No. 92469-4

SUPREME COURT
OF THE STATE OF WASHINGTON

WAL-MART STORES, INC.,

Petitioner,

v.

UNITED FOOD AND COMMERCIAL WORKERS INTERNATION UNION; ORGANIZATION UNITED FOR RESPECT AT WALMART; and DOES 1-X,

Respondents.

MEMORANDUM OF AMICUS CURIAE WASHINGTON RETAIL ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION.

Historically, Washington treats state retailers like other private property owners -- as having the right under state trespass laws to exclude those whose conduct exceeds a limited invitation to the public (here, to shop for and purchase merchandise). In giving the UFCW the right to trespass on Walmart's property with impunity from those laws, Division Two has upended decades of settled rights and raised serious concerns throughout the State's retail industry.

The Court of Appeals' response to the UFCW's campaign of deliberately disruptive protests -- extending to the ***inside*** of Walmart stores -- kicks the case to the National Labor Relations Board (NLRB) while denying Walmart any relief under state trespass laws. But the NLRB *itself* has said, time and time again, that it has no jurisdiction to protect property rights. And so the NLRB won't stop trespassing. And with no recourse in state court, Walmart -- and every retailer in Walmart's position -- is now forced to use security guards to protect their property, which itself presents an unnecessary risk of violence.

Thus, under the Court of Appeals' decision, employers would be forced into making a choice that the United States Supreme Court says they do not have to make. The Court has held unequivocally that an employer can seek to address federal labor law protections and prohibitions under the National Labor Relations Act (by filing an unfair labor practice charge (ULP) against a union), while at the same time seeking to protect fundamental state property rights in state court vis-à-vis

the same trespassing union. The state court and the NLRB have concurrent jurisdiction to address separate legal rights

The UFCW's effort to pitch this as a "one-off" case ignores the impact on ***the customer***, whom the Court of Appeals also all but ignored. There are plenty of Washington retailers just like Walmart that are the target of union demonstrations; and in this day and age of grass roots movements, interest groups increasingly recruit and team up with local allies to protest a wide variety of concerns.[1]

If the Court of Appeals' decision stands, Washington consumers can expect handbilling, picketing, and chanting with bull horns in their faces -- *on the sales floor and in the parking lots.* The WRA respectfully submits that review is warranted to ensure retailers and other businesses can continue to provide a safe and peaceful shopping experience across the State.

II. IDENTITY AND INTEREST OF AMICUS CURIAE.

The WRA is a trade association established in 1987. Representing over 2,800 retail storefronts, it is the primary advocacy group on behalf of retailers in Washington State -- large and small -- at the local, state, and

[1] *See, e.g.*, http://www.bizjournals.com/seattle/news/2012/05/10 (SEIU/Teamsters protest outside Amazon.com); http://www.kirotv.com/news/fast-food-workers-protesting-throughout-seattle (organized by "local labor activist group"); http://www.kirotv.com/news/seattle-protestors-fight-15-now-rallies (protestors march outside Macy's and Uber and inside Seattle University buildings); http://earthfirstjournal.org/newswire/2015/12/08/seattle-residents-occupy-bnsf-offices-to-protest-oil-trains (over 40 protestors chanting inside business); http://mynorthwest.com/11/658297/Bakery-protest-turns-violent-after-clash-over-cookies (80 members of Solidarity Network protest business which allegedly did not give employees breaks).

national levels of government. The WRA works to promote the growth and strength of the retailing industry and the economic development of Washington State. The WRA believes that the Court of Appeals' decision significantly affects its ability to protect its property rights, employees, and customers from trespassers' activities.

III. ARGUMENTS IN SUPPORT OF REVIEW.

A. The Court of Appeals' decision impermissibly devalues the right of Washington retailers to exclude protestors from their business establishments.

The Court of Appeals' decision is contrary to the fundamental right of Washington businesses to exclude trespassers. *Olwell v. Nye & Nissen Co.*, 26 Wn.2d 282, 286, 173 P.2d 652 (1946) ("The very essence of the nature of property is the right to its exclusive use."). As the Supreme Court of the United States has made clear, just because retailers are open to the public for shopping does not transform their property into a public forum for protesters to congregate. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 565, 92 S. Ct. 2219, 33 L. Ed. 2d 131 (1972) ("The invitation is to shop for the products which are sold. There is no general invitation to use the parking lot ... or the sidewalk except as an adjunct to shopping."). A retailer's "parking spaces are not public streets and thus available for parades ... or other activities for which public streets are used." *Id.* (quotations omitted).

This Court concurs. "[P]roperty [does not] lose its private character merely because the public is generally invited to use it for

designated purposes." *Waremart, Inc. v. Progressive Campaigns, Inc.*, 139 Wn.2d 623, 651, 989 P.2d 524 (1999) (upholding injunction prohibiting petitioners from entering retailer's stores and parking lots). Under Washington law, the *lone* exception in the retail context is ballot initiatives, and then only for shopping malls and not for individual retailers—outside that, this Court has rejected *any* notion that free speech rights give one access to private property.[2] The bottom line is this: if the UFCW or other groups want to protest, they have every right to do so on public property around retail stores, provided they do not breach the peace or block traffic. But they have no right to come onto a retailer's property to conduct their protest.[3]

By not allowing Walmart to enforce its property rights and no-solicitation policy (which many retailers have), merely because Walmart earlier sought redress under federal law, the Court of Appeals' decision threatens to undermine basic property rights protections. This Court should grant review to reaffirm those protections.

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[2] *See Southcenter Joint Venture v. Nat'l Democratic Policy Comm.*, 113 Wn.2d 413, 428-29, 780 P.2d 1282 (1989), (clarifying that the access right recognized in *Alderwood Assocs. v. Washington Envtl. Coun.*, 96 Wn.2d 230, 635 P.2d 108 (1981), arises from the initiative provisions of the Washington State constitution, is limited to initiative signature gathering, and does not protect general speech activities on private property).

[3] There is no federal labor law right to trespass. Union agents have a right of access on an employer's property *only* in "rare" cases of disparate treatment or inaccessibility (such as logging camps), neither of which apply here. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533-39, 112 S. Ct. 841, 117 L. Ed. 2d 79 (1992). *Cross Country Inn, Inc. v. South Cent. Dist. Council*, 552 N.E.2d 232 (Ohio Ct. App. 1989) (Ans. 1), decided prior to *Lechmere*, is irrelevant.

B. Employers may file Unfair Labor Practice charges seeking to protect employee rights and still seek relief under state law.

This kind of case is *not* "unique" and "unlikely to occur again." (Ans. 1.) Employers often need to seek relief before the NLRB to protect their employees' rights under federal law[4] and simultaneously seek relief in state court to protect their business or other interests under state law.[5] For instance, in *Linn v. United Plant Guard Workers of America,* 383 U.S. 53, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966), an employer filed ULP charges alleging that a union's distribution of leaflets had restrained and coerced its employees (the same allegation Walmart made to the NLRB) in the exercise of their NLRA rights. The Board dismissed the ULPs, and a manager sued for defamation based on ***the same leaflets***. *Id.* at 56-57. There was no preemption.

And in the controlling case here -- *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 89 S. Ct. 1745, 56 L. Ed. 2d 209 (1978) -- the Court ***presumed*** the retailer could have filed a ULP charge arising out of the *same* union picketing that gave rise to the state law trespass action. *Id.* at 198. In fact, there was no preemption of a state obstruction-of-access claim even where the complaint expressly charged a NLRA violation. *United Auto., Aircraft &*

[4] In 2010 alone, the last year in which the NLRB published its annual case statistics on-line, employers in Washington filed 139 ULPs against unions. *See* https://www.nlrb.gov/reports-guidance/reports/annual-reports/statistical-tables-fy-2010 (Table 6A).

[5] The employers in *GSM, Inc. & Local 585, UAA*, 284 NLRB 174 (1987), and *Donelson Packing Co. & Amalgamated Food & Allied Workers*, 220 NLRB 1043 (1975), did what Walmart did—filed ULP charges based on the union's intimidation and coercion of employees, while also seeking an injunction against the union's trespasses.

Agr. Implement Workers v. Russell, 356 U.S. 634, 637, 645 n.2, 78 S. Ct. 932, 2 L. Ed. 2d 1030 (1958). So it is no surprise that Walmart's evidence before the NLRB overlapped with its evidence before the superior court.

Thus, Walmart's withdrawal of its ULP has nothing to do with the real issues here. Nor does it matter whether Walmart filed a ULP charge in the first place, or refiled the same charge and pursued it all the way to the end (and lost, as the employer did in *Linn*). "The critical determination ... is whether a state ... claim involves an identical controversy to that which *could have been brought* before the NLRB." *Hotel Employees & Rest. Employees Local 8. v. Jensen*, 51 Wn. App. 676, 679, 754 P.2d 1277 (1988) (emphasis added). Thus, preemption does not turn on a plaintiff's choice of where to file; if there is preemption, only one tribunal has jurisdiction, no matter who files first and where. *Angelo Prop. Co. v. Hafiz*, 167 Wn. App. 789, 808, 274 P.3d 1075 (2012) (parties cannot consent to subject matter jurisdiction; "a court either has [it] or it does not").

That is what the UFCW fails to appreciate -- under this decision, *any* trespass action brought by an employer against any group "advocating" for worker rights would be dismissed because Division Two assumed that the NLRB is responsible for deciding trespass claims. But as Walmart explained (Pet. 15-16), the NLRB cannot (and will not) stop

trespassing.[6] Indeed, unlawful interference with employee rights to free choice can take place *without* a trespass.[7]

Thus, under Division Two's rationale, state courts could not stop an activist group from broadcasting right next to the customer check-out lines at the front of a store, so long as there is a "labor dispute." And that term can be loosely defined, and certainly is not limited to union organizing campaigns. Indeed, in this case the UFCW expressly disclaimed any intent to represent Walmart employees in the collective bargaining context; according to the UFCW, it was protesting to "have Walmart publicly commit to adhering to labor rights and standards." (CP 305, 447.)

Hillhaven Oakland Nursing & Rehabilitation Center v. Health Care Workers, 41 Cal. App. 4th 846, 49 Cal. Rptr. 2d 11 (1996), on which the UFCW relies (Ans. 1, 6), illustrates WRA's point. As the California Court of Appeals explained: "[T]he local interest exception [to NLRA preemption] is founded upon a recognition that certain conduct can be the

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[6] *E.g.*, *Taggart v. Weinacker's Inc.*, 397 U.S. 223, 227-28, 90 S. Ct. 876, 25 L. Ed. 2d 240 (1970) (Burger, C.J., concurring) ("Congress has...provided no remedy to an employer within the ... NLRA to prevent an illegal trespass on his premises."); *May Dep't Stores v. Teamsters Local 743*, 355 N.E.2d 7, 10-11 (Ill. App. 1976) ("[S]ince trespass by a union organizer is not an [ULP], the NLRB is unable to grant any relief to a deserving employer."); *Burger King*, 265 NLRB 1507, n.2 (1982) ("whether or not conduct constitutes a trespass is a matter for the state and local authorities" (quotations omitted)); *Nat'l Organization Masters, Mates & Pilots of Am.*, 116 NLRB 1787, 1793, 1796 (1956) ("the act of trespass [by union] did not of itself violate the Act").

[7] *E.g.*, *NHHSE Union*, 339 NLRB No. 135, *1 (2003) (union organizer invited onto employer's property); *Teamsters Cannery Local No. 630*, 275 NLRB 911, 911 (1985) (coercion occurred away from workplace).

basis for state court action even though the ***same conduct*** might constitute an unfair labor practice." *Id.* at 18 (emphasis added & citing *Sears*).[8]

The UFCW also asserts (citing no evidence) that "when unions conduct activities on company property, companies file trespass lawsuits only, as Sears did." (Ans. 2.) Again, that is not true. A cursory search of the NLRB database produces numerous cases where employers filed ULP charges involving trespassing union agents.[9] There could be a host of business reasons why employers in the cases the UFCW cites did not file ULP charges against the trespassing union, including that there were no allegations of unlawful coercion or intimidation *of employees*.

Finally, the NLRB cases that the UFCW cites also prove the WRA's point. For example, in *District 65*, 157 NLRB 615 (1966), the ALJ distinguished the employee-coercion ULP from a trespass action: "While most persons capable of judging, would likely ... see in [the union actions] conduct calling for either police action or a remedy for trespass,

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[8] *Hillhaven* (unlike this case) is truly a one-of-a-kind case and easily distinguished: (i) there was a collective bargaining agreement by which the employer *gave the union access to its property*; (ii) the NLRB issued a complaint on the employer's ULP; and (iii) the NLRB brokered a settlement by which the employer again granted access rights. The California court was concerned about the risk of interference with pre-existing, *employer*-negotiated access rights. 49 Cal. Rptr. 2d at 18-19.

[9] *E.g.*, *Metro. Reg'l Council of Carpenters*, 2011 WL 1924130, at *3 (NLRB Div. of Judges) (conduct "may violate trespass[] ... laws, but "does not violate the [NLRA]"); *Mates*, 116 NLRB at 1793 ("Board's essential concern in [such] a case ... is the protection of employees' rights"); *Teamsters Local 115*, 275 NLRB 1547, 1557 (1985) (order prohibited pushing, chasing, spitting and mass picketing, but not trespassing).

or both, whether such action violates [the NLRA] ... is not beyond doubt." *Id.* at 622.[10]

C. The Court of Appeals' decision will force retailers to take steps to protect their customers which could put everyone involved at risk of violence.

The Court of Appeals will force retailers across the State to expose their customers and employees to an unnecessary risk of violence. There is no question that repeated trespasses in the face of the property owner's demands to cease and desist create a threat of violence. That was the situation *Sears* addressed. If Sears could not gain access to state court to stop the union's trespasses, the Court reasoned, its only options would be to tolerate the trespass (an option the Court itself rejected, since it violated state law) or resort to self-help with security guards. 436 U.S. at 202.

With self-help, there is an "unacceptable possibility of precipitating violence." *Sears*, 436 U.S. at 208. "[I]n light of the danger of violence inherent in many instances of sustained trespassory picketing," the Justices explained, "relief often may come too late to prevent interference with the operation of the target business." *Id.* at 213 & n.* (noting Congress did not intend to "create a situation where there is no forum to which the parties may turn for orderly interim relief in the face of a potentially explosive situation").

[10] The order in *Bartenders, Local 2*, 240 NLRB 757 (1979) (Ans. 10), barred only coercive, trespassory conduct vis-à-vis *employees*. *Id.* at 761-62.

It is not hard to appreciate the security risks from customers' proximity to protestors, some of whom may become aggressive when confronted. Moreover, if retailers must resort to using security guards to confront protestors, they face increased risk of liability for claims of assault, false imprisonment, and other torts.

In retail, customer service is king, and rightly so. There is no greater concern than ensuring the customer has a positive shopping experience and is willing to return to purchase more merchandise. A retailer neglects the customer at its peril; it is a lesson too often learned by businesses that have had to shut their doors (and lay off employees) due to sunken revenue. Only an injunction against future trespassory protests can protect the employer's customer good will and prevents customers from shopping elsewhere.

IV. CONCLUSION.

The Washington Retail Association respectfully submits that Division Two's decision in this case warrants review.

Respectfully submitted this 4th day of February, 2016.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 4th day of February, 2016.

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- *Motion for Leave to File Memorandum of Amicus Curiae Washington Retail Association in support of Petition for Review; and,*
- *Memorandum of Amicus Curiae Washington Retail Association in support of Petition for Review.*

Case Name: Wal-Mart Stores, Inc. v. United Food and Commercial Workers International Union, Organization United for Respect at Wal-Mart, et al.

Cause #: 92469-4

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