

No. 45442-4-II

**DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON**

WAL-MART STORES, INC.,

Plaintiff-Appellant,

v.

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

Defendants-Respondents.

ON APPEAL FROM
PIERCE COUNTY SUPERIOR COURT
(Hon. Jack Nevin)

**APPELLANT WAL-MART STORES, INC.'S
OPENING BRIEF**

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I. INTRODUCTION

The trial court's order dismissing this state law trespass action based on federal preemption rests on an inaccurate recitation of law, and represents an untenable position under Washington property rights law. Simply put, the trial court's order gives Defendants the right to violate Washington trespass laws with impunity. Indeed, the Defendants' position can be summarized in five words: "Break the law, get rewarded." According to Defendants, if they act so badly as to arguably or actually violate federal labor laws against bullying employees, this State can do nothing to stop their repeated demonstrations on Walmart's private property. Fortunately, that is not the law.

Defendants' agents and supporters come onto Walmart's property uninvited and without authorization—often times *inside* Walmart's retail stores—and engage in mass demonstrations and "flash mobs" that involve marching in circles, song and dance numbers, banging on pots and pans, yelling through bull horns, soliciting customers and working Walmart employees (referred to as "associates"), and blocking ingress, egress, and access. Despite their claims of "peaceful activities," Defendants cannot really dispute their disruptive and confrontational behavior. They are proud of it. They video themselves conducting demonstrations and post the videos on YouTube® for all to see. And Defendants refuse to stop, even though they are repeatedly told not to enter for non-shopping purposes and then told again to leave the premises.

Defendants try to hide behind the National Labor Relations Act (“NLRA”), but neither Congress nor the U.S. Supreme Court require a state court to shirk its duty to maintain public order and protect property rights just because there is arguably a “labor” dispute. To the contrary, in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), the Supreme Court upheld a state court injunction against *peaceful* trespassory picketing even though the conduct might also have violated the NLRA. Walmart’s lawsuit falls squarely within *Sears*’ holding. That should be the end of the matter. Tellingly, courts in Arkansas, California, Colorado, Florida, Maryland and Texas have all relied on *Sears* in rejecting Defendants’ preemption arguments.

Here, Walmart’s request for injunctive relief does not interfere with the NLRA: the National Labor Relations Board, which administers the NLRA, focuses only on the coercive effect of Defendants’ tactics on Walmart associates’¹ freedom of choice in whether to support or reject the union, *regardless of where those tactics are employed* (on or off the employer’s property). In contrast, a Washington court evaluates only the rights of the property owner/leaseholder under state law. That the factual setting is the same is irrelevant: the *legal* controversies are different.

The trial court below, however, chose to rely on its gut feelings instead of settled law. It made an “admittedly subjective” finding that, *absent violence*, disruptive trespass and blatant violations of property

¹ Walmart refers to its employees as “associates.”

rights do not constitute matters deeply rooted in local interest and responsibility (the hallmark of a state interest that the NLRA *does not* preempt). But that is not the law. And the Supreme Court made that abundantly clear in *Sears* when it upheld a California state court injunction against *peaceful* trespass. Indeed, Walmart is not aware of any court that has applied the trial court’s rationale, and neither the trial court nor the Defendants cited any such case.

Defendants know full well that the NLRB has no authority or jurisdiction to enjoin their trespasses. Thus, if Washington courts do not exercise jurisdiction over this case, Walmart would have no legal remedy to stop Defendants’ unlawful activities, forcing it to consider “self-help” measures. But that alternative, as the U.S. Supreme Court noted, poses an unacceptable risk of violence.

If this Court vacates the trial court’s dismissal order based on preemption, it should go on and review—and reject—Defendants’ motion pursuant to the Act Limiting Strategic Lawsuits Against Public Participation (“anti-SLAPP”). No fact determinations are necessary, and it would cause unnecessary delay to remand this case for that purpose, only to have a second appeal under the SLAPP statute.

Walmart’s stand-alone retail stores are not public forums, and Defendants have offered no evidence to the contrary. This trespass suit is about conduct—*not speech*—and illegal conduct at that. Indeed, the U.S. Supreme Court held long ago that unions have no First Amendment right to conduct labor demonstrations on private retail property simply because

customers may shop there. Thus, Defendants cannot shield their unlawful trespasses on Walmart's private property by claiming they are incidentally tied to speech. Moreover, Defendants have ample alternatives to deliver their message; they do not need to conduct disruptive flash mobs and the like on private property. They are free to peacefully parade and chant and wave signs on public property to their hearts' content, so long as they do not block access. Moreover, even assuming Defendants' arguments trigger the SLAPP statute (which they do not), Walmart has presented clear and convincing evidence that it has a strong probability of prevailing on the merits of its claims.

Ultimately, if the First Amendment protects Defendants' illegal conduct simply because Walmart is "open to the public" for a particular purpose, *i.e.*, shopping, this Court would be powerless to stop anti-government protestors from marching through its own courtroom with a band during oral argument. That can't be the law.

II. ASSIGNMENTS OF ERROR

The trial court erred in (a) concluding that the NLRA preempts Walmart's state court trespass action, and (b) failing to consider and deny Defendants' Anti-SLAPP motion.

III. STATEMENT OF ISSUES

A. Preemption

1. Whether the United States Supreme Court in *Sears* set forth the controlling analysis for a *Garmon* preemption defense to a state law trespass action.

2. Whether the legal controversy presented by Walmart's state law trespass action is different from the legal controversy it could have raised before the NLRB involving the federal labor law rights of Walmart associates to be free from coercion in their decision regarding unionization, such that there is no NLRA preemption under the "arguably prohibited" prong of the *Garmon* analysis.

3. Whether Defendants can raise or sustain a preemption defense under the "arguably protected" prong of the *Garmon* analysis where they claim neither disparate treatment nor employee inaccessibility and have no access-related charge before the NLRB.

B. Anti-SLAPP Motion

1. Whether Defendants can carry their burden of establishing that the anti-SLAPP statute, which is intended to protect citizens' free expression by shielding them from meritless lawsuits designed to chill such expression, applies in this case where Walmart seeks to stop Defendants' trespassing, not their speech.

2. Assuming Defendants can meet their burden, whether Walmart has shown by clear and convincing evidence that it is likely to prevail on its trespass action.

IV. STATEMENT OF THE CASE

A. Defendants Engage in Disruptive, Trespassory Demonstrations in Washington.

Defendant UFCW is a national labor organization whose stated mission is to represent grocery, retail, meat packing, and food processing

workers in many states, including Washington. Defendant Organization United for Respect at Walmart (“OURWalmart”) is a labor organization and UFCW’s wholly-owned subsidiary and agent.

Over the past two years, Defendants UFCW and OURWalmart have repeatedly entered onto Walmart’s private property in Washington—without any permission or authorization—and engaged in a series of loud and disruptive mass demonstrations. Defendants do not dispute these activities; instead, they brag about them and post videos on social media. *See, e.g.*, CP 249-50 (describing actions inside Walmart’s Washington stores and resulting publicity); CP 881, 1088, 1093, 1095, 1097 (video clips of Defendants’ demonstrations).

For example, on November 3, 2012, around 20 demonstrators entered a Walmart store in Auburn, filled shopping carts with merchandise, and marched through the aisles, banging on pots and pans and chanting, clapping and shouting loudly, “Who’s Walmart is it? It’s [O]ur Walmart!”² Several customers held their ears and screamed for the demonstrators to stop. CP 1285, ¶ 3. The demonstrators blocked space next to cash registers. CP 1274, ¶ 4; CP 1288, ¶ 9. Customers asked why Walmart allowed Defendants to demonstrate inside the store, rather than making them leave. CP 510, ¶ 5.

² CP 1278, ¶ 8; CP 1286-87, ¶¶ 2-7; CP 1274, ¶ 5; CP 1251-52, ¶¶ 2-3; CP 1124-25, ¶¶ 1-3; CP 509-10, ¶¶ 2-4.

Just days later, at a Walmart store in Federal Way, nearly 50 demonstrators crowded the store sidewalk, handing out OURWalmart flyers and chanting loudly. CP 512, ¶ 3; CP 518, ¶ 5; CP 1127, ¶ 7. The store manager asked them to leave, but they refused and told him to call the police. CP 518, ¶ 4. After the police arrived and moved the demonstrators off Walmart's property, a group of 15 or so of them returned to the front of the store. CP 512-13, ¶¶ 6-7; CP 1127, ¶ 4.

1. Defendants disrupted operations at various stores on Black Friday 2012.

On November 23, 2012, the day after Thanksgiving and one of the busiest shopping days of the year for Walmart, a group of around 15 demonstrators assembled in the parking lot of Walmart's Lakewood store and entered the store separately and pretended to shop, filling their carts with merchandise. CP 1122-23, ¶ 2. Defendants then met at the front of the store, blocked access to cash register lanes, and loudly sang and chanted anti-Walmart lyrics to the tunes of Christmas carols. *Id.* Walmart asked them to leave, but they refused. *Id.*, ¶¶ 3-4. The demonstrators left behind carts full of merchandise, and Walmart had to discard the perishable goods. *Id.*, ¶¶ 8-10.

That same day, nearly 50 demonstrators marched immediately outside the entrance to the Walmart store in Port Angeles and handed out OURWalmart balloons. CP 850, ¶ 2; CP 1117, ¶ 5. They refused to leave, staying nearly two hours. CP 1117, ¶ 6. Customers complained that they felt harassed. *Id.*, ¶ 7. Also that same day, around 100 to 150

demonstrators marched on the parking lot of – and in front of the entrance to – a Renton Walmart store, carrying signs and chanting. CP 856, ¶¶ 5-6; CP 847, ¶ 3; CP 841-43, ¶¶ 7-9. Customers had difficulty entering the lot and many left. CP 847, ¶¶ 6-7; CP 843-45, ¶¶ 10-11 & 17. The demonstrators blocked the entrance doors. CP 844, ¶ 14; CP 847, ¶ 4.

2. Defendants continued to trespass in 2013.

On April 6, 2013, Defendants returned to the Lakewood Walmart store. Demonstrators came in the store, and when asked to leave, they clustered together and chanted loudly. The demonstrators then lined up near registers and chanted for five minutes. CP 444, ¶¶ 7-11; CP 453, ¶ 3; CP 853, ¶¶ 5-6. Customers complained, and cashiers stopped working to see what was going on. CP 452-53, ¶¶ 2, 4; CP 853, ¶ 6.

A few weeks later, demonstrators entered the Longview store and asked to speak with the store manager. As the store manager approached, the group turned and began to walk around the store’s interior “action alley.” CP 1112-13, ¶¶ 2-3. The store manager informed them that they were trespassing and asked them to leave at least three times. *Id.*, ¶¶ 4, 7, 9. Demonstrators also yelled loudly at cashiers and told them to join the union. CP 826-27, ¶ 3. A few demonstrators yelled to customers, “Wrong day to shop here! They are closed!” “Don’t shop here; shop at Fred Meyer or Safeway!” CP 827, ¶ 4; CP 1113, ¶ 8.³

³ One demonstrator stopped a customer by holding out his hand in the stop position. The customer stopped and said “is it illegal to shop here?” The demonstrator responded, “today it is.” CP 1113, ¶ 8.

On July 17, 2013, at a Walmart store's grand opening in Tacoma, 10 or so demonstrators handed out fliers inside the store. They refused to leave when a manager approached them. CP 440-41, ¶¶ 2-5; CP 845, ¶¶ 19-21. Two weeks later, at the Federal Way store, nearly 25 demonstrators congregated near the customer service desk, refusing to move. CP 504-05, ¶¶ 2-5. Defendants surrounded the shift manager and read him a petition that accused him of lying, being disrespectful, lacking integrity, and causing homelessness. *Id.*, ¶¶ 4-7. The demonstrators threatened further "actions at this store" and against other managers. *Id.*

3. Defendants know that Walmart's invitation to the public is limited to shopping.

On multiple occasions, Walmart has permanently revoked any conceivable license or authorization for Defendants to come onto Walmart's property for any purpose other than shopping. CP 54-55, 65-66, 74, 83-84, 1259. Walmart managers have repeatedly told Defendants that they are not permitted to engage in demonstrations or other non-shopping activities on Walmart's private property and that they must leave. Still, they trespass over and over again, and refuse to leave even if a Walmart manager asks them to, and force law enforcement officers to get involved. CP 60, 89-92.

B. Defendants Refused to Stop; Walmart Is Forced to File This Lawsuit.

Despite Walmart's repeated demands that Defendants stop trespassing, they refused. Accordingly, Walmart commenced this action on April 17, 2013 and, based on Defendants' *continued* trespasses

thereafter, filed its First Amended Complaint (“FAC”) on June 10, 2013. This action involves only Walmart’s private property, and does *not* seek relief against current Walmart associates. CP 49. Nor does Walmart seek to restrain speech. Defendants are free to publicize their message; they just can’t trespass on Walmart’s private property while doing so.

On June 28, 2013, Defendants answered the FAC. On August 9, 2013, the last day of the 60-day statutory time period for doing so, Defendants filed an anti-SLAPP motion that included an NLRB preemption argument. On August 26, 2013, Walmart filed its opposition, along with more than 25 declarations describing Defendants’ numerous trespassory demonstrations in the State over the past year or so. Walmart also included with its evidence five video clips of demonstrations at the Renton, Auburn, Federal Way and Lakewood stores. On September 6, 2013, the trial court held oral argument on the SLAPP motion, focusing on the NLRA preemption issue.

C. The Trial Court Found That The NLRA Preempts Walmart’s Trespass Lawsuit Because Defendants Did Not Engage In Violent Acts.

On September 13, 2013, the trial court issued an oral ruling, which is the subject of this appeal. It began by noting that when labor activity is “arguably subject” to the NLRA, “the state as well as federal courts must defer to the ... [NLRB].” VRP (9/13/13) at 4:6-8. The trial court went on to note that there are two exceptions to that rule: “if the involved conduct is only of peripheral federal concern under the [NLRA] ... or, if the activity touches on an interest so deeply rooted in local feelings and

responsibility that in the absence of compelling congressional direction,” state courts retain jurisdiction over the activity. *Id.* at 4:11-17.

The trial court summarized Walmart’s position as follows: this is a “common law tort,” and while Defendants are free to do or say whatever they want, they can’t do it on Walmart’s private property. *Id.* at 7:1. In contrast, the trial court summarized Defendants’ position as being “about free speech [and] association.” *Id.* at 7:4-5. “[T]he reality,” the trial court opined, “is it’s an amalgam of both. It is that free speech and that association, but manifesting itself in a way that [Walmart] is addressing by virtue of the filing of this action.” *Id.* at 7:5-9.

While noting a “compelling” argument that property owners in Washington should have the right to exclude trespassers, the trial court seemed to fashion what he personally felt was a “just” result, referencing the “push-pull between the two sort of sides to this issue.” *Id.* at 10:20-21. Ultimately, it did not find “sufficient evidence to meet the standard of an interest deeply rooted in local feeling and responsibility,” characterizing its ruling as “very subjective.” *Id.* at 15:17-19, 16:10.

There were two determining factors. First, the trial court dwelled on the fact that Walmart initially filed—but later withdrew—an Unfair Labor Practice (“ULP”) charge against Defendants. As the trial court put it: “Here, Walmart invoked the [NLRB]’s jurisdiction. The defendant, in turn, responded and also invoked the [NLRB]’s jurisdiction.... By initially pursuing relief with the [NLRB], [Walmart] implicitly recognized the [NLRB]’s jurisdiction over their claims.” *Id.* at 13:1-17.

Second, the trial court viewed Defendants' demonstrations as non-violent and not an intentional tort. *Id.* at 16:6-10 ("I do not find that which has been alleged rises to the level of that deeply rooted, that interest deeply rooted in local feeling. *I don't see it rises to the level of violence or [sic] the intentional tort or [sic] the threat of violence.*" (emphasis added)). The trial court seemed to appreciate that trespassory mass demonstrations could create a threat of violence, but then dismissed that concern because "at any given time in this County City Building and this courthouse, there is a threat of violence." *Id.* at 16:11-13.

Ultimately, the trial court decided that the NLRA preempts this lawsuit (as well as the SLAPP statute). CP 1405. This appeal followed.

V. ARGUMENT

A. **The Trial Court Erred By Finding That Walmart's State Law Trespass Action Is Preempted By The NLRA.**

Notwithstanding the NLRA, state courts retain jurisdiction over certain labor-related matters, including trespass claims like those in this case. The trial court correctly began its analysis with the *Garmon* preemption doctrine, "because if you have preemption, then that affects if ... you would go forward." VRP (9/13/13) at 4:3-5. After that, however, the trial court departed from any legal authority and substituted its subjective feeling for the settled rule of law. This Court reviews federal preemption issues *de novo*. *Peterson v. Kitsap Cmty. Fed. Credit Union*, 171 Wn. App. 404, 416-17, 287 P.3d 27, 33 (2012).

In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), the Supreme Court announced a general rule (subject to exceptions) that the NLRA preempts state regulation of conduct that the NLRA actually or arguably protects or prohibits. *Id.* at 244-45. The *Garmon* preemption analysis proceeds as follows: a court determines in the first instance whether the NLRA actually or arguably prohibits or protects the conduct that the state lawsuit seeks to regulate. *Id.* at 245. If so, the NLRA ordinarily preempts otherwise applicable state law and procedures so as to not interfere with the NLRA statutory scheme. *Id.* However, if the conduct at issue “touches interests so deeply rooted in local feeling and responsibility that, in absence of compelling congressional direction, [the Court] [cannot] infer that Congress had deprived the States of the power to act,” the Court will refuse to invalidate state regulation or sanction of the conduct. *Id.* at 244; *see also United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 657 (1954) (noting that Congress did not give NLRB “such exclusive jurisdiction over the subject matter of a common-law tort action ... as to preclude an appropriate state court from hearing and determining its issues where such conduct constitutes an unfair labor practice under [the NLRA]”).

Since *Garmon*, the Supreme Court has repeatedly held that the NLRA does not preempt state tort lawsuits involving important local interests because the state tort and federal labor “legal controversies” are different – which means that the state action will not interfere with the NLRA statutory scheme – even though they arise in the same factual

setting. See, e.g., *Sears*, 436 U.S. at 196-97 (“[a]lthough the arguable federal violation and the state tort arose in the same factual setting, the respective controversies presented to the state and federal forums would not have been the same” (citing *Farmer v. United B’hood of Carpenters & Joiners of Am.*, 430 U.S. 290, 304-05 (1977)); *Belknap, Inc. v. Hale*, 463 U.S. 491, 510 (1983) (“The Board would be concerned with the impact on strikers not with whether the employer deceived replacements”); *Linn v. United Plant Guard Workers of Am.*, 383 U.S. 53, 63 (1966) (“The injury that the statement might cause to an individual’s reputation – whether he be an employer or union official – has no relevance to the Board’s function.”); *Automobile Workers v. Russell*, 356 U.S. 634, 637, 645 & n.2 (1958) (no NLRA preemption in state obstruction of access case “even though the amended complaint charged a violation of [the NLRA]” and even though the Court “assume[d], for the purposes of this case, that the union’s conduct did violate [the Act]”); see also *Radcliffe v. Rainbow Const. Co.*, 254 F.3d 772, 784-86 (9th Cir. 2001) (rejecting preemption claim despite “[t]he fact that a state tort may also constitute an unfair labor practice” because “the state court deciding the tort claim would focus on different issues from those central to the unfair labor practice claim”).⁴

⁴ Courts in Arkansas, California, Colorado, Florida, Maryland, and Texas (both a trial court and the Texas Court of Appeals) rejected these same Defendants’ identical NLRA preemption arguments in similar trespass litigation in those states. Appellant’s Unopposed Request for Judicial Notice. As Defendants themselves pointed out, “[t]his suit is one of six similar lawsuits filed by Walmart in six states. CP 336 n.8.

1. *Sears* is dispositive of Defendants’ argument under the “arguably prohibited” prong.

The trial court erred by failing to apply *Sears*, which controls the preemption analysis in this case. As the Florida state court addressing these same preemption arguments concluded, “the claims raised in [Walmart’s complaint] fit squarely within the exception to federal preemption identified in *Sears*....” *Wal-Mart Stores, Inc. v. UFCW*, No. 2013-CA-004293-O, 2013 WL 6704653 (Fla. 9th Cir. Ct. Nov. 21, 2013).⁵

Sears says unequivocally that a state court can exercise jurisdiction over a union’s conduct

- based on its *trespassory location*,
- even when it is *peaceful* and non-violent, and
- even when the union’s exact *same* conduct arguably or actually gives rise to a claim against the union for violating some aspect of federal labor law.

In *Sears*, a local union picketed a Sears department store because it did not hire carpenters from the union. 436 U.S. at 182. Like many of the Walmart stores involved in this action, the stand-alone Sears store was located in the center of a large rectangular lot, and was surrounded by walkways and a large parking area. *Id.* Three sides of the lot adjoined a public sidewalk. *Id.* The picketers patrolled either on the “privately

⁵ Florida Rules of Procedure permit the citation of Florida trial court decisions. Fla. R. App. Proc. 9.800(c).

owned walkways next to the [store] or in the [private property] parking area a few feet away.” *Id.* The picketing “was peaceful and orderly.” *Id.*

When Sears asked the union to remove the picketers from its property, the union refused, insisting the pickets “would not leave unless forced to do so by legal action.” *Id.* at 183. Sears sought an injunction in state court, and the trial court rejected the union’s NLRA preemption argument and entered an order prohibiting the pickets from trespassing on Sears’ private property. *Id.*

On appeal, the Court accepted that the picketing itself (not its location) “was both arguably prohibited and arguably protected by federal law,” *i.e.*, the NLRA, due to the potential prohibited recognitional/work-assignment objectives of the picketing. *Id.* at 187. But, like Walmart here, the Court noted that Sears did not assert a claim in state court that the location of the picketing violated any *federal* law; “[i]t sought simply to remove the pickets from its property to the public walkways, and the injunction issued by the state court was strictly confined to the relief sought.” *Id.* at 185.

Consequently, the Court rejected the union’s *Garmon* preemption argument. The Supreme Court explained:

The critical inquiry, therefore, is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court *is identical to* ... or different from ... that which could have been, but was not, presented to the Labor Board.

Id. at 197 (emphasis added). “*For it is only in the former situation* that a state court’s exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid.” *Id.* (emphasis added).

The trial court in this case missed that core holding of *Sears*: even though the NLRA “arguably prohibited the trespassory demonstration as unlawful ‘work reassignment’ or ‘recognition’ picketing,” the Supreme Court held that *Sears*’ state law action was ***not preempted***:

[T]he controversy which *Sears* might have presented to the Labor Board *is not the same* as the controversy presented to the state court. If *Sears* had filed a charge, the federal issue would have been whether the picketing had a recognitional or work-reassignment objective; decision of that issue would have entailed relatively complex factual and legal determinations completely unrelated to the simple question whether a trespass had occurred.

Id. at 198 (emphasis added). “Conversely,” the Supreme Court reasoned, “in the state action, *Sears* only challenged *the location* of the picketing; whether the picketing had an objective proscribed by federal law *was irrelevant* to the state claim. Accordingly, permitting the state court to adjudicate *Sears*’ trespass claim would create *no realistic risk of interference* with the Labor Board’s primary jurisdiction to enforce the statutory prohibition against unfair labor practices.” *Id.* at 198 (emphasis added). Thus, in a case also involving the UFCW, the Washington Court of Appeals noted that under *Sears*, a “state court may determine state

trespass issues.” *UFCW Local 367 v. Canned Foods, Inc.*, 79 Wn. App. 54, 63, 900 P.2d 569, 574 n.7 (1995).

Just as in *Sears*, the legal controversies in this case and Walmart’s prior ULP charge are entirely different: employer property rights (under state trespass law) versus associate freedom of choice (under federal labor law). Walmart filed a ULP charge that alleged that some aspects of some of Defendants’ demonstrations violated NLRA § 8(b)(1)(A), which makes it unlawful to “restrain or coerce employees in the exercise of the rights guaranteed in [NLRA] section 7,” by trying to intimidate and bully associates into supporting Defendants.⁶ However, whether Defendants violated Walmart associates’ right to be free from such coercion would turn on complex legal questions under federal labor law separate and apart from whether the demonstrators trespassed.

Most notably, a trespass claim does *not* require a showing of coercive conduct. *Kilb v. First Student Transp., LLC*, 157 Wn. App. 280, 289, 236 P.3d 968, 973 (2010) (noting that there is NLRA preemption only “[i]f the conduct relied on to prove an *essential* element of the state action is conduct that is arguably covered by the Act” (emphasis added)).

⁶ Walmart alleged that Defendants “violated [§] 8(b)(1)(A) of the [NLRA] by planning, orchestrating, and conducting a series of unauthorized and blatantly trespassory in-store mass demonstrations, invasive ‘flash mobs,’ and other confrontational group activities at numerous facilities nationwide (including, but not limited to, the facilities listed in the attached spreadsheet) by which the UFCW restrained and coerced employees in the exercise of their Section 7 rights (which includes the right to refrain from supporting the UFCW). . . .” CP 243.

A person is liable for common law trespass if he “intentionally (a) enters land in the possession of the other, or causes a thing or a third person to do so, or (b) remains on the land.” *Bradley v. Am. Smelting & Refining Co.*, 104 Wn.2d 677, 681, 709 P.2d 782, 785 (1985); *see also* CP 347 (Defs.’ Mot.) (“a trespasser is defined as a person who enters or remains upon land of another without permission or invitation, express or implied”). That’s all it takes for someone to commit a trespass; there is no requirement to show that the individual engaged in other illegal conduct of any type once unlawfully on another’s premises. Put another way, Walmart does not have to show in a state court trespass action that Defendants tried to bully associates into supporting them (conduct arguably covered by the Act) to establish any element of its trespass claim.

Consequently, as in *Sears*, the trial court can resolve this trespass action without deciding whether a violation of NLRA § 8(b)(1)(A) occurred, and there is no realistic risk of interference with the NLRA statutory scheme. *See, e.g., Fla. Gulf Coast Bldg. Trades Council v. DeBartolo*, 392 So.2d 916, 918 (Fla. Dist. Ct. App. 1980) (“As in *Sears*, [the landowner] had no direct way to present the issue of location of handbilling to the Board; their complaint [to the NLRB] could deal only with the act of handbilling and its objectives.”); *Brown Jug, Inc. v. Teamsters Local 959*, 688 P.2d 932, 937 (Alaska 1984) (“In *Sears*, the NLRB would have considered whether the picketing itself constituted an unfair labor practice while the state court had merely been asked to determine whether the location of the picketing violated state trespass

laws.”); 2013 WL 6704653, at ¶ 2 (Fla. Order) (“Any legal controversy that might have been presented to the [NLRB] by the parties to this action, while they might arise out of the same facts, is or would be *radically different* from the present action....” (emphasis added)).⁷

And that’s where the trial Court erred in the first instance. It inappropriately conflated and equated “substantially identical” facts with identical legal controversies. VRP (9/13/13) at 13:11.⁸ That was reversible error. What matters is whether the “the controversy”—*not* the facts—are the same. *Beaman v. Yakima Valley Disposal, Inc.*, 116 Wn.2d 697, 709, 807 P.2d 849, 855 (1991) (“Thus, the ‘critical inquiry’ under *Garmon* is whether the [sic] controversy presented to the state court is identical with that which could be presented to the NLRB.” (quoting *Sears*, 436 U.S. at 196-97, 198 (no preemption “although the arguable federal violation and the state tort arose in the same factual setting”))).

⁷ After *Garmon* (1959) and before *Sears* (1978), courts were divided on the question of whether state courts had jurisdiction over peaceful trespassory activity. 436 U.S. at 184, n.7. Shortly after *Garmon*, the Washington Supreme Court held that the NLRA preempted state court power to issue an injunction against union picketing on owners’ real property. *Freeman v. Retail Clerks*, 58 Wn.2d 426, 363 P.2d 803 (1961). In light of *Sears*, however, *Freeman* is no longer good law, and the trial court did not cite *Freeman* in its ruling.

⁸ See VRP (9/13/13) at 12:4-11 (“[A]s I went through the complaint and attempted to juxtapose [it] and the ULP, I see the complaint in paragraph 16, 22, 32, 33, talking about – alleging issues that I think are substantially the same as that in the ULP. The ... planning, orchestrating and conducting a series of unauthorized and blatant trespasses [sic] in store, mass demonstrations.”).

To be sure, Walmart did note in its prior ULP charge that Defendants were trespassing at the time they sought to coerce Walmart associates into supporting the union. But stating that obvious contextual fact does not convert the charge into a claim that Defendants violated the NLRA by trespassing. Again, the ULP charge would have turned solely on whether Defendants violated associates' rights to be free from coercion and would require no analysis of state trespass law. Indeed, if Defendants hypothetically had full and complete access to Walmart's facilities, they could still have violated § 8(b)(1)(A) through the coercive tactics they used during their otherwise (hypothetically) lawful presence inside stores.

Defendants have falsely claimed that Walmart not only challenges the location of Defendants' activities (as in *Sears*), but also asserts that they trespassed in part due to the nature of their activities on Walmart's property. Walmart has difficulty understanding such an argument. Do Defendants suggest that a quiet flash mob in the produce aisle would not constitute trespass, but a loud one would? That makes no sense.

In any event, Walmart describes in its trespass Complaint what goes on during demonstrations—as it must—to distinguish Defendants' conduct from that of the shopper-invitee and to establish irreparable harm for purposes of injunctive relief. *See N.W. Gas Ass'n v. Wash. Utilities & Transp.*, 141 Wn. App. 98, 121-22, 168 P.3d 443 (2007); *Autoskill Inc. v. Nat'l Educ. Support Sys., Inc.*, 994 F.2d 1476, 1498 (10th Cir. 1993) (required showing of irreparable harm established by inability to determine number of customers lost to objectionable conduct). Of course,

what the demonstrators do or say during their demonstrations does not somehow transform their conduct from trespassory to non-trespassory.⁹

The trial court also erred in relying on the fact that Sears did not file a ULP charge in that case, while here, “Walmart invoked the jurisdiction of the [NLRB] by filing a ULP.” VRP (9/13/13) at 9:2-3, 13:7-9 ([I]n *Sears* ... because there was no ULP filed, there was no risk of overlapping jurisdiction.”).¹⁰ But the trial court overlooked or misunderstood that under the “arguably prohibited” prong of the *Sears* analysis ***the Court assumed Sears could have filed a charge.*** 436 U.S. at 198 (“*If Sears had filed a charge, the federal issue would have been*” (emphasis added)). Indeed, the filing or lack of filing of a ULP charge is irrelevant to the arguably prohibited analysis. Other Supreme Court decisions confirm this. Compare *Farmer*, 430 U.S. at 304-05 (no “arguably prohibited” preemption even though no ULP charge filed), with *Linn*, 383 U.S. at 63, and *Russell*, 356 U.S. at 637, 645 & n.2 (no “arguably prohibited” preemption even though ULP charge filed). Instead, the arguably prohibited analysis turns on whether the legal

⁹ The trial court disregarded NLRB guidance that demonstrates that *the NLRB* does not view Walmart’s action as preempted. In 1999, the UFCW challenged Walmart’s solicitation policy and its right to sue for trespass by filing a ULP with the NLRB. The NLRB’s Office of General Counsel concluded that Walmart’s solicitation policy was legally permissible and that Walmart did not violate labor law by suing the UFCW for trespass. CP 398-407.

¹⁰ Walmart withdrew its associate-coercion ULP charge because of the NLRB’s extended delay in taking any action.

controversies of a potential or actual ULP charge are identical (or not) to the state law action.¹¹

Because a state law trespass claim presents a different legal controversy than a NLRA associate-coercion charge, *Parker v. Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), cited by the trial court, is inapposite. There, the court found that plaintiffs' state law interference-with-contract and fraud claims were preempted because they presented the *same legal controversy* to the state court that the NLRB would have (and did) consider in determining whether the employer violated the NLRA. *Id.* at 1516-17 (state law fraud allegations in *Parker* "were nothing more than allegations that the Company failed to bargain in good faith ... in negotiating the concessions and in failing to reveal the likelihood of a plant closure," a legal controversy exclusively within the NLRB's jurisdiction). Here, Walmart's ULP charge related solely to Defendants' attempts to bully Walmart associates into supporting the union by trying to intimidate them in their workplace in violation of their NLRA rights. Walmart sought no relief for itself, and did not seek to vindicate its

¹¹ Defendants often try to confuse courts in these state law trespass cases (in Arkansas, California, Colorado, Florida, Maryland, and Texas) by mixing and matching the *Sears* "arguably prohibited" and "arguably protected" analyses. As discussed above, the filing or lack of filing of a ULP charge by an employer (or union) is irrelevant to the *Garmon* arguably prohibited analysis. As discussed below, the filing of a ULP charge by a union under two narrow circumstances (neither at issue here) can lead to NLRA preemption under the *arguably protected* prong of the *Garmon* analysis if the NLRB investigates and issues a complaint.

property rights or invoke the rights and remedies of Washington trespass law.¹² Moreover, *Parker* did not involve “deeply rooted” matters, like the fundamental property rights at issue in this case. (*Infra* at 27.)

Defendants also like to cite *Hillhaven Oakland Nursing & Rehabilitation Center v. Healthcare Workers*, 41 Cal.App.4th 846 (1996), but that unique case has nothing to do with this one. Indeed, the court there said it could not find any other preemption case with similar facts: (i) the alleged trespass arose in the context of a collective bargaining agreement between the employer and incumbent union, under which the employer gave the union access to its property; (ii) the NLRB issued a complaint on the employer’s 8(b)(1)(A) ULP charge; and (iii) the NLRB brokered a settlement by which the employer again gave the union access to its property. The California court was concerned about a strong risk of interference with pre-existing, NLRB-negotiated access rights *to which the employer had agreed*. None of those unique factors are present here.

This is a plain vanilla trespass case. In its state court action, Walmart challenges only the location of the Defendants’ disruptive demonstrations. Under *Sears*, there is no NLRA preemption under the “arguably prohibited” prong of the *Garmon* analysis.

¹² Indeed, Walmart did not – and could not – invoke the jurisdiction of the NLRB to address the trespass issue because, as noted below, the NLRB has no jurisdiction to enforce state trespass laws or protect an employer’s private property rights. (*Infra* at 32-35.)

2. There is no preemption under the “arguably protected” prong.

Sears, in connection with *Lechmere v. NLRB*, 502 U.S. 527 (1992), also disposes of any preemption argument under *Garmon*’s “arguably protected” prong. In *Sears*, the Court noted that the union did not claim that the NLRA protected its trespass and filed no ULP charge with the NLRB to that effect. Nevertheless, the Court analyzed the issue in light of the two-part *Garmon* preemption test.

The *Sears* Court first noted that, as a threshold matter, federal labor law does not generally preempt a state court jurisdiction over a trespass lawsuit even where federal labor law might “arguably protect” a union’s trespass because “experience under the [NLRA] teaches that such situations are rare and that a trespass is far more likely to be unprotected than protected.” 436 U.S. at 204. However, *Sears* left open the question of exactly when and under what circumstances the NLRA might preempt a trespass claim under *Garmon*’s “arguably protected” prong.

For a period after *Sears*, the NLRB and the courts went back and forth on the issue with varying and oftentimes inconsistent results. But the U.S. Supreme Court put all lingering questions to rest in *Lechmere*. There, the Court explained that such “rare” situations arise *only* in cases of (a) disparate treatment (not at issue here), or (b) where “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,” such as

“logging camps, mining camps, and mountain resort hotels” (also not at issue here). 502 U.S. at 539 (emphasis omitted).¹³

Moreover, in *Loehmann’s Plaza I*, 305 NLRB 663 (1991), the Board stated that it will not exercise jurisdiction over an “arguably protected” ULP charge arising in the trespass context unless it actually investigates the charge *and issues a Complaint*. *Id.* at 670 (emphasis added). That is because the mere filing of a charge “does not require any presentation of evidence. Neither does it involve any determination by a government official on the merits of an allegation.” *Id.*

Thus, if Defendants think their conduct is protected, they can file a ULP charge and if the NLRB investigates and issues a complaint (based on disparate treatment or mining-camp-type inaccessibility), there would be preemption. But that did not happen here. Defendants have not filed a ULP charge claiming disparate treatment or inaccessibility. The charge they did file complained of Walmart’s “cease and desist” letters (not disparate treatment or inaccessibility) CP 245-46, but in any event, the NLRB recently rejected that charge. Defendants then withdrew it; with no NLRB complaint, there is no “arguably protected” preemption.

¹³ In *Canned Foods*, the Court of Appeals rejected the UFCW’s argument that *Lechmere* does not apply when its nonemployee agents are trying to reach customers as opposed to employees. 79 Wn. App. at 63, 900 P.2d at 574. In response to the union’s alternative arguments, the court also noted, “If *Lechmere* does not apply, its exception (employee inaccessibility or disparate treatment) does not apply, and a nonemployee union agent has no right to remain on private property under circumstances contrary to state trespass law.” *Id.*

Consequently, the trial court’s reliance on *Riesbeck Food Markets, Inc. v. UFCW, Local 23*, 404 S.E.2d 404 (W. Va. 1991), *Cross Country Inn, Inc. v. South Central District Council*, 552 N.E.2d 232 (Ohio Ct. App. 1989), and *Wiggins & Co. v. Retail Clerks Union Local No. 1557*, 595 S.W.2d 802 (Tenn. 1980), all of which involved “inaccessibility” arguments, was misplaced. They were decided before the Supreme Court’s decision in *Lechmere*, which limited NLRA preemption in “arguably protected” cases to situations of disparate treatment (not the case here) or mining/logging-camp inaccessibility (not the case here).

3. Trespass is a “deeply rooted” matter of local interest.

The trial court also erred as a matter of law in concluding that this trespass action does not involve a matter “deeply rooted” in state law. Again, Supreme Court decisions provide the answer. In *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983), the Court analyzed whether the NLRA preempted a misrepresentation/breach of contract claim by replacement workers against an employer who fired them in favor of returning strikers. 463 U.S. at 509-10. The Court began its analysis:

Under *Garmon*, a state may regulate conduct that is of only peripheral concern to the Act or that is so deeply rooted in local law that the courts should not assume that Congress intended to preempt the application of state law.

In the next three sentences of its decision, the Court identified three of its prior cases as examples of the latter scenario:

- “In *Linn v. Plant Guard Workers* ... we held that false and malicious statements in the course of a labor dispute were actionable under state law if

injurious to reputation, even though such statements were in themselves [ULPs] adjudicable by the Board.” *Belknap*, 463 U.S. at 509 (internal citation omitted).

- “Likewise, in *Farmer v. Carpenters* ... we held that the [NLRA] did not preempt a state action for intentionally inflicting emotional distress, even though a major part of the cause of action consisted of conduct that was arguably an unfair labor practice.” *Belknap*, 463 U.S. at 509-10 (internal citation omitted).
- “Finally, in *Sears, Roebuck & Co. v. Carpenters* ... we held that a state trespass action *was permissible and not preempted*, since the action concerned only the location of the picketing while the arguable unfair labor practice would focus on the object of the picketing.” *Belknap*, 463 U.S. at 510 (emphasis added & internal citation omitted).

Thus, the Court identified *Sears* as one of the three then-most-recent “deeply rooted” cases. *See, e.g., City of San Jose v. Operating Eng’rs Local Union No. 3*, 49 Cal.4th 597, 608 (2010) (“The local concern doctrine has generally been applied in cases where it was necessary to ‘maintain[] civil order by deterring and punishing violence and other intentional torts, including defamation, *trespass*, and infliction of emotional distress.’” (emphasis added) (citing 2 Higgins, *The Developing Labor Law* 2334-35 (5th Ed. 2006) (citing *Sears*))). Thus, courts in other jurisdictions have recognized that trespass is a deeply rooted local interest that does not interfere with the NLRB’s jurisdiction. *See, e.g., K-T Marine, Inc. v. Dockbuilders Local Union 1456*, 597 A.2d 540, 542 (N.J. App. 1991) (“preventing a trespass remains within the jurisdiction of state

courts”); *Palm Beach Co. v. Journeymen’s & Prod. Allied Servs. of Am.*, 519 F. Supp. 705, 714 (S.D.N.Y. 1981) (noting that “[s]ubsequent to *Garmon*, the Supreme Court found the requisite local interest with respect to other torts that posed an imminent threat to public order” and identifying trespass as such a tort); *Pa. Nurses Ass’n v. Pa. State Educ. Ass’n*, 90 F.3d 797, 803 (3d Cir. 1996) (recognizing “acts of trespass” as an exception to NLRA preemption); 2013 WL 6704653, at ¶ 1 (Fla. Order) (“State courts possess the power to protect interests that are deeply rooted in state law, which would include actions for civil trespass”).

Like those (and other) states, Washington cares deeply about trespass issues and views trespass as a matter involving deeply rooted local interest. *Proctor v. Huntington*, 196 Wn.2d 491, 504, 238 P.3d 1117 (2010) (“fundamental property rights” require that “a landowner may generally obtain an injunction to eject trespassers”); *Guimont v. Clarke*, 121 Wn.2d 586, 595, 854 P.2d 1 (1993) (“right to exclude” is a “fundamental attribute of property ownership” under Washington law); *see also Arnold v. Melani*, 75 Wn.2d 143, 150-51, 449 P.2d 800 (1968) (“It is elementary that the fundamental maxims of a free government seem to require, that the rights of personal liberty and Private property should be held sacred.” (quotations omitted)).

While noting a “compelling” argument that property owners in Washington should have the right to stop trespassers, the trial court decided that Walmart’s allegations did not “rise[] to the level of that deeply rooted” local interest because the Defendants’ activities were not

“violent,” did not constitute “intentional torts” and did not “threaten violence.” VRP (9/13/13) at 16:6-10. Tellingly, the trial judge admitted that his analysis was “very subjective.” *Id.* at 16:10. Not only was the trial court’s finding subjective, it was wrong.

Sears and the “deeply rooted” exception do not require a showing of violence, threats of violence, or even intentional torts, although trespass is an intentional tort. *See, e.g., Birchler v. Castello Land Co.*, 133 Wn.2d 106, 115, 942 P.2d 968, 972 (1997) (“Trespass is an intentional tort.”). Indeed, the *Sears* Court itself carefully noted that, “The picketing was *peaceful* and orderly,” and framed the issue before it as determining under what circumstances a state court may “enforce local trespass laws against a union’s *peaceful* picketing.” 436 U.S. at 182, 184 (emphasis added); *see also Hillhaven*, 41 Cal.App.4th at 855 (“In *Sears* . . . the court expanded the *local interest exception* to a case involving *peaceful*, non-obstructive picketing on an employer’s private property,” and “since *Garmon*, the [local interest] exception has been extended to conduct defined as tortious by state law which involves *neither violence or other threat* to the maintenance of domestic peace [*e.g., trespass, libel, intentional infliction of emotional distress*].” (emphasis added and quotations omitted)).

Moreover, the Supreme Court applied the “deeply rooted” exception in *Belknap* to a “breach of contract” claim that did not involve violence, threats of violence, or an intentional tort. 463 U.S. at 512 (“The interests of the Board and the NLRA, on the one hand, and the interest of

the state in providing a remedy to its citizens for breach of contract, on the other, are ‘discrete’ concerns.”).

Finally, the trial court mistakenly relied on *Local 926, Int’l Union v. Jones*, 460 U.S. 669 (1983), which did nothing more than apply the “arguably prohibited” analysis in a non-deeply-rooted, non-trespass context. *Id.* at 683 (“They also foreclose any claim that Jones’ action against the Union for interference with his job is so deeply rooted in local law that Georgia’s interest in enforcing that law overrides the interference with the federal labor law that prosecution of the state action would entail.”). Moreover, unlike a trespass claim, the state law contract interference claim in *Local 926* shared a “crucial element” with the alleged NLRA violation. *Id.* at 682 (both required employee to show his discharge was the result of union influence; “the federal and state claims are thus the same in a fundamental respect”). Enforcing trespass laws is a deeply rooted local interest quite different from the NLRB’s interest in protecting employees from union intimidation, regardless of location.

4. Defendants’ plan is to get courts to “punt” the property rights issue because the NLRB has no ability to stop Defendants’ trespasses.

Defendants know well that the NLRA gives it no right to trespass onto Walmart’s property to conduct flash mobs and demonstrations. As discussed above, the U.S. Supreme Court in *Lechmere v. NLRB* rejected that idea long ago. But they still claim preemption. Why? Because they know that the NLRA gives the NLRB absolutely no power to stop their disruptive trespasses. As Chief Justice Burger stated in *Taggart v.*

Weinacker's Inc., 397 U.S. 223 (1970) (concurring): “The protection of private property, whether a home, factory, or store, through trespass laws is historically a concern of state law. Congress has never undertaken to alter this allocation of power, and has provided no remedy to an employer within the ... NLRA to prevent an illegal trespass on his premises.” *Id.* at 227-28 (emphasis added).

In the parties’ related trespass litigation in other states, Defendants claimed (unsuccessfully) that the NLRA preempts state trespass cases, in part because Walmart seeks an injunction, which Defendants claim the NLRB can provide (Walmart never sought an injunction in conjunction with its 8(b)(1)(A) charge). The NLRB has no such authority.¹⁴

The NLRB has no power to issue an injunction. If the NLRB wanted an injunction, it would have to go to federal court and ask for one, and the federal court would make its own decision about whether an injunction was appropriate. *See* 29 U.S.C. § 160(j).

Even then, in the ULP context, a federal court has authority only to consider an injunction to stop violations of the NLRA, which brings the preemption analysis full circle. Like the NLRB, a federal court in this

¹⁴ In any event, the *Garmon/Sears* preemption analysis does not turn on the availability of potential remedies (injunctive or otherwise). Where, as here, the state trespass action does not interfere with the intended purpose of the NLRA, the availability of a purported NLRB injunction to stop the complained-of conduct is irrelevant. If there is no interference, the purported availability of an NLRB injunction controlling the same or related conduct would suggest no more than concurrent jurisdiction, not preemption.

context is limited to enjoining a union from violating employees' federal law rights to be free from bullying or intimidation in their right to choose or reject a union, which does not implicate the same rights and protections that a state court would consider when evaluating an employer's property rights and protections under state law.

Thus, if the NLRB sought (and a federal court entered) an injunction to stop Defendants' coercion of employees in the workplace, the injunction would not stop their underlying trespasses at all, nor would it stop the disruptive flash mobs or parading and chanting directed at managers and customers, *not* associates. Any injunctive relief would attempt only to limit the in-store intimidating and coercive conduct directed at or affecting *associates*, and would have no application to exterior trespasses (except as to blocking ingress or egress).

NLRB cases bear this out. In *District 65, RWDSU*, 157 NLRB 615 (1966), for example, the administrative law judge ("ALJ") specifically distinguished the evaluation of the NLRA 8(b)(1)(A) employee-coercion allegation from any trespass action: "While most persons capable of judging, would likely consider the Union's action in the minimum conduct cases both distasteful and unwise, and possibly see in it conduct calling for either police action or a remedy for trespass, or both, whether such action violates the provisions of Section 8(b)(1)(A) of the [NLRA], as amended, is not beyond doubt." *Id.* at 622. Ultimately, the ALJ ordered the union to cease and desist from "preventing [the] employees from engaging in their normal work ... and making threats, either veiled or direct ... and shoving

or pushing” any other person. *Id.* at 626. The ALJ’s order was designed to protect *the employees*; it did not bar any non-coercive (vis-à-vis employees) trespassory conduct, and it did not protect the employer’s property rights.

5. Absent court intervention, Walmart must consider self-help to protect its property rights.

If Walmart cannot turn to the courts for assistance in restraining repeated and disruptive trespasses by third parties (not Walmart associates), it must consider a resort to self-help (*e.g.*, private security guards to eject Defendants) because the NLRB has no jurisdiction or authority to stop that unlawful conduct. *See, e.g., May Dep’t Stores Co. v. Teamsters Union Local No. 743*, 355 N.E.2d 7, 10-11 (Ill. Ct. App. 1976) (“Since trespass by a union organizer is not an [ULP], the NLRB is unable to grant any relief to a deserving employer. If the employer is also denied access to the State courts his only recourse is to employ self-help.”); *see also Linn*, 383 U.S. at 64 n.6 (“that the Board has no authority to grant effective relief [for libel] aggravates the State’s concern since the refusal to redress an otherwise actionable wrong creates disrespect for the law and encourages the victim to take matters into his own hands”).

But “resorting to self-help . . . [creates] [t]he unacceptable possibility of precipitating violence.” *Sears*, 436 U.S. at 208. In *Sears*, the Court sought to avoid the situation where a property owner must either tolerate trespass or engage in “self-help” to “forcefully evict” trespassers, which “involve[s] a risk of violence.” *Id.* at 202, 213 (“[T]he danger of

violence is inherent in many -- though certainly not all -- situations of sustained trespassory picketing. One cannot predict whether or when it may occur, or its degree.” (quotations omitted)).

The Supreme Court went on to say that, “in light of the danger of violence inherent in many instances of sustained trespassory picketing, relief often may come too late to prevent interference with the operation of the target business.” *Id.* (quotations omitted). Thus, Walmart must rely on this Court to help it avoid the inherent risk of violence that accompanies repeated trespass where the property owner’s only alternative to court intervention is self-help. *See, e.g., Sears*, 436 U.S. at 202, 208, 213 & n.* (1978) (“[R]esorting to self-help ... [creates] [t]he unacceptable possibility of precipitating violence.”). Federal labor law does not strip Washington courts of the power to protect property rights and ensure public safety and order in the face of disruptive and repeated union trespass.

B. Defendants’ Anti-SLAPP Motion Is Otherwise Meritless and Should Be Denied.

Assuming this Court holds that Walmart’s trespass action is not preempted, it should also reject the remainder of Defendants’ anti-SLAPP motion. There is no need to remand to the trial court for further consideration of the motion, which presents issues of law that this Court can resolve. *See Carpenter v. Elway*, 97 Wn. App. 977, 989, 988 P.2d 1009, 1016 (1999) (holding that trial court erred in deciding motion on jurisdictional grounds; “because this case involves a question of law that

we can determine and because a remand would not be an efficient use of court resources, we will decide the issue on the merits”).

“Washington’s anti-SLAPP statute mirrors California’s anti-SLAPP statute. Therefore, in most circumstances, California cases may be considered as persuasive authority when interpreting RCW 4.24.525.” *Dillon v. Seattle Deposition Reporters, LLC*, -- Wn. App. --, 316 P.3d 1119, 1132 n.21 (2014); *see also* CP 342 (Defs.’ Mot. To Strike).

1. Defendants cannot meet their burden to establish that Walmart’s complaint arises from protected free speech.

The SLAPP statute, RCW 4.24.525(2)(d) and (e), provides:

This section applies to any claim, however characterized, that is based on an action involving public participation and petition. As used in this section, an “action involving public participation and petition” includes:

(d) Any oral statement made, or written statement or other document submitted, in a place *open to the public or a public forum* in connection with an issue of public concern; [or]

(e) Any other *lawful* conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.

(Emphasis added.)¹⁵ For the reasons below, Defendants fail to meet their burden under either subsection (d) or (e).

¹⁵ These provisions, which amended Washington’s original Anti-SLAPP Act, became effective on June 10, 2010. *Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp.2d 1104, 1109 (W.D. Wash. 2010).

a. Defendants do not satisfy RCW 4.24.525(2)(d).

The FAC focuses on Defendants' unlawful activities on Walmart's private property and not on any speech in public forums. Whatever Defendants' purported message, private property is not a public forum under well-established law. *See, e.g., Waremart, Inc. v. Progressive Campaigns, Inc.*, 139 Wn.2d 623, 641, 989 P.2d 524 (1999) (grocery store and its parking lot is not a traditional public forum conferring constitutionally protected right to collect petition signatures); *Initiative 172 v. W. Wash. Fair Ass'n*, 88 Wn. App. 579, 583-84, 945 P.2d 761 (1997) (declining to recognize fairgrounds as public forum because it received no government funds nor had direct ties to government).

In *Waremart*, store owners sought to enjoin signature gatherers from entering its stores and parking lots. The trial court issued an injunction, finding that Waremart's properties were not comparable to a traditional shopping mall and Waremart was not a public forum. The public was expressly not invited to enter Waremart's stores for any noncommercial purpose, the trial court reasoned, nor did Waremart allow unrestricted access to charitable, civil or political groups. *Id.* at 637 n.6.

The Washington Supreme Court affirmed, emphasizing that a property owner should generally have the right to determine what lawful activities take place on its premises. *Id.* at 641. The Court noted that "property [does not] lose its private character merely because the public is generally invited to use it for designated purposes. Few would argue that a free-standing store, with abutting parking space for customers, assumes

significant public attributes merely because the public is invited to shop there.” *Id.* at 637 n.7 (quoting *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972) (holding that the First Amendment does not extend to speech activities on privately owned property); *see also City of Sunnyside v. Lopez*, 50 Wn. App. 786, 795 n.7, 751 P.2d 313, 319 (1988) (“If the invitation to enter is limited either expressly or impliedly from the circumstances, then the proprietor has the right to the protection afforded by the trespass laws.”); *Ralphs Grocery Co. v. UFCW*, 55 Cal.4th 1083, 1092-93 (2012) (front of retail store is not a public forum)

Like Waremart, Walmart operates free-standing stores and parking lots, extends a limited business invitation to the public to shop and purchase goods and services, and does not allow unrestricted access to non-associates. CP 431-36, ¶¶ 8 & 11 & Ex. A. Walmart also prohibits non-associates from engaging in solicitation, distribution of literature, protests and picketing on its properties, and places time, manner and place restrictions on other uses with advance notice. *Id.* Walmart provides no public meeting places, cinemas, plazas, or central courtyards inside or outside of its stores. CP 431, ¶ 9. Thus, *Waremart* is controlling.

Nevertheless, Defendants claim that Walmart seeks to enjoin them from “engaging in speech in a public place.” CP 343. But they offer nothing to rebut Walmart’s evidence that its invitation to the public is limited to shopping. CP 431-36, ¶ 11 & Ex. A. Nor do they cite any authority for the notion that a retail store’s private property is a “public place” for purposes of constitutionally protected speech under the anti-

SLAPP statute. If that were the case, courts would have to consider places like public libraries, symphony halls, and restaurants as proper venues for Defendants' demonstrations, bull horns and all.

Walmart's stores are open to the public to shop; they are not open for the public to come in and debate public policy.

b. Defendants cannot satisfy RCW 4.24.525(2)(e).

Defendants concede that, under subsection (2)(e), they must show that Walmart's claims are based on *lawful* conduct in furtherance of their right of free speech on an issue of public concern. CP 343. As the prior section explained, Defendants have no constitutional right to demonstrate on Walmart's private property. *A fortiori*, their conduct—trespassing on private property—cannot be in furtherance of constitutionally protected speech. *See, e.g., Flatley v. Mauro*, 39 Cal.4th 299, 333 (2006) (because defendant's activity was extortion and thus not constitutionally protected activity, motion to strike properly denied).

In any event, Walmart seeks relief against trespass, not speech. “A defendant in an ordinary private dispute cannot take advantage of the anti-SLAPP statute simply because the complaint contains some references to speech or petitioning activity by the defendant.” *Dillon*, 316 P.3d at 1134 (alterations & quotations omitted). Instead, “it is the *principal thrust* or *gravamen* of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies and when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity.” *Id.* “If the mention of protected activity is

‘only incidental to a cause of action based essentially on nonprotected activity,’ then the anti-SLAPP statute does not apply.” *Baharian-Mehr v. Smith*, 189 Cal.App.4th 265, 272 (2010). “[C]ollateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute.” *Dillon*, 316 P.3d at 1134.¹⁶

Walmart’s FAC alleges that Defendants engaged in unlawful trespassing by “intentionally and repeatedly enter[ing] onto Walmart’s private property ... without permission to engage in picketing, patrolling, parading, ‘flash mobs,’ demonstrations, handbilling, solicitation, customer disruptions, and manager confrontations, causing a breach of the peace, and they threaten to do so again.” CP 57, ¶ 44. The FAC further alleges, “Defendants did not have authorization, license, invitation or privilege to enter Walmart’s property for the purposes described in the paragraphs above, and do not currently have authorization, license, invitation or privilege to enter on Walmart’s property in the future for the purposes described in the paragraphs above.” CP 57. Finally, the FAC alleges that “Defendants’ activities at Walmart stores constituted impermissible use of Walmart’s property.” CP 58.

¹⁶ “Freedom of speech means more than simply the right to talk and to write. It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one’s friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.” *Dillon*, 316 P.3d at 1134 (alterations & quotations omitted).

Thus, the FAC is narrowly tailored to seek injunctive and declaratory relief from Defendants' anticipated future disruptive demonstrations on Walmart's private property. Walmart seeks no relief related to public forums or activities on public property. Walmart has done nothing to prevent Defendants from engaging in public debate on public property or in public forums. Even if Defendants could show they engaged in protected free speech activities (which Walmart denies), such protected activity was only "incidental" to Walmart's claim targeting Defendants' non-protected activity, i.e., trespass.¹⁷

Defendants suggest that their demonstrations are protected under a "freedom of association of workers" theory arising out of Washington law. But the UFCW tried that argument in *Canned Foods*, and the Court of Appeals rejected it: "state trespass law allows the possessor of private property to eject persons present thereon without permission." 79 Wn. App. at 57-58 (declining to recognize any exception to trespass under federal or state labor law).¹⁸ No Washington court since then has recognized a labor law exception to trespass.

¹⁷ Nor does Washington's free speech clause help Defendants because it does not apply to private parties. *Southcenter Joint Venture v. Nat'l Dem. Party Comm.*, 113 Wn.2d 413, 423, 780 P.2d 1282 (1989).

¹⁸ The union in *Canned Foods* invoked two statutes. First, they cited RCW 49.36.010, which provides that "[i]t shall be lawful for work[ers] to organize themselves into, or carry on labor unions for the purpose of lessening the hours of labor or increasing the wages or bettering the conditions of the members of such organizations; or carry out their legitimate purposes by any lawful means."

In their motion, Defendants cited a bunch of pre-*Sears* and pre-*Lechmere*¹⁹ “peaceful picketing” cases to support their failed argument, but in any event, none of those cases involved trespass. CP 1338-39. Moreover, Defendants’ demonstrations are hardly “peaceful,” as the evidence (including videos) clearly shows. They also cited Washington’s equivalent of the federal Norris LaGuardia Act CP 1337, *see* RCW 49.32.010, *et seq.*, but in addressing that same statute, this Court made clear that trial courts remain “free to enjoin unlawful invasion of personal rights, whether or not a labor dispute exists.” *Venegas v. United Farm Workers Union*, 15 Wn. App. 858, n.5, 552 P.2d 210 (1976).

Defendants did not simply communicate on issues of public concern; rather, they entered private property without authorization or privilege and refused to leave when Walmart requested. Defendants interfered with Walmart customers, blocked ingress and egress, blocked aisles and cash registers, and disrupted the shopping experience by shouting and using things like bullhorns. This is not a SLAPP case.

Second, they cited RCW 49.32.020, which generally declared a public policy regarding labor relation activities, and conferred actionable rights on employees, including a right to be free from coercion, interference, and restraint by their employers in organizing or joining labor union and in designating such union as their agent for collective bargaining. *Krystad v. Lau*, 65 Wn.2d 827, 400 P.2d 72 (1965). Neither statute grants a union the right to trespass.

¹⁹ *Supra* at 25-27.

2. Walmart’s evidence overwhelmingly establishes that they are likely to prevail on its trespass claims.

Even if Defendants were able to establish (which they have not) that they were lawfully engaged in an “action involving public participation and petition,” Walmart has demonstrated by clear and convincing evidence a probability of prevailing on the merits of its action. The court’s role in determining whether a plaintiff has met its burden “is akin to the trial court’s role in deciding a motion for summary judgment.” *Dillon*, 316 P.3d at 1142. “The trial court may not find facts or make determinations of credibility.” *Id.* “Instead, the court shall consider pleadings and supporting and opposing affidavits stating the facts,” and “must view the facts and all reasonable inferences therefrom in the light most favorable to the plaintiff.” *Id.* at 1142-43 (quotations omitted).

a. Walmart has established a prima facie case of trespass.

Defendants are liable for trespass if they intentionally entered Walmart’s property, or they remained there, without permission or invitation, express or implied. *Bradley*, 104 Wn.2d at 681-82, 709 P.2d at 785; Wash. Pattern Jury Instr. 120.01 (Trespasser-Definition). Walmart is not required to prove that Defendants specifically intended to commit a trespass; instead, Walmart need only show that they intended *to enter or remain* on Walmart’s property. *Bradley*, 104 Wn.2d at 681-82. Defendants even acknowledge this. CP 347 (anti-SLAPP Mot. (“a trespasser is defined as a person who enters or remains upon land of another without permission or invitation, express or implied”).

Those elements are satisfied here. Walmart offers products and services for sale. To that end, it invites the public to come to its stores to shop. CP 431, ¶ 8. Walmart, however, prohibits non-associates from engaging in solicitation or distribution of literature or any demonstration or messaging activity inside its facilities at any time. CP 434-36. Walmart also prohibits non-associates from engaging in solicitation or distribution of literature outside its facilities (where it owns or possesses the exterior areas) unless they comply with the time, place, and manner rules of its non-solicitation policy. *Id.*

Moreover, Walmart permanently revoked any license that Defendants may have thought they had to come onto Walmart's property and do anything except shop for and purchase Walmart merchandise. On five separate occasions, Walmart gave formal notice to Defendants that they were not authorized or permitted to come onto Walmart's private property and engage in such disruptive activities as picketing, patrolling, parading, "flash mobs," demonstrations, hand billing, solicitation, customer disruptions, and manager confrontations. CP 65-72, 74, 83-84, 1259. Defendants admit they received those notices CP 97, 100-02, which were crystal clear in defining the extent of Walmart's invitation to the public, and more than sufficient to establish that Defendants and their agents commit a trespass each and every time they come onto Walmart's property for any reason other than to shop.

If that were not enough, store managers confronted Defendants when they came on Walmart's private property, told them they could not

demonstrate, asked them to leave, and called the police when they refused to leave.²⁰ That Defendants left after law enforcement arrived does not insulate them from trespass: Defendants trespassed when they entered onto Walmart’s private property—again and again (which they admit),²¹ even after they were ejected—to engage in demonstrations. *See Bradley*, 104 Wn.2d at 682, 709 P.2d at, 785. Defendants even admit they are planning future trespassory demonstrations. CP 144. Walmart has offered clear and convincing evidence of Defendants’ trespasses.

Having established the elements for trespass, Walmart need not parse this action and separately show the likelihood of success in obtaining injunctive and declaratory relief. Once a plaintiff shows that it can prevail on *any* part of its “claim,” it has met its burden under the anti-SLAPP statute. *Oasis W. Realty, LLC v. Goldman*, 51 Cal.4th 811, 820 (2011). A claim “is comprised of ... plaintiff’s [primary] right to be free

²⁰ *E.g.*, CP 53-54; CP 1134, ¶ 7; CP 1119-20, ¶¶ 2-4; CP 1117-18, ¶¶ 6, 8-10; CP 850-51, ¶¶ 8-9; CP 867, ¶ 3; CP 829, ¶ 3; CP 512, ¶ 3; CP 518, ¶¶ 4-5; CP 1127, ¶¶ 4, 7; CP 1122-23, ¶¶ 3-4, 11; CP 857, ¶8; CP 847, ¶ 4; CP 845, ¶¶ 18-21; CP 439-40, 443, ¶¶ 2-5, Ex. A, ¶ 4; CP 1112-13, ¶¶ 4, 7 & 9; CP 1277-78, ¶¶ 5-7.

²¹ *See, e.g.*, CP 97 (admitting that OURWalmart supporters “walked through the [Longview] store and passed out literature); CP 98 (admitting that OURWalmart supporters “handbilled outside the front entrance” of Renton store); CP 99 (admitting that OURWalmart supporters “went into the [Auburn] store, sang, and kept rhythm on pots and pans”); CP 99-100 (admitting that OURWalmart supporters went “inside the [Lakewood] store, put some merchandise into shopping carts, sang a song, and then left the store”); CP 101 (admitting that OURWalmart supporters “entered the [Lakewood] store and chanted”).

from the particular injury suffered” to his or her person or property. *Mycogen Corp. v. Monsanto Co.*, 28 Cal.4th 888, 904 (2002) (quotations omitted). “The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief.” *Crowley v. Katleman*, 8 Cal.4th 666, 682 (1996).

Defendants concede that Walmart’s requests for injunctive and declaratory relief are *not* separate claims from its trespass claim. CP 103. Thus, Walmart’s showing that it will likely prevail on its trespass claim is sufficient to defeat the anti-SLAPP motion.

b. Walmart has established the right to an injunction.

Regardless, Walmart meets the requirements for an injunction. “It is an established rule ... that one who seeks relief by temporary or permanent injunction must show (1) he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him.” *Tyler Pipe Indus. v. Dep’t of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982) (quotations omitted).

Walmart has presented evidence that it owns or controls the retail property involved in this action. That evidence is undisputed. Among Walmart’s rights as the owner or possessor of real property is the right to exclude. *See Hoglund v. Omak Wood Prods., Inc.*, 81 Wn. App. 501, 506 n.2, 914 P.2d 1197 (1996) (noting that right of possession gives one “the legal right to exclude all persons from all parts of the land”).

Moreover, even if money damages could suffice for Defendants' past trespasses, Defendants have threatened similar conduct in the future CP 1288, ¶ 11, so seeking redress in the courts for each offense at the time it occurs is unduly burdensome and likely futile. Injunctions entered in five other states have not stopped Defendants. Indeed, a UFCW representative has bragged that Walmart will "need a hundred [injunctions] ... to stop them." CP 1151-52, ¶¶ 70-71; CP 1176.

Finally, Defendants' demonstrations have resulted in substantial injury, including damage to Walmart's goodwill and customer relationships, loss of productivity, and the use of valuable resources to monitor and control Defendants' in-store activities. Their repeated and continuing trespasses have interfered with associates as they try to work.²²

Defendants' trespasses also interfere with Walmart's basic purpose for its interior sales floor: to provide customers a pleasant and inviting shopping experience, without which it cannot successfully operate. CP 431, ¶ 8. Defendants' trespasses have impaired Walmart's relationships with its customers, by (inter alia) Defendants confronting them and blocking their ingress and egress and freedom of movement.²³ Their

²² *E.g.*, CP 513, ¶ 10; CP 520, ¶ 13; CP 1123, ¶¶ 6-10; CP 857, ¶ 9; CP 845, ¶ 18; CP 1115, ¶ 3; CP 450, ¶ 6; CP 852-53, ¶¶ 2, 4; CP 853, ¶ 6.

²³ *E.g.*, CP 1134, ¶ 5; CP 1285, ¶ 3; CP 1278, ¶ 10; CP 1274, ¶¶ 4-6; CP 1252, ¶ 4; CP 1125, ¶ 4; CP 510, ¶ 5; CP 1287-88, ¶ 8; CP 513, ¶ 10; CP 1128, ¶ 10; CP 1123, ¶ 6; CP 857, ¶ 9; CP 847, ¶¶ 5-7; CP 843-45, ¶¶ 10-11, 17; CP 1115, ¶¶ 5-6; CP 452-53, ¶¶ 2, 4; CP 852-53, ¶ 3.

trespasses increase security risks associated with physical altercations due to the proximity of the demonstrations to customers and associates.²⁴

There is no way even to estimate how many Walmart customers have been deterred by the Defendants' illegal activities. Courts have recognized that injury and threatened injury to a business' reputation and good will constitute irreparable harm sufficient to justify injunctive relief. *See Reinder Brothers, Inc. v. Rain Bird Eastern Sales Corp.*, 627 F.2d 44, 53 (7th Cir. 1980); *Blackwelder Furniture Co.*, 550 F.2d 189, 196-97 (4th Cir. 1977); *People v. Anderson*, 137 A.D.2d 259, 271 (N.Y. App. 1988) (money damages inadequate "because of the difficulty in proving how many individuals would have been deterred from patronizing [plaintiff's] businesses as a direct result of defendants' conduct").

In the meantime, Defendants would continue to violate Walmart's property rights with impunity. Where there is a continuing trespass and multiplicity of suits, the remedy at law is inadequate, and courts should use their equitable powers to enjoin such activities. A continuing trespass causes irreparable harm because the cost of bringing repeated lawsuits outweighs any potential recovery. *E.g., Kemmerer v. Midland Oil & Drilling Co.*, 229 F. 872 (8th Cir. 1915); *Greyhound Lines, Inc. v. Peter Pan Bus Lines, Inc.*, 845 F. Supp. 295, 302 (E.D. Pa. 1994); *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp.2d 1058, 1067 (N.D. Cal. 2000); *Pliske*

²⁴ CP 1128, ¶ 10; CP 1252, ¶¶ 4-6; CP 1274, ¶ 7; CP 1125, ¶¶ 5-6; CP 845, ¶ 18.

v. *Yuskis*, 403 N.E.2d 710, 715 (Ill. App. 1980). Absent an injunction, Walmart has no adequate remedy for Defendants' continued trespasses.

c. Walmart is also entitled to declaratory relief.

Defendants did not address the claim for declaratory relief in their anti-SLAPP motion. Indeed, they admit that there is a live controversy between the parties warranting a declaratory judgment. CP 104.

Walmart has established a likelihood of success on its declaratory relief claim. Defendants know that any invitation to come onto Walmart's property is limited to retail shopping: numerous cease and desist letters and Walmart managers have made this clear. Nevertheless, Defendants keep coming back. They have instructed demonstrators that they "are not trespassing unless a manager with appropriate authority orders you to leave and you refuse. If you leave when ordered, you have not trespassed." CP 91. Defendants believe that to be the law no matter how many times Walmart ejects them from its property. Washington law does not require Walmart to tell Defendants to leave each and every time for their unauthorized entry to constitute trespass; rather, entering the property to engage in unauthorized activity is *itself* a trespass. Walmart seeks a declaration under RCW 7.24 *et seq.* to establish this very point.

VI. CONCLUSION

This Court should vacate the order dismissing this action, instruct the trial court to deny Defendants' anti-SLAPP motion and remand for further proceedings.

RESPECTFULLY SUBMITTED this 26th day of March, 2014.

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CERTIFICATE OF SERVICE

I, Jennifer Endres, hereby certify under penalty of perjury of the laws of the State of Washington that on March 26, 2014, I caused to be served a copy of the attached document to the following person(s) in the manner indicated below at the following address(es):

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