BY JENNIFER LASER AND CARLA J. CHRISTOFFERSON

MINDING THE STORE

There are clear limits to the rights of activists on private retail property

THOSE OF US who have witnessed activists in front of a local supermarket with portraits of President Barack Obama sporting a Hitler-style mustache are unlikely to forget it. Ranging from mildly annoying to greatly provocative, many activists have developed a belief that they have the legal right to utilize the space in front of retail establishments for their expressive activities. However, many activists—and, surprisingly, retailers—are unaware of the rights of retailers to set and enforce limits. This may explain why many retailers are reluctant to enforce their property rights against unwanted expressive activity, as well as why many activists are quick to infringe on those rights. In California, activists have no legal right to utilize private property immediately in front of a retail store to express their political or religious views, and retailers have the right to limit this form of expression.

Understandably, some retailers—as well as law enforcement officials—may be reluctant to block campaigners. The right to free speech is an honored tradition in America, and many assume, albeit inaccurately, that people have the right to speak wherever there is a public audience for their political or religious views.[1] And what better place to find such an audience than an apron of a busy supermarket or a big-box store, where hundreds of shoppers pass?

What free speech enthusiasts frequently overlook is the other right that American society and American jurisprudence hold dear—the right of a private property owner or tenant to exclude persons from trespassing or using their property in an unauthorized manner.[2] The landowner's and tenant's right to exclude trespassers by means of an injunction is firmly established by California statutory and case law.[3] The ongoing tension between retailers and free speech practitioners reflects the convergence of these two sets of rights, which to date the California courts have resolved largely in favor of retailers.

As a general rule, "the right to exclude persons is a fundamental aspect of private property ownership."[4] Thus, owners and tenants of a retail establishment can seek an injunc-

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tion against political, religious, or other groups using the store's apron for their expressive activities without the store's permission. Under federal law, the store's property rights will almost always trump the free speech rights of the activists because the First Amendment of the U.S. Constitution does not guarantee the right to expressive activity at a privately owned store or a shopping center.[5] In a recent Ninth Circuit decision, which held that the beaches "are not a traditional public forum" under federal law and limiting public access to the beaches does not violate the First Amendment, the court reiterated the well-established principle that the right to exclude others is "'one of the essential sticks in the bundle of property rights' belonging to the property owner."[6] In commenting on the property rights of private property owners, the court noted that "the general public does not generally have a First Amendment right to access private property for expression."[7]

Under the California Constitution, the property owner's rights are less absolute. California courts have interpreted the free speech clause of the California Constitution to afford greater protections than the First Amendment and have placed limits on the property owner's right to exclude unwanted speech on those properties that, by their nature, have become the "functional equivalent of a traditional public forum."[8] The most famous example is the Pruneyard Shopping Center, a privately owned 21-acre mall containing 65 shops, 10 restaurants, and a cinema. This property was at issue in the landmark California Supreme Court decision *Robins v. Pruneyard Shopping Center.*[9] In holding that the California Constitution protects "reasonable exercise" of speech and petitioning at a privately owned shopping center, the court emphasized "the growing importance" of the role that large shopping centers play in the modern society and how they provide an "essential and invaluable forum for exercising [speech and petition] rights."[10] The court compared a modern mall to the traditional town center business district, where historically the public's free speech activity was exercised.[11]

The *Pruneyard* decision drew an important distinction, however, between a large shopping center and a "modest retail establishment" such as an individual retail store.[12] This distinction subsequently was reaffirmed by numerous appellate court decisions that uniformly held that retail stores that invite customers onto their property for the purpose of buying food and other merchandise do not transform themselves into the functional equivalent of a traditional public forum.[13] In other words, to establish a quasi-public forum at a particular store, it is not enough to simply show that a large number of people visit the store. It must be a functional equivalent of a town center "where people choose to come and meet and talk and spend time."[14]

California courts repeatedly have held that a retail store is not the equivalent of a town center. A retail store does not have cinemas and other forms of entertainment, and it does "not invite the public to meet friends, to eat, to rest, to congregate, or to be entertained at its premises."[15] Also, because retail stores usually have only one or two exits, activists or religious groups "positioning themselves immediately in front of the stores creates a significant risk that store patrons will associate the stores with [the activists'] message."[16] It also makes it nearly impossible for customers to avoid the activists, which increases the interference with the shopping experience of customers and the normal business operations of stores.[17]

California courts have not limited this protection to small, stand-alone stores. The decisions apply to large "big box warehouse-style retail stores" (such as Costco and Home Depot)[18] and discount stores and "supercenters" (such as Wal-Mart and Target).[19] Even the large retail stores that are part of a larger shopping center are not considered quasi-public forums in California, although this last category of stores—that is, stores located within larger commercial developments—has been the subject of the most frequent controversy.

Stand-Alone Stores

There can be little doubt that a stand-alone store, such as a free-standing grocery store, is not a "functional equivalent of a traditional public forum." Therefore, the stand-alone store has the right to ban all forms of expressive activity on the private property in front of its store or limit that activity in any way it sees fit. The California Court of Appeal unequivocally confirmed that right more than a decade ago in *Trader Joe's v. Progressive Campaigns, Inc.*,[20] and it has reaffirmed this right of the retailer in numerous subsequent decisions.[21] Even free speech activists rarely dispute this well-settled rule. What complicates the landscape is that, in large metropolitan areas, few retail stores stand alone.

In California, many retail stores are located within larger retail developments, and often share a parking lot and a common sidewalk with other retail establishments. Over the last decade, there has been a fair amount of free speech litigation surrounding the right (or lack thereof) to campaign in front of these types of retail stores, including, among others, Albertson's, Ralph's, Costco, Home Depot, Target, and Wal-Mart.[22] In all those cases, the free speech advocates argued that the *Pruneyard* holding should be extended to these retail stores because of their proximity to the public areas within the larger retail developments. So far, the courts have consistently rejected that argument.

In holding for the retailers, the courts reasoned that even though certain common areas of the shopping center (such as a central courtyard where community events are held) may serve as the functional equivalent of a public forum, that alone did not alter the nature of the store itself or the "particular location immediately surrounding the stores."[23] The stores use the areas immediately outside the store (often referred to as aprons) to display merchandise and store shopping carts. As a result, "the aprons and perimeters of those [retail] establishments have become, in many instances, an extension of the store itself."[24] Unlike "the modern mall" in *Pruneyard,* these "[a]prons and perimeter areas of the stores do not act as the functional equivalent of traditional public forum," so the stores had the right to maintain "exclusive control over those areas" and to exclude or limit any expressive activity from those areas.[25]

This analysis was recently embraced by two court of appeal decisions involving grocery stores—*Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8* (*Ralphs I*)[26] and *Ralphs II*.[27] Both decisions will be reviewed by the California Supreme Court this year. In *Ralphs I,* the court of appeal held that "the entrance area and apron…is not a public forum under the liberty speech clause of the California Constitution."[28] Consistent with the prior court of appeal decisions on this issue, the court in *Ralphs I* held that just because the retail development where the Ralphs store was located included common areas and restaurants where outdoor seating was available, those common areas did not transmute the entrance and apron of the store, which did not include such public areas, into a public forum.[29] Thus, Ralphs, as a private property owner of the store, had the right not only to "limit the speech allowed" in front of the store but also to ban it.[30] *Ralphs II* did not expressly analyze whether the area in front of the store, which was located in a commercial shopping center, was a public forum. The opinion focuses instead on the legality of the California statutes permitting labor picketing in front of a store. *Ralphs II* does implicitly conclude, however, that the picketers had no constitutional rights under either the federal or California Constitution to speak in front of the store.[31]

Notably, these decisions have also held that the mere fact that the store permits certain expressive activity on its aprons does not make the property a public forum.[32] A private store owner can selectively permit certain activities on its aprons (e.g. allowing girl scouts to sell cookies) and prohibit others (e.g. soliciting donations or gathering signatures) without affecting the private nature of the forum.[33]

Limits on Speech Directed at the Retailer

No California appellate court has directly addressed, in a nonlabor context, the retailer's right to ban expressive activity in front of its store when the expressive activity is directed at the store itself. Examples of this activity may include protests against the sale of products allegedly manufactured in an inhumane fashion or containing harmful chemicals, or the alleged use of foreign child labor.

The court of appeal recently reviewed the legality of a shopping mall's restrictions on such conduct in *Best Friends Animal Society v. Macerich Westside Pavilion Property.*[34] In that case, animal rights activists challenged the rules of the Westside Pavilion mall that restricted the Animal Society's protests to designated mall areas that were not in the vicinity of the pet store they were seeking to picket. (The protesters believed that the pet store was guilty of selling puppies bred in inhumane "puppy mills.") Consistent with the longstanding principle that a large shopping mall, such as Westside Pavilion, "is a public forum in which persons may reasonably exercise their right of free speech guaranteed by the California Constitution," the court went on to analyze whether Westside Pavilion's time, place, and manner restrictions on the Animal Society's protests were reasonable. In ruling that they were not, the court held that in order to comply with the free speech guarantee contained in the California Constitution, "the shopping mall must allow protests within aural and visual range of a targeted business whenever the mall is open to the public."[35]

Because *Best Friends Animal Society* addresses the free speech rights in the common areas at a large shopping mall, which has previously been recognized as a public forum, the case has limited relevance to a protest conducted on an apron of a retail store, which the courts have held to be private property. Under a long line of cases, a store can limit or ban activism.

Following the court's ruling in *Best Friends*

Animal Society, however, it is quite clear that when a store is located within a larger retail development or a shopping mall, its right to ban protesters will be strictly limited to its perimeters and aprons—the areas immediately in front of the store, which the courts have held to be "an extension of the store itself."[36] Once protesters move beyond the store's apron into the common area of the mall, they will be permitted to protest "within aural and visual range" of a targeted store whenever the mall is open to the public.[37]

Courts recognize the rights of retailers to limit expressive activities on their perimeters and aprons. While enforcing property rights, a retailer must be mindful of the special limits the law has imposed on large retail malls, but property owners certainly can avail themselves of several expedient remedies, including a temporary restraining order and a preliminary injunction. ■

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[1] U.S. CONST. amend. I; CAL. CONST. art. I, §§2, 3.
[2] CAL. CONST. art. I, §1.
[3] *See, e.g.,* Allred v. Harris, 14 Cal. App. 4th 1386, 1390 (1993).
[4] *Id.* at 1390.
[5] Lloyd Corp. v. Tanner, 407 U.S. 551, 556 (1972).
[6] Wright v. Incline Village Gen. Improvement Dist., 665 F. 3d 1128, 1137 (9th Cir. 2011) (quoting PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 82 (1980)).
[7] *Id.*
[8] *See* Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899 (1979); Van v. Home Depot, U.S.A., Inc., 155 Cal. App. 4th 1375, 1382-88 (2007); Albertson's, Inc. v. Young, 107 Cal. App. 4th 106, 109-10 (2003); Trader Joe's Co. v. Progressive Campaigns, Inc., 73 Cal. App. 4th 425, 433-37 (1999).
[9] Robins, 23 Cal. 3d 899.
[10] *Id.* at 910.
[11] *Id.* at 907-10 & n.5; Albertson's, 107 Cal. App. at 114-15.
[12] Pruneyard, 23 Cal. App. at 910-11.
[13] Van, 155 Cal. App. 4th at 1382-88; Albertson's, 107 Cal. App. 4th at 732; Trader Joe's, 73 Cal. App. 4th at 433-34.
[14] Albertson's, 107 Cal. App. 4th at 121; *see also* Pruneyard, 23 Cal. 3d at 907, 910 & n.5; Trader Joe's, 73 Cal. App. 4th at 434.
[15] Albertson's, 107 Cal. App. at 120.
[16] Van, 155 Cal. App. 4th at 1389; *see also* Costco Cos. v. Gallant, 96 Cal. App. 4th 740, 755 (2002).
[17] Van, 155 Cal. App. 4th at 1389.
[18] *Id.* at 1382-86; Costco, 96 Cal. App. 4th 740.
[19] Van, 155 Cal. App. 4th at 1382-86 (Target); In re Donation Solicitation Cases, 2006 WL 1633864 (Cal. App. June 14, 2006) (Wal-Mart).
[20] Trader Joe's v. Progressive Campaigns, Inc., 107 Cal. App. 4th 425 (1999).
[21] *See, e.g.,* Van, 155 Cal. App. 4th at 1384-85; Albertson's, 107 Cal. App. 4th at 109.
[22] Van, 155 Cal. App. 4th at 1378-79; Albertson's, 107 Cal. App. 4th at 734; Costco, 96 Cal. App. 4th 740; In re Donation Solicitation Cases, 2006 WL 1633864.
[23] Van, 155 Cal. App. 4th at 1389-91; *see also* Albertson's, 107 Cal. App. 4th at 734.
[24] *See* Van, 155 Cal. App. 4th at 1387.
[25] *Id.* at 1388; Albertson's, 107 Cal. App. 4th at 721, 734 (upholding the retailer's right to exclude expressive activities from the walkway at the entrance of a store in a large shopping center); *see also* Slevin v. Home Depot, 120 F. Supp. 2d 822, 835 (N.D. Cal. 2000) (applying California law, the court held that the area in front of Home Depot's main exit is not a public forum and does not have to permit expressive activity); In re Donation Solicitation Cases, 2006 WL 1633864, at *5 (Cal. App. June 14, 2006) (Wal-Mart could limit expressive activities on the walkway areas in front of its stores.).
[26] Ralphs Grocery Co. v. United Food & Comm. Workers Union Local 8 (Ralphs I), 113 Cal. Rptr. 3d 88 (2010) (previously published as 186 Cal. App. 4th 1078 but subsequently depublished following the grant of the supreme court review).
[27] Ralphs Grocery Co. v. United Food & Comm. Workers Union Local 8 (Ralphs II), 120 Cal. Rptr. 3d 878, 888 (2011). The right to picket a store in a labor dispute is governed by a separate statutory scheme that the California Supreme Court will likely address in *Ralphs I* and *Ralphs II*.
[28] *Id.* at 97-98.
[29] *Id.* at 98.
[30] *Id.*
[31] *Id.* at 888 (2011) (previously published as 192 Cal. App. 4th 200 but subsequently depublished following the grant of supreme court review).
[32] Ralphs I, 186 Cal. App. 4th at 1091; Albertson's, Inc. v. Young, 107 Cal. App. 4th 106, 125-6 (2003).
[33] *Id.*
[34] Best Friends Animal Soc'y v. Macerich Westside Pavilion Prop., 93 Cal. App. 4th 168 (2011).
[35] *Id.* at 180-82.
[36] Van, 155 Cal. App. 4th at 1387.
[37] Best Friends Animal Soc'y, 193 Cal. App. 4th at 181.