

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

DATE: November 24, 2008

TO : Joseph Norelli, Regional Director  
Region 20

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: The Kroger Co., d/b/a  
Foods Co/Ralphs/Food4Less  
Case 20-CA-33899

This case was submitted for advice as to whether the California Supreme Court's recent decision in Fashion Valley Mall, LLC V NLRB,<sup>1</sup> made it sufficiently clear that an employer cannot ban a union from conducting expressive activity on its private property when the property is not a public forum as defined in Robins v. Pruneyard Shopping Center.<sup>2</sup> We conclude that, although the Fashion Valley decision suggests that an employer cannot ban a union from engaging in expressive activity directed toward the employer on its property, even when the property is not a public forum, we would not authorize a complaint since the state court has not yet ruled directly on this issue.

### **FACTS**

The Kroger Co., d/b/a Foods Co/Ralphs Grocery Co./ Food4Less (the Employer) operates approximately 400 grocery stores located throughout Northern and Southern California. Most of these stores are located in commercial strip malls, although some also are located in large shopping centers/malls and some are stand-alone stores. Charging Party UFCW Local 8 Golden State (the Union) currently represents employees at seven of the 11 stores in the Union's geographical jurisdiction, located in Sacramento, Fresno, Tulare, and Pittsburgh, California.

On July 27, 2007, the Employer opened a new store on Stockton Boulevard in Sacramento, California. The Employer has refused to recognize the Union at the new store without a showing of majority support. Since the opening of the store, the Union has been picketing and leafletting the

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<sup>1</sup> 42 Cal.4th 850 (2007).

<sup>2</sup> 23 Cal.3d 899 (1979).

store generally five days a week, eight hours a day, as part of an area standards/consumer boycott campaign.

Sometime between about December 7, 2007, and January 23, 2008, the Employer promulgated rules restricting expressive activity covering all of the Employer's California stores. The rules, among other things, limit the number of persons that could be on the sidewalk at one time, require all persons to stand at least 20 feet from the entrance of the store while handbilling, restrict the time of day for picketing/leafleting, and ban any expressive activity in the parking lot. The Union asserts that the rules are an unreasonable restriction on the rights of non-employee Union representatives to engage in Section 7 activities.

On April 15, 2008, the Employer filed a state court action in Ralphs Grocery Company, d/b/a Foods Co v. UFCW Local 8, Superior Court No. 34-2008-00008682, seeking a preliminary injunction to stop the Union from picketing and leafleting at the Stockton Boulevard store. On September 9, the court denied the Employer's motion for a preliminary injunction. The court ruled that the Employer failed to introduce evidence sufficient to carry its burden on any of the equitable factors required for injunctive relief and to prove that its rules were reasonable as to time, place, and manner. The Employer appealed the court's denial of the injunction.

The Region has not submitted the issue of whether the Employer's Stockton Boulevard store is a public forum under California law, nor whether the Employer's time, place, and manner restrictions violate the Act. It seeks advice only on the narrow legal issue of the impact of the Fashion Valley decision on a union's right of access to private property, that is not a public forum under California law, to engage in expressive activity in California.

#### **ACTION**

Although the California Supreme Court's decision in Fashion Valley suggests that the California constitutional right of free speech protects a union's right to engage in expressive activity on private property even if the property is not a Pruneyard public forum, it has not ruled directly on that issue. We therefore conclude that the issue should be decided by the California Supreme Court in the first instance, and not by the Board in an administrative proceeding. [FOIA Exemption 5

[FOIA Exemption 5, cont'd. ]

.] In either event, the Union is free to seek declaratory relief from the California courts in order to resolve this issue.

Under Lechmere Inc. v. NLRB,<sup>3</sup> an employer may generally exclude from its private property nonemployee union representatives engaged in Section 7 activity, as long as the employer has a sufficient property interest under applicable state law to exclude others and make a refusal to vacate the property a "trespass."<sup>4</sup> California has established certain exceptions to the right of private property owners to exclude alleged trespassory union conduct from their premises.<sup>5</sup>

In Schwartz-Torrance Investment Corp. v. Bakery Confectionary Worker's Union,<sup>6</sup> the Supreme Court of California held that because the owner of a shopping center had fully opened its private property to the public, it could not enjoin as trespass a union's peaceful picketing of an employer at premises leased by the employer from the owner of the shopping center. The court relied on California policy supporting "concerted activities of employees for the purpose of collective bargaining,"<sup>7</sup> and its conclusion that peaceful picketing by a labor union involves an exercise of the constitutionally protected right of freedom of speech.<sup>8</sup> The court found that those interests outweighed the employer's property right, which, because of its public character, was "largely theoretical."<sup>9</sup>

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<sup>3</sup> 502 U.S. 527, 537 (1992).

<sup>4</sup> Bristol Farms, 311 NLRB 437, 438-39 (1993).

<sup>5</sup> Glendale Associates, Ltd., 335 NLRB 27, 28 (2001), enfd. 347 F.3d 1145 (9<sup>th</sup> Cir. 2003); Bristol Farms, 311 NLRB at 438-39.

<sup>6</sup> 61 Cal.2d 766 (1964).

<sup>7</sup> Id. at 769.

<sup>8</sup> Ibid.

<sup>9</sup> Id. at 771-772.

Following its decision in Schwartz-Torrance, the Supreme Court of California again addressed the right of union access to private property in In re Lane.<sup>10</sup> The court, relying on its holding in Schwartz-Torrance, held that a privately-owned sidewalk in front of a stand-alone store was not private, in the sense that it was open to the public to gain access to the store. Therefore, it was an area where the public could exercise its First Amendment rights, including peaceful handbilling of the employer.<sup>11</sup> The court stated that:

[W]hen a business establishment invites the public generally to patronize its store and in doing so to traverse a sidewalk opened for access by the public the fact of private ownership of the sidewalk does not operate to strip the members of the public of their rights to exercise First Amendment privileges on the sidewalk at or near the place of entry to the establishment. In utilizing the sidewalk for such purposes, those seeking to exercise such rights may not do so in a manner to obstruct or unreasonably interfere with free ingress or egress to or from the premises.<sup>12</sup>

Following the court's decision in Lane, both the California and the U. S. Supreme Courts separately addressed whether the First Amendment allowed a shopping center to prohibit expressive activity. First, in Lloyd v. Tanner,<sup>13</sup> the United States Supreme Court held that a privately owned shopping center could prohibit First Amendment activity on the property if the activity was unrelated to the business of the shopping center. However, in Pruneyard, *supra.*, the Supreme Court of California held that, notwithstanding that the federal constitution did not grant individuals a right to engage in expressive activity at privately owned shopping centers, California law required owners to permit such activity.<sup>14</sup> The court held that "Section 2 and 3 of article 1 of the California constitution protected speech and petitioning, reasonably

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<sup>10</sup> 71 Cal.2d 872 (1969).

<sup>11</sup> Id. at 878.

<sup>12</sup> Id.

<sup>13</sup> 407 U.S. 551 (1972).

<sup>14</sup> Robins v. Pruneyard Shopping Center, 23 Cal.3d at 905-906.

exercised, in shopping centers even when the centers are privately owned."<sup>15</sup> The court premised its holding on the fact that large retail shopping centers had become the functional equivalent of the traditional business district.<sup>16</sup>

In finding that a property owner's interests must sometimes yield to the public's interest in freedom of expression, the Pruneyard court relied, among other cases, on both Schwartz-Torrance and Lane. The court defended its reliance on those cases, even though they were based on federal constitutional principles of free speech that had since been overruled by Lloyd v. Tanner, by explaining that:

The fact that those opinions cited federal law that subsequently took a divergent course does not diminish their usefulness as precedent. . . . The duty of this court is to help determine what "liberty of speech" means in California. Federal principles are relevant but not conclusive so long as federal rights are protected.<sup>17</sup>

Thus, Pruneyard conclusively established that, in California, individuals have a state constitutional right to engage in expressive activity in a mall or large shopping center that possesses the characteristics of a public forum.

After Pruneyard, California appellate courts assessing the right of private property owners to prohibit expressive activity on their property focused strictly on whether the property was open to the public such that it was equivalent to a Pruneyard public forum. In most cases, the appellate court found the private property was not the equivalent of a public forum and upheld the right of the property owner to prohibit the expressive activity. Unlike Schwartz-Torrance and Lane, none of the cases involved a labor dispute where the expressive activity was directed at the property owner; and each court noted that distinction.

For instance, in Allred v. Shawley,<sup>18</sup> the appellate court enjoined anti-abortion protestors from using the

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<sup>15</sup> Id. at 910.

<sup>16</sup> Id. at 907-910 & n. 5.

<sup>17</sup> Id. at 908.

<sup>18</sup> 284 Cal.Rptr. 140 (1991).

parking lot of an abortion clinic where the clinic had maintained the private character of the parking lot and had not generally invited the public on to the property.<sup>19</sup> The court discussed the fact that the expressive activities in Allred and that in Schwartz-Torrance and Lane were related to the business on the property.<sup>20</sup> However, the court distinguished the speech in Schwartz-Torrance and Lane on the basis of the "heightened weight given" because they "pertained to union interests."<sup>21</sup> Thus, in those cases, the activists "were not merely expressing opinions, but were involved in protected union activity . . . . This assuredly strengthened their interests, which in turn tipped the balance (against the private owner's interest) in their favor."<sup>22</sup>

In Trader Joe's Co. v. Progressive Campaigns, Inc.,<sup>23</sup> the appellate court affirmed the lower court's order enjoining individuals from soliciting ballot initiative signatures at a stand-alone store. The court found that the store was open to the public but, unlike Pruneyard, had not held itself out as a public meeting place and the public had no special interest in using it.<sup>24</sup> The court distinguished Lane, which also involved a stand-alone store. It relied upon the fact that the speech activity in Lane involved a labor dispute and therefore justified the impingement on the private property rights since there was a need to prevent the owner from insulating himself from his role in the dispute.<sup>25</sup>

In Costco Companies, Inc. v. Gallant,<sup>26</sup> the court found that a company could lawfully ban individuals gathering

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<sup>19</sup> Id. at 146-147.

<sup>20</sup> Id. at 145-146.

<sup>21</sup> Id. at 148.

<sup>22</sup> Ibid.

<sup>23</sup> 73 Cal.App.4th 425 (1999).

<sup>24</sup> Id. at 431.

<sup>25</sup> Id. at 435, citing Sears Roebuck & Co. v. San Diego District County Dist. Council of Carpenters, 25 Cal.3d 317 at 326-327, 158 Cal.Rptr. 370 (Cal. 1979), cert. denied 447 U.S. 935 (1980).

<sup>26</sup> 117 Cal.Rptr.2d 344 (2002).

petition signatures from outside its stand-alone "big box" warehouse-style retail stores, primarily because the public invitation to the stores was solely to purchase goods and services, not to "meet friends, be entertained, dine or congregate."<sup>27</sup> The court concluded that the stores were "in no sense 'miniature downtowns'" like in Pruneyard, and were "not essential or invaluable forums for the general exercise of free speech."<sup>28</sup> The court added that "[A]dmittedly 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 the property."<sup>29</sup> The court also noted that -- unlike the unions in Schwartz-Torrance and Lane -- the activists "have never been advocates with respect to an issue in which Costco [had] any direct interest."<sup>30</sup>

In Albertson's, Inc. v. Young,<sup>31</sup> the appellate court found that defendants did not have a right to solicit and gather signatures on private property outside the grocery supermarket.<sup>32</sup> Distinguishing Pruneyard, the court found that the supermarket, which anchored an outdoor shopping center and its private surroundings, was not a quasi-public forum.<sup>33</sup> The court emphasized that the store was not "a place where people choose to come and meet and talk and spend time" and there were "no enclosed walkways, plazas, courtyards, picnic areas, gardens, or other areas that might invite the public to congregate"<sup>34</sup> as in Pruneyard. The court distinguished Lane on the basis that the speech there was directly related to a conflict with the property owner. Like in Trader Joe's and Costco, the court pointed out that, in that situation, a business should not be

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<sup>27</sup> Id. at 355.

<sup>28</sup> Ibid.

<sup>29</sup> Id. at 355 n. 1, citing In re Lane and Sears.

<sup>30</sup> Ibid.

<sup>31</sup> 131 Cal.Rptr.2d 721 (2003).

<sup>32</sup> Id. at 738.

<sup>33</sup> Id. at 733.

<sup>34</sup> Ibid.

allowed to immunize itself against on-the-spot public criticism.<sup>35</sup>

In another line of cases, the California courts have relied on the Moscone Act<sup>36</sup> to hold that property owners may not deny access to individuals on exterior premises engaged in peaceful expressive activity concerning a labor dispute.<sup>37</sup> In Winco Foods, Inc.,<sup>38</sup> the Board relied on Sears to find that a stand-alone grocery store had no right under California labor law to exclude union organizers engaged in consumer handbilling from the parking lot and walkways adjacent to its store. The Board rejected the employer's contentions that the Moscone/Sears limitation on property rights was preempted or invalid on Fourteenth Amendment equal protection and taking grounds.<sup>39</sup> However, independently construing California law on review of the Board's decision,<sup>40</sup> the D.C. Circuit concluded that California could not, under the First Amendment of the U.S. Constitution, accord labor activity greater latitude for trespass than other expressive activity because, to do so would constitute content discrimination.<sup>41</sup> Given that federal constitutional policy, the D.C. Circuit concluded that if the meaning of the Moscone Act came before the

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<sup>35</sup> Id. at 734, citing Lane, 71 Cal.2d at 876.

<sup>36</sup> Cal. Code of Civ. Proc. §527.3.

<sup>37</sup> Sears, 158 Cal.Rptr. at 374 (Moscone Act's language "leaves no doubt but that the Legislature intended to insulate from the court's injunctive power all union activity...[declared lawful under prior California law]").

<sup>38</sup> 337 NLRB 289, 292-294 (2001), enf. denied sub nom. Walmart Foods v. NLRB (Walmart II), 354 F.3d 870 (D.C. Cir. 2003) (rehearing en banc denied) (stand-alone grocery store precluded from excluding union representatives from exterior premises under Moscone/Sears).

<sup>39</sup> 337 NLRB at 289, 289 n.3. Accord: NLRB v. Calkins, 187 F.3d 1080, 1094-95 (9th Cir. 1999), enfg. Indio Grocery Outlet, 323 NLRB 1138, 1142 (1997).

<sup>40</sup> The circuit court undertook this analysis only after asking the California Supreme Court to consider the constitutional issue (Walmart Foods v. NLRB ("Walmart I"), 333 F.3d 223, 227-228 (D.C. Cir. 2003)), and after the California court declined to do so, 354 F.3d at 871.

<sup>41</sup> 354 F.3d at 872-75 (giving special protection to labor speech would be unconstitutional content regulation).

California Supreme Court again, that court would either declare the statute unconstitutional or construe it differently to avoid unconstitutionality.<sup>42</sup> The court therefore found no basis for concluding that California property law, interpreted constitutionally, prohibited the employer from excluding the union agents from the property, and refused to enforce the Board's order.<sup>43</sup>

In refusing to enforce the Board's order, the D.C. Circuit also discussed whether Lane independently granted unions the right they purportedly enjoyed under the Moscone Act. The court noted that Lane was based on federal law that subsequently had been overturned and therefore Lane no longer reflected current California law.<sup>44</sup>

Since the D.C. Circuit's decision in Waremart II, the California Supreme Court revisited the issue of private property rights and expressive activity in Fashion Valley Mall, LLC v. NLRB.<sup>45</sup> In that case, the court held that under California law a shopping center could not enforce a time, place, and manner rule under Pruneyard that prohibited a union from advocating a public boycott of one of the tenants at the mall. The court stated that the "mall's purpose to maximize profits for its merchants was not compelling compared to [the] union's right to free expression."<sup>46</sup> In reaching its decision, the court relied, as it had in Pruneyard, on its earlier holdings in Schwartz-Torrance and Lane. In response to the mall's argument that the court could not rely on Schwartz-Torrance and Lane because they were based on the First Amendment, the court reaffirmed its Pruneyard position that the "fact that those opinions cited federal law that subsequently took a divergent course does not diminish their usefulness as precedent."<sup>47</sup> Regarding the union's activity, the court stated that "[I]n light of the fact that we expressly relied upon, and extended, our decisions in Schwartz-Torrance and Lane, which approved union activity advocating a boycott, it would make no sense to interpret this

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<sup>42</sup> Id. at 875.

<sup>43</sup> Id. at 876-77.

<sup>44</sup> Id. at 876.

<sup>45</sup> 42 Cal.4d 850 (2007).

<sup>46</sup> Id. at 869.

<sup>47</sup> Id. at 864 fn. 6.

language . . . to suggest that shopping centers may prohibit speech that advocates a boycott."<sup>48</sup>

Thus, to the extent that the D.C. Circuit indicated in Waremart II that Schwartz-Torrance and Lane no longer represent California law,<sup>49</sup> the state Supreme Court's decision in Fashion Valley finds to the contrary. The court unequivocally endorsed those earlier cases. Significantly, none of the appellate state court decisions discussed above, which denied the right to engage in expressive activity on private property, suggest anything to the contrary. First, those cases primarily analyzed whether the property at issue could be considered a Pruneyard public forum and denied the expressive activity on that basis. Second, in upholding the property owners' rights, the appellate courts uniformly distinguished Schwartz-Torrance and Lane on the grounds that they both involved speech directed at the business on the property and also involved protected labor rights. For instance, in Allred, the court noted that the speech activity in Lane was "not merely expressing opinions," but involved "protected union activity," tipping the balance in the union's favor.<sup>50</sup> In Trader Joe's, the court pointed out that the speech activity in Lane involved a labor dispute that justified the impingement on the private property rights since there was a need to prevent the owner from insulating himself from public comment for his role in the dispute.<sup>51</sup> Likewise, in Costco, the court also acknowledged that where the property owner itself is the subject of a public dispute such as a labor dispute, the property owner may be required to give its opponents access to the property.<sup>52</sup> And finally, in Albertson's, the court also pointed to Lane, indicating it was inapposite because it involved expressive activity specifically related to the business. Thus, in distinguishing their cases from the California appellate courts have repeatedly emphasized the different balance that is struck between private property

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<sup>48</sup> Id. at 864-865. See also generally, Golden Gateway Center v. Golden Gateway Tenant Assn., 26 Cal.4th 1032 (2001).

<sup>49</sup> 354 F.3d at 875-876.

<sup>50</sup> Allred v. Shawley, 284 Cal.Rptr. at 148.

<sup>51</sup> Trader Joe's Co. v. Progressive Campaigns, Inc., 73 Cal.App.4th at 435.

<sup>52</sup> Costco Companies, Inc. v. Gallant, 117 Cal.Rptr.2d at 355 n. 1.

and the right of free speech when the expressive activity is directly related to the property owner and arises in the context of a labor dispute.

In agreement with the Region, we conclude that the Fashion Valley decision suggests that an employer cannot ban a union from engaging in expressive activity on its property, even when the property is not a Pruneyard public forum. By expressly relying on Schwartz-Torrance and Lane, the court has arguably affirmed the right to engage in expressive speech on private property when the protest concerns a labor dispute. This approach is consistent with how the appellate courts have repeatedly interpreted those earlier cases.

Nevertheless, until the California courts directly address the issue of expressive labor activity in a case involving a non-Pruneyard public forum, the question is less than clear.<sup>53</sup> We therefore conclude that the California courts should first address the issue regarding a union's right to engage in expressive activity on an employer's private property, rather than the Board through the administrative process. If the Union desires clarification of this area of state law, it can file a motion for declaratory relief and place this issue before the California courts.<sup>54</sup>

Accordingly, the Region should dismiss, absent withdrawal, charges against the Employer involving any store that does not meet the Pruneyard public forum test.  
[FOIA Exemption 5

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B.J.K.

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<sup>53</sup> It is still unclear whether the California Supreme Court considers that union activity directed at an employer during a labor dispute enjoys greater access to property than any other person or organization that seeks access to express disagreement with a property owner.

<sup>54</sup> Professional Fire Fighters v. City of Los Angeles, 60 Cal.2d 276 (1963) (union representing fire fighters can seek declaratory and injunctive relief for discrimination against its members).