities on the private property of a hospital, they frequently rely on two ancient cases that are seldom mentioned in modern court decisions, *In re Zerbe* and *In re Catalano*.[400] The Court held in *Zerbe* that a union representative could not be arrested for trespass when he entered a railroad's right-of-way to picket during a strike at a manufacturing plant.[401] Later it held in *Catalano* that union representatives who entered a construction jobsite to investigate safety conditions and prepare a steward's report did not violate state trespass statutes.[402] As shown below, the reliance by unions on these decisions is misplaced for several reasons.

First, *Zerbe* and *Catalano* are limited to *criminal* proceedings and are not applicable to a *civil* action either: (1) Filed by a property owner to restrain the tort of trespass on private property, obtain damages for such a trespass, or obtain a judicial declaration of the owner's right to exclude trespassers from its property; or, (2) filed by a union to obtain the right to engage in expressive activities on an employer's private property. This distinction between criminal and civil actions was emphasized by the Court in *Zerbe*, which stressed that since it was not confronted with the availability of civil remedies but instead with the construction of a criminal statute, the union representative "must be given the benefit of every reasonable doubt as to whether the statute was applicable to him."[403] In addition, the Court repeatedly emphasized that it was relying on the requirement that criminal statutes be construed in the defendant's favor.[404] In apparent recognition of this distinction, the California Supreme Court did not even mention *Zerbe* or *Catalano* in its recent *Fashion Valley* decision, where it exhaustively traced the history of access to private property for expressive activities.[405]

Second, *Zerbe* and *Catalano* have no application to the *interior* of a building such as a hospital. In *Zerbe*, the union representative did not

400. *In re Zerbe*, 388 P.2d 182 (Cal. 1964); *In re Catalano*, 623 P.2d 228 (Cal. 1981).

401. *Zerbe*, 388 P.2d at 184, 186.

402. *Catalano*, 623 P.2d at 229-30.

403. *Zerbe*, 388 P.2d at 184.

404. *Id.* at 184-86.

405. *See Fashion Valley Mall, LLC v. NLRB*, 172 P.3d 742, 745-46 (Cal. 2007).

even enter the private property of the employer targeted for picketing; instead, he entered the railroad's property and stationed himself near a spur track that led to the employer's plant.[406] In *Catalano*, the union representatives entered a construction jobsite.[407] Thus, a union distorts the holding of these decisions when it claims that they authorize organizers to roam the corridors of a hospital and conduct their activities in the hospital's cafeteria.

Third, the exceptions for union activity in California's criminal trespass statutes relied on by the courts in *Zerbe* and *Catalano* are unconstitutional under the First and Fourteenth Amendments. The United States Supreme Court found in *Police Department of Chicago v. Mosley* and *Carey v. Brown* that exceptions in criminal statutes for the expressive activities of labor unions were unconstitutional, and there is no basis for distinguishing those exceptions from the exceptions in the California statutes.[408] Furthermore, the D.C. Circuit has relied on those federal decisions in determining that the state *Moscone Act* is unconstitutional because of its special protection for the expressive activities of labor unions.[409]

Fourth, except in the limited context of a shopping center—where the United States Supreme Court has allowed the encroachment by union organizers on private property in California—the exceptions to the state criminal trespass statutes for union activity also violate an employer's federally protected right of private property under the United States Constitution, which was recognized in *Central Hardware*.[410]

Fifth, if the exceptions to the criminal trespass statutes create a general right for union agents to intrude on an employer's private property during a labor dispute—as the unions contend—they are preempted by the *NLRA* because they would establish a state policy of withdrawing from employers the protection of the state law of trespass during such a dispute. This is the principle established by the Fourth Circuit in the *Rum Creek* decisions.[411] Unions may attempt to distinguish these decisions because the Fourth Circuit referred

406. *Zerbe*, 388 P.2d at 184.
407. *Catalano*, 623 P.2d at 229.
408. *Supra* nn. 78-85 and 92-99 and accompanying text.
409. *Supra* nn. 282-91 and accompanying text.
410. *C. Hardware Co. v. NLRB*, 407 U.S. 539, 546-47 (1972).
411. *Supra* nn. 131-35 and accompanying text.

favorably in a footnote to the exception for union activity in one of the California criminal trespass statutes.[412] But that brief reference assumed that the California exception would apply only to activities that are permitted to be carried out by the *National Labor Relations Act*, while in *Catalano* the trespassing by the union organizers on an employer's private property was clearly *not* permitted to be carried out on that property by the *NLRA* in light of the Supreme Court's *Babcock* decision twenty-five years earlier (which was later reaffirmed in *Lechmere*).[413]

Finally, even assuming that the exceptions to the criminal trespass statutes do not violate the Federal Constitution and are not preempted, the California Supreme Court should reconsider these decisions. In both *Zerbe* and *Catalano* the court assumed the legislative function by extending exceptions from one statutory provision to others, as if it had the authority to rewrite the statutes of California. The Court should also recognize that, as discussed above: (1) The exception in Penal Code subsection 602(o) is limited to "lawful labor union activities which are permitted to be carried out on the property . . . by the *National Labor Relations Act*,"[414] and (2) under *Babcock*, *Lechmere* and the NLRB decisions cited above, trespassing by union organizers on an employer's private property is clearly *not* a permissible activity under that federal statute.[415] It is a plain contradiction of the statutory language to hold that the exception applies to activity that is *not* permitted to be carried out on the property by the *NLRA*. In the specific context of a hospital, it would be erroneous to find that this exception applies to trespassing on the hospital's private property inasmuch as the NLRB definitively held in *Southern Monterey County Hospital* that unions do *not* have the right under the *NLRA* to engage in such activity.[416]

412. *Rum Creek Coal Sales Inc. v. Caperton* (*Rum Creek I*), 926 F.2d 353, 355 n. 2 (4th Cir. 1991).

413. *Supra* nn. 138-46 and accompanying text.

414. *In re Catalano*, 623 P.2d 228, 236 (Cal. 1981) (citing Cal. Penal Code Ann. § 602(n) (West 1978) (subsequently relettered as § 602(o))).

415. *Supra* nn. 11-14, 181-89 and accompanying text.

416. *S. Monterey Co. Hosp.*, 348 N.L.R.B. 327, 331 (NLRB 2006).

F. *PREEMPTION OF TRESPASS COMPLAINTS UNDER THE* NLRA

The union argument that all state court actions against union trespassers are preempted as a result of the Court of Appeal's decision in *Hillhaven v. Healthcare Workers Union* is frivolous and easily rebutted.[417] The United States Supreme Court expressly held in *Sears*, and later reaffirmed in *Lechmere*, that arguable *NLRA* claims do not preempt state trespass actions.[418] Therefore, as the Supreme Court also held in *Sears*, a state court action to enjoin union trespassing is not preempted if the union has not invoked the NLRB's jurisdiction by filing an unfair labor practice charge.[419] And the NLRB definitively held in *Makro, Inc*.: (1) That a state court action is not preempted by the mere filing of an unfair labor practice charge, and (2) that such a charge is preempted only if the agency's General Counsel, after conducting an investigation, issues a formal complaint against the employer.[420] As the Supreme Court stated in *Sears* and again in *Lechmere*, such preemption will rarely occur because union trespassing is "far more likely to be unprotected [under the *NLRA*] than protected."[421]

The *Hillhaven* decision is no exception to this rule. In that case, the employer filed an unfair labor practice charge against the union because of the unlawful entry by numerous union trespassers into a nursing home and the NLRB's Regional Director (acting on behalf of the General Counsel) subsequently issued a formal complaint against the union after investigating the employer's charge.[422]The appellate court held that because the complaint had been issued, the employer's state court action was preempted.[423] If the employer had not filed the unfair labor practice charge there would have been no preemption.

417. *Hillhaven Oakland Nursing & Rehab. Ctr. v. Healthcare Workers Union, Loc. 250*, 49 Cal. Rptr. 2d 11, 15 (Cal. App. 1st Dist. Div. 2 1996).

418. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 535 (1992); *Sears, Roebuck & Co. v. San Diego Co. Dist. Council of Carpenters*, 436 U.S. 180, 205 (1978).

419. *Sears*, 436 U.S. at 207.

420. *Makro, Inc. and Renaissance Props Co. & United Food & Commercial Workers Loc. No. 880*, 305 N.L.R.B. 663, 669-70 (NLRB 1991).

421. *Lechmere*, 502 U.S. at 535 (quoting *Sears*, 436 U.S. at 205) (internal quotation marks omitted).

422. *Hillhaven*, 49 Cal. Rptr. 2d at 12-13, 14 nn. 4, 5.

423. *Id.* at 17.

G. *STATE ANTI-INJUNCTION STATUTE*

The anti-injunction statute does not create a substantive right for union agents to engage in their activities on an employer's private property.[424] Instead, it establishes prerequisites for obtaining injunctive relief against trespassing and other unlawful acts during a labor dispute.[425] Thus, if union agents trespass on hospital property during such a dispute, they may not be enjoined by a California court—according to the terms of the statute—unless all of the prerequisites have been satisfied.[426]

Serious questions remain, however, about the validity of this statute, despite the decision of the California Court of Appeal in *Waremart Foods v. United Food & Commercial Workers*,[427] which held that it is constitutional and not preempted by the *NLRA*.[428] First, the Court of Appeal improperly refused to follow the United States Supreme Court precedent from *Police Department v. Mosley* and *Carey v. Brown*, although it expressly recognized that "[t]hese cases stand for the proposition that state laws cannot grant special preference to the location at which picketing occurs in a labor dispute."[429] The court reached this conclusion by superficially treating the anti-injunction statute as a mere "rule of procedure" that places no limitations on the location or content of speech.[430] But the statute does, in fact, grant special preference to the expressive activities of unions when they trespass on an employer's private property.[431] This is evident because an injunction is readily available to a property owner under traditional standards for injunctive relief if *non-labor* protesters enter its property to conduct their activities, while a series of difficult hurdles must be overcome by the same property owner under the anti-injunction statute if *labor* protesters enter the same property to engage in the same type of expressive conduct. This distinction in the court's decision between labor and non-labor speech is a clear violation of both the First

424. *See* Cal. Lab. Code Ann. §§ 1138-38.5 (West 2003).

425. *Id.* at §§ 1138.1-38.3.

426. *Id.*

427. *Waremart Foods v. United Food & Commercial Workers Union, Loc. 588*, 104 Cal. Rptr. 2d 359 (Cal. App. 3d Dist. 2001).

428. *Id.* at 366-69.

429. *Id.* at 367-68.

430. *Id.* at 368.

431. *See* Cal. Lab. Code Ann. §§ 1138-38.3 (West 2003).

Amendment and the Equal Protection Clause of the Fourteenth Amendment under *Police Department v. Mosley* and *Carey v. Brown*.[432] Moreover, it is contrary to the D.C. Circuit's subsequent decision in *Waremart Foods v. NLRB*, discussed above.

Second, the Court of Appeal failed to consider the Fourth Circuit's *Rum Creek* precedent in concluding that the anti-injunction statute is not preempted by the *NLRA*. As explained above, the Fourth Circuit held that the *NLRA* preempts any state policy that withdraws the protection of a state law from an employer during a labor dispute.[433] The United States Supreme Court relied on this precedent in *Livadas*.[434] It is difficult to conceive of a state law that provides more protection to an employer during a labor dispute than a statute that provides injunctive relief against unlawful conduct by the union involved in the dispute, such as picketing on the employer's private property. Yet the anti-injunction statute deliberately establishes a state objective of making it difficult to obtain an injunction under these circumstances. Accordingly, the statute is preempted by the *NLRA*.

IV. CONCLUSION

Although it is a fundamental tenet of our system of government that no one is above the law, in California there is a glaring exception to that rule: The trespass laws are not adequately enforced against labor unions. Many employers suffer from this unequal protection of the laws, but hospitals, by virtue of their size and service to the community, are among the most vulnerable. This situation is unfair and, as explained in this article, it is also unconstitutional and in violation of federal law. Therefore, it must change. But given the enormous influence of labor unions in the California legislature, change at that level is effectively ruled out. Thus, if the rule of law is to be restored, it is up to law enforcement officers, city attorneys, and the judiciary, to do it.

432. *Carey v. Brown*, 447 U.S. 455, 459-60 (1980); *Police Dept. of the City of Chi. v. Mosley*, 408 U.S. 92, 96 (1972).

433. *Supra* nn. 131-35 and accompanying text.

434. *Livadas v. Bradshaw*, 512 U.S. 107, 129-30 (1994) (citing *Rum Creek Coal Sales Inc. v. Caperton* (*Rum Creek II*), 971 F.2d 1148, 1152-53 (4th Cir. 1992)).