IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 67453

International Union of Painters and
Allied Trades District Council 15, Local 159,
Appellant,

-v-

Great Wash Park, LLC, d/b/a/ Tivoli Village,
A Nevada Limited Liability Company,
Respondent.

On Appeal from an Order Granting Preliminary Injunctive Relief from
The Eighth Judicial District Court of the County of Clark in the State of Nevada
District Case No. A705268

BRIEF FOR *AMICI CURIAE* OF THE COALITION OF A DEMOCRATIC WORKPLACE, ASSOCIATED BUILDERS AND CONTRACTORS, INC., INDEPENDENT ELECTRICAL CONTRACTORS, INC., INTERNATIONAL FRANCHISE ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND NATIONAL RETAIL FEDERATION

Anthony L. Martin
NV State Bar 08177
Erica J. Kelly
NV State Bar 12238
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
3800 Howard Hughes Pkwy, Ste. 1500
Las Vegas, NV 89169
Tel: (702) 369-6800
**Counsel of Record*
Counsel for Amici Curiae

Brian E. Hayes
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
1909 K Street, N.W.
Suite 1000
Washington, DC 20006
Tel: (202) 887-0855
Counsel for Amici Curiae

DISCLOSURE STATEMENT

Pursuant to Nevada Rules of Appellate Procedure 26.1, *amici curiae* the Coalition of a Democratic Workplace ("CDW"), Associated Builders and Contractors, Inc. ("ABC"), Independent Electrical Contractors, Inc. ("IEC"), International Franchise Association ("IFA"), National Association of Manufacturers ("NAM"), National Association of Wholesaler-Distributors ("NAW"), National Federation of Independent Business ("NFIB"), and National Retail Federation ("NRF") hereby submit the following corporate disclosure statement.

CDW is an informal coalition. CDW has no parent corporation, and no publicly held company has 10% or greater ownership in the CDW.

ABC is a non-profit, tax-exempt organization incorporated in the State of Maryland. ABC has no parent corporation, and no publicly held company has 10% or greater ownership in ABC.

IEC is a non-profit, tax-exempt organization incorporated in the State of Texas. IEC has no parent corporation, and no publicly held company has 10% or greater ownership in IEC.

IFA has no parent corporation, and no publicly held company has 10% or greater ownership in IFA.

NAM has no parent corporation, and no publicly held company has 10% or greater ownership in NAM.

NFIB Small Business Legal Center is a non-profit, tax-exempt organization incorporated in the State of California. NFIB has no parent corporation, and no publicly held company has 10% or greater ownership in NFIB.

NRF has no parent corporation, and no publicly held company has 10% or greater ownership in NRF.

RLC is a non-profit, tax-exempt organization incorporated in the State of Virginia. RLC has no parent corporation, and no publicly held company has 10% or greater ownership in RLC.

The undersigned counsel of record certifies that the following are the persons and entities described in NRAP 26.1(a) and these representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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Anthony L. Martin, Brian E. Hayes and Erica J. Kelly of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., are the only attorneys and firm who have appeared for the *Amici Curiae* in this case.

DATED this 2nd day of September, 2015.

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

/s/ Anthony L. Martin

Anthony L. Martin
Nevada Bar No. 08177
Erica J. Kelly
Nevada Bar No. 12238
Wells Fargo Tower
Suite 1500
3800 Howard Hughes Parkway
Las Vegas, NV 89169
Counsel for Amici Curiae

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GLOSSARY

Appellant ..... Appellant International Union of Painters and Allied Trades District Council 15, Local 159

LMRA ..... Labor Management Relations Act, codified at 29 U.S.C. 185, *et al.*

NLRA ..... National Labor Relations Act, codified at 29 U.S.C. §§ 151, *et al.*

NLRB ..... National Labor Relations Board

OB ..... Opening Brief filed by Appellant

Respondent ..... Respondent Great Wash, LLC d/b/a Tivoli Village, a Nevada Limited Liability Company

Trial Court ..... Eighth Judicial District Court of Clark County in the State of Nevada

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae, the Coalition of a Democratic Workplace ("CDW"), Associated Builders and Contractors, Inc. ("ABC"), Independent Electrical Contractors, Inc. ("IEC"), International Franchise Association ("IFA"), National Association of Manufacturers ("NAM"), National Association of Wholesaler-Distributors ("NAW"), National Federation of Independent Business ("NFIB"), and National Retail Federation ("NRF"), hereby submit the following Statement of Interest pursuant to Nevada Rules of Appellate Procedure 29(d)(3).

The CDW represents millions of businesses of all sizes. The CDW's membership includes hundreds of employer associations, individual employers and other organizations that together employ tens of millions of individuals. The CDW was formed to give its members a voice in matters of labor policy and reform. The CDW routinely files comments, and appears as *amicus curiae* in agency and court proceedings that implicate important matters concerning labor law and policy.

ABC is a national construction industry trade association representing nearly 21,000 chapter members. ABC and its 70 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which they work. ABC member contractors employ workers whose training and experience span all of the 20-plus skilled trades that comprise the construction industry. Moreover, the vast majority of ABC's

contractor members are classified as small businesses. ABC's diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value. This process assures that taxpayers and consumers will receive the most for their construction dollar.

Established in 1957, IEC is a trade association representing 3,000 members, with 53 chapters nationwide. Headquartered in Alexandria, Virginia, IEC is the nation's premier trade association representing America's independent electrical and systems contractors. IEC National aggressively works with the industry to establish a competitive environment for the merit shop - a philosophy that promotes the concept of free enterprise, open competition and economic opportunity for all. IEC believes this case brings up very specific property, nuisance and trespass issues. IEC opposes the ability of any entity to utilize its members' property, either temporarily or permanently, to convey a message publicly, without the express permission of the property owner. The actions of an entity to utilize the façade of a building not belonging to that organization to convey any message is paramount to temporary graffiti and should not be permitted.

IFA is the oldest and largest trade association in the world devoted to representing the interests of franchising. Its membership includes franchisors, franchisees and suppliers. The IFA's mission is to protect, enhance and promote franchising through government relations, public relations and educational programs, on a broad range of legislative, regulatory and legal issues that affect franchising. IFA's membership currently spans more than 300 different industries, including more than 11,000 franchisee, 1,100 franchisor and 575 supplier members nationwide. IFA is interested in the case because franchise businesses are subject to the NLRA.

NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. Its mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

NAW is comprised of direct member companies and a federation of national, regional, state, and local associations and their member firms which collectively total approximately 40,000 companies with locations in every state in

the United States. NAW members are a constituency at the core of our economy-the link in the marketing chain between manufacturers and retailers as well as commercial, institutional and governmental end users. Industry firms vary widely in size, employ millions of American workers, and account for over $5.8 trillion in annual economic activity.

NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents 350,000 member businesses nationwide. The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a critical impact on small businesses nationwide, such as the case before the Court in this action.

NRF is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. The retail industry is the nation's largest private

sector employer; supporting one in four U.S. jobs or 42 million working Americans. Retail contributes $2.6 trillion to annual GDP, marking retail as a daily barometer for the nation's economy.

The *Amici Curiae* ("*Amici*") have a strong interest in the proper resolution of this case. The *Amici*'s members have a direct and substantial interest in the question presented in this case, namely whether any third party, including unions and other non-employee labor representatives, may take control over the façade of buildings and structures located on privately-owned property against the express wishes of a property owner and in contravention of state common laws. The *Amici* therefore support Respondent and respectfully request that the Court affirm the injunction granted by the Trial Court.

The authority of the *Amici* to file this Brief is pursuant to leave of the Court granted by a timely motion under Nevada Rules of Appellate Procedure 29(a).

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The issue in this case is one of national significance and involves the fundamental right of property owners to access state courts in order to secure their right to be free of third-party trespass. Contrary to the claims of the Appellant, this case does not concern itself with federal labor law. The fact that the trespasser happens to be a labor union is immaterial. The case involves nothing more than a simple state law trespass action.

"Projection bombing" refers to a guerilla marketing technique in which a person or group utilizes powerful, and mobile video projection equipment, to beam giant images or words onto buildings, other structures, streets, sidewalks, and the like.[1] By intentionally projecting an illuminated image onto various prominent and highly visible parts of a building and other physical structures, the "photo-bombers", in this case - a labor organization, effectively takes control of the physical space on which the image is displayed. Such misappropriation interferes with the private property rights of the owner. The owner is entitled to dominion and control of the façade of its own buildings, and should not be subject to the trespass of any third party, regardless of the content of the image such third party attempts to project.

[1] Projection bombing is also known as "architectural projection" or "projection mapping." Internationally, it has also been called Visual Attacks.

The derogation of the owner's property rights and the extent of the interference in the instance of projection bombing is no minor matter. Thus, projected images can take up the entire wall of a building. Or wrap around the entire façade of the owner's property. It is beyond cavil that such acts substantially interfere with the owner's property rights and constitute a trespass as the Court below correctly found. Significantly, the interference and trespass that lies at the heart of this matter remains the same regardless of who is projecting the image, or the content of its message.

The Appellant here effectively seeks to immunize its actions from state court redress, and to limit the State of Nevada from protecting the property rights of its own citizens by claiming that the regulation of its tortious conduct is federally preempted. The Appellant's claim is unavailing. Projecting images onto a property owner's physical structure(s) is, quite simply, trespass. And, in this instance, the Respondent, quite properly, sought relief from such trespass under state law and in Nevada Trial Court. This was wholly proper, and such action is not even arguably preempted by the mere happenstance that the trespasser is a labor organization. The United States Supreme Court has clearly recognized a state's inherent right to determine the parameters of its own state laws and determined, under analogous circumstances that a state-based civil action for

trespass is not preempted. *See Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 199-200 (1978).

Without the effective protection of a state's trespass laws, the property rights of its citizens will be subject to widespread and routine transgression. Federal preemption in the labor context was never meant to be, and has never been, interpreted to deprive a state of the ability to protect the property rights of its citizens. Intentionally projecting an image on the private property of another is a trespass, and states have the right to prohibit such trespass regardless of the identity of the trespasser or the content of its message.

II. ARGUMENT

A. STATE-LAW PROPERTY CLAIMS ARE NOT PREEMPTED BY SECTION 303 OF THE LMRA, NOR DO THEY CONFLICT WITH THE POLICIES OF SECTION 8(b)(4) OF THE NLRA

The Appellant argues that the Trial Court in this matter lacked jurisdiction because Respondent's claim is preempted under Section 303 of the LMRA. (OB 6, 8-9.) The assertion is incorrect. The Federal Courts, including the United States Supreme Court, and the US Court of Appeals for the Ninth Circuit, have consistently held that state tort claims are not preempted. *See Sears*, 436 U.S. at 199-200; *San Antonio Cmty. Hosp. v. s. Cal. Dist. Council of Carpenters*, 125 F.3d 1230, 1235 (9th Cir. 1997); *Retail Property Trust v. United Broth. of Carpenters and Joiners of America*, 768 F.3d 938 (9th Cir. 2014).

The Supreme Court's jurisprudence is unequivocal in this regard: "The right of employers to exclude union organizers from their private property emanates from state common law." *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 at 217 n. 21 (1994). As a result, there is nothing "federal" about a claim for trespass, even where a union is involved. A preliminary injunction for common law trespass relating to "non-violent [] activities taken in the course of a labor dispute" is not preempted by Section 303 of LMRA, despite the Appellant's claims. (OB at 6.)

1. An Action To Vindicate A Property Owner's Property Interests Does Not Implicate Federal Labor Law

Federal law governing labor relations does not remove the states' power to regulate where the activity regulated is a merely peripheral concern. The Supreme Court clarified, more than thirty years ago, that the NLRA does not preempt state-law property claims. *See Sears*, 436 U.S. at 207. In *Sears*, the question was whether the NLRA "deprives a state court of the power to entertain an action by an employer to enforce state trespass laws against picketing which is arguably - but not definitely - prohibited or protected by federal law." *Id.* at 182. Justice Stevens explained that the Court was "unwilling to presume that Congress intended the arguably protected character of the Union's conduct to deprive the [State] courts of jurisdiction to entertain [a] trespass action." *Id.* at 207. The Court's holding is still binding.

In *Sears*, the controversy in state court was limited. It did not challenge the lawfulness of the picketing generally; rather, it "sought simply to remove the pickets from its property." *Id.* at 185. Justice Stevens also explained that "the history of the labor preemption doctrine in [the Supreme] Court does not support an approach which sweeps away state-court jurisdiction over conduct traditionally subject to state regulation without careful consideration of the relative impact of such a jurisdictional bar on the various interests affected." *Id.* at 188. For these reasons, the Court had previously upheld state-court jurisdiction. *Id.* at 195 (*citing San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959), and *citing* other authorities).

Trespass is a labor-neutral tort. And although *Sears* recognized that unions have a limited federal right to access private property,[2] this right does *not* preclude a property holder from invoking state-court jurisdiction to bring a claim for trespass against a union, even if the federal right arguably attaches. *See Sears*, 436 U.S. at 204-06 (*citing NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956)); *see also Lechmere, Inc. v. NLRB*, 502 U.S. 527, 535, 539 (1992) (recognizing the limited nature of this federal right); *accord* 2 John E. Higgins, Jr., The Developing Labor Law 2365 (5th ed. 2006) (explaining that test supporting the narrow federal right of access is "a stringent one").

[2] Any limited access rights discussed by the Supreme Court are in circumstances not remotely analogous to the one at bar. *See Sears*, 436 U.S. at 204-06.

Respondent brought a traditional state-action in tort, seeking declaratory and injunctive relief from the Appellant's tortious conduct - *i.e.*, its trespass on its private property via the projection - and *not* directed at peaceful union conduct. The scope of the underlying action was limited. Respondent was not seeking to prevent or punish the Appellant's labor conduct, but only the conduct that involved a trespass on its private property. Respondent's claim depends entirely on whether the *location* of the projections on the façade of its property constitutes a trespass in contravention of state law. That issue, in turn, depends on Respondent's private property rights to be free of third-party projections - again, an issue that arises under, and turns exclusively, on state law. *See City of Valparaiso, Ind. v. Iron Workers Local Union No.* 395, 669 F.Supp. 912, 914 (N.D. Ind. 1987) ("The critical omission from the City's complaint is the absence of any allegation that an object of the unions' conduct is to put pressure on a neutral or secondary party to cease doing business with a primary employer. Because this is a necessary element for relief under § 158(b)(4), without it, the City's complaint does not implicate a federal question."). Here, federal labor law is not implicated in the absence of any assertion, other than the Appellant's self-serving statement, that Appellant's activities are aimed at pressuring a neutral, secondary party.

None of the cases relied upon by the Appellant involve a Section 303 preemption of a state court trespass action. For example, in *Local 20, Teamsters*

Chauffeurs and Helpers Union v. Morton, 377 U.S. 252 (1964), cited by the Appellant, the U.S. Supreme Court rejected a district court ruling adjudicating a claim based on the common law, which, the court said, prohibits "making direct appeals to a struck employer's customers or suppliers to stop doing business with the struck employer." *Id*. at 255. Unlike the employer in *Morton*, the Respondent here seeks relief based on state-based claims to preserve its basic property rights.

Other cases relied upon by the Appellant are equally unpersuasive. Thus, in *San Antonio Cmty. Hosp. v. s. Cal. Dist. Council of Carpenters*, 125 F.3d 1230, 1235 (9th Cir. 1997), the Ninth Circuit held that interference with contract and contractual based claims, not state-based trespass claims, are preempted under Section 303. Similarly, in *Iodice v. Calabrese*, 512 F.2d 383, 386 n. 1 (2d Cir. 1975), the Second Circuit merely acknowledged that the trial court dismissed a state secondary boycott law based on Section 303 preemption. *Id*. In *Smart v. Local 702 Intern. Broth. Of Electrical Workers*, 562 F.3d 798, (7th Cir. 2009), the Seventh Circuit held that Section 303 preempted a state anti-trust claim. *Id*. at 808. No authority relied upon by the Appellant stands for the proposition that a state trespass action is preempted under Section 303.

Tellingly absent from the Appellant's cited authority is any reference to *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772 (9th Cir. 2001). There, the Ninth Circuit specifically rejected the claim of state tort preemption. *Id*. at 784. Indeed,

the court noted that "the fact that a state tort may also constitute an unfair labor practice does not inevitably cause preemption of the state claim." *Id*. at 785. More importantly, the court unsurprisingly recognized that "[t]he property right underlying the law of trespass, of course, is a matter of state law." *Id*. at 784. Stated simply, the trespass action turns exclusively on state-law issues. *See Helmsley-Spear, Inc. v. Fishman*, 11 N.Y.3d 470, 476, 900 N.E.2d 934, 938 (NY 2008).

2. Matters Of Local Concern Are Not Preempted Merely Because They Might Relate To A "Secondary Boycott"

In enacting the NLRA, Congress expressed no intent to displace state-law remedies designed to protect the private property interests of a state's citizens. Despite the Appellant's argument, Section 303 does not preempt all lawsuits for injunctive relief and damages arising out of peaceful union activity. (OB at 11.) Rather, Section 303 provides a limited and specific form of federal relief: it supplies a cause of action for business and property losses incurred by "reason of" the secondary activity itself; it does not limit damages for other forms of tortious conduct. *See* 29 U.S.C. § 187(b); *see also Local 20, Teamsters, Chauffeurs and Helpers Union v. Morton*, 377 U.S. 252 at 261 (1964) (explaining that "state law has been displaced by § 303 in private damage actions based on peaceful union secondary activities"); *see also Retail Property Trust v. United Broth. of Carpenters and Joiners of America,* 768 F.3d 938 (9th Cir. 2014).

Under the Appellant's view, a private property owner, such as Respondent, could never pursue property based, state-law tort claims. (OB at 10-11.) However, as indicated above, owners of private property must be afforded an opportunity to invoke state-court jurisdiction to pursue claims for tortious conduct against their property interests. Not only must state claims be resolved by state tribunals, state courts are also uniquely equipped to adjudicate these types of common law claims and, where appropriate, enter immediate equitable relief, by way of a temporary restraining order or preliminary injunction, as here.[3] *See Retail Property Trust*, 768 F.3d at 953 (*citing Sears*, 351 U.S. at 190).

3. Trespass Claims Are Not Preempted Because They Threaten Public Order

The Appellant's convoluted argument that *Retail Property Trust*'s reliance on *Morton* stands for the proposition that any state-law action that is arguably related to a non-violent, secondary boycott is preempted by Section 303 of LMRA is simply overblown. (OB at 6:16-17.) The limited holding in *Morton* does not stand for so broad a proposition and is in full accord with the local-interest exception that would later serve as the foundation for the Supreme Court's holdings in *Sears* and *Retail Property Trust*. The tort at issue in *Morton*—an

[3] Appellant's reliance on *San Antonio Community Hospital* is misplaced; the Ninth Circuit permitted the consideration of an injunction based on the state tort claim for defamation despite the Section 303 claim. *See San Antonio Cmty. Hosp.* 125 F.3d at 1239. As the Ninth Circuit discussed later, if it believed Section 303 preempted all state court torts, it would not have considered the state tort claim. *See Retail Property Trust*, 768 F.3d at 957.

analog to tortious interference with a prospective business relation - is distinct from trespass.

If there was any doubt about whether this case falls within the *Sears* local-interest exception, or whether it falls within *Morton*'s finding of preemption for claims of business losses, that doubt was resolved by the Supreme Court in *Local 926, International Union of Operating Engineers, AFL-CIO v. Jones*, 460 U.S. 669 (1983). In *Jones*, the court clarified that a state law claim for tortious interference with contractual relations - in that case, for the loss of a job caused by a union - was preempted by the NLRA, whereas the claim for trespass is not preempted. *Id.* at 682. The *Jones* court explained that an action for tortious interference impermissibly overlapped with the NLRA, because the "same crucial element" must be proved under both federal and state law - namely, whether "the Union actually caused the [plaintiff's] discharge and hence was responsible for the employer's breach of contract." *Id.* at 682. But "[t]his was not the case in *Sears*." *Id.* In *Sears*, the *Jones* court continued, the action for trespass challenged "only the location of the Union picketing," whereas an action for unfair labor practices "would have focused on whether the picketing had recognitional or work reassignment objectives, issues 'completely unrelated to the simple question whether a trespass had occurred.'" *Id.* at 682-83 (*quoting Sears*, 436 U.S. at 198).

Accordingly, in *Jones*, the Supreme Court maintained the same distinction—recognized in *Morton*—that is fatal to Appellant's arguments in this case: Section 303 gives rise to complete preemption, but only of state-law claims for business and property losses based on peaceful union secondary activities; it does not preempt other common-law tort claims, including claims for the violation of state-conferred property interests. *Jones*, 460 U.S. at 682-83; *accord Sears*, 436 U.S. at 198; *Morton*, 377 U.S. at 257.

In *Sears*, the Supreme Court explained that the enforcement of state-conferred property interests did not interfere with federal labor law, because the union likely had no independent federal right to violate those state-conferred interests. *See Sears*, 436 U.S. at 204-07. And in *Thunder Basin*, the Supreme Court reemphasized that "[t]he right of employers to exclude union organizers from their private property emanates from state common law." *Id*. at 510 U.S. at 217 n. 21. The outcome here is no different. No third party, including the Appellant, has free reign to engage in trespass on private property and claim the state has no right to control such conduct.

The Appellant's argument further attempts to cloud the essential issue by its discourse on the "compelling state interest" exception. Stripped of its rhetorical dross, the Appellant's argument in this regard boils down to an untenable claim that so long as its protest can be described as "peaceful," it has free reign to invade

an employer's private property and the state has no jurisdiction to constrain such behavior. However, *Sears* specifically held that even a "peaceful" protest is not preempted if it involves the invasion of an employer's private property - precisely because a state-law action to redress such an invasion touches upon a "compelling state interest." *See Sears*, 436 U.S. at 195. Accordingly, even non-violent conduct falls squarely within a "compelling state interest" exception when it involves the physical invasion of private property and threatens the public order. *Id.*; *see also Morton*, 377 U.S. at 257 (describing the "compelling state interest" exception).

B. LABOR SPEECH IS NOT PRIVILEGED OVER OTHER TYPES OF SPEECH

The First Amendment right to speak is not an absolute right to engage in every form of speech whenever and wherever the speaker desires. *See Schenck v. United States*, 249 U.S. 47, 52, 63 L.Ed. 470, 39 S.Ct. 247 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing panic."); *see also Greer v. Spock*, 424 U.S. 828, 836, 47 L.Ed.2d 505, 96 S.Ct. 1211 (1976) (The guarantees of the First Amendment have never meant "that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please."). Moreover, despite the Appellant's insinuations, labor speech is not granted special First Amendment protections over any other types of speech. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972) and *Carey v. Brown*, 447 U.S. 455 (1980).

The question, nonetheless, becomes whether Respondent is required by the First Amendment to allow projections, regardless of their content, on the side of its privately-owned building and other structures. The clear answer is no: privately-owned property cannot "be treated as though it were public" for purposes of subjecting the private owner to First Amendment constraints unless the "property has taken on *all* the attributes of a town, *i.e.*, residential buildings, streets, a system of sewers, a sewage disposal plant, and a business block." *See Flagg Bros., Inc. v. Brooks,* 436 U.S. 149, 159 (1978) (emphasis in original) (internal quotation marks omitted).

But that is exactly the result Appellant effectively urges – *i.e.*, that private property owners would be compelled to turn their own property into a massive viewing screen for the dissemination of any third-party's communication, even communications deliberately designed to injure the property owner's own commercial interests. No reasonable construction of the First Amendment can possibly yield such a result.

C. PROJECTIONS ON PRIVATE PROPERTY NOT ONLY CONSTITUTE TRESPASS BUT ALSO TAKE PROPERTY OWNERS' FUNDAMENTAL OWNERSHIP RIGHTS

Contrary to the Appellant's argument, the intentional projection of light on a private property owner's building is trespass. As discussed in the Respondent's Brief, a civil trespass consists of an unpermitted and unprivileged entry onto the

land of another. *See Allied Props. v. Jacobsen*, 343 P.2d 1016, 1021, 75 Nev. 369 (Nev. 1959). A property right must be invaded. *See Moonin v. Nevada ex rel. Dep't of Pub. Safety Highway Patrol*, 960 F.Supp.2d 1130, 1145 (D. Nev. 2013); *citing to Lied v. Clark County*, 94 Nev. 275, 579 P.2d 171, 173 (1978). However, physical entry by another person is not the only manner trespass occurs:

> Causing entry of a thing. The actor, without himself entering the land, may invade another's interest in its exclusive possession by throwing, propelling, or placing a thing either on or beneath the surface of the land or in the air space above it. Thus, in the absence of the possessor's consent or other privilege to do so, it is an actionable trespass to throw rubbish on another's land, even though he himself uses it as a dump heap, or to fire projectiles or to fly an advertising kite or balloon through the air above it, even though no harm is done to the land or to the possessor's enjoyment of it.

See Restatement (Second) of Torts § 158 (1965). As such, the intentional act of projecting a sign onto privately owned buildings or other structures plainly constitutes a trespass. The argument relied on by the *Amici Curiae* in support of Appellant is both fundamentally distinguishable and wholly misplaced. Its argument, without any authority, involves instances of ambient light or the reflection of light from a sign. (*Amici Curiae* Brief Supporting Appellant at 2:11-16; 5:1-9.) The trespassory nature of ambient light is fundamentally different than the trespassory nature of the intentional display of a tangible image and message. Apart from the commonality of "light", the two are completely different.

Additionally, the Supreme Court has repeatedly affirmed, in a variety of

contexts, that private property owners have a right to maintain control over the use of their property. *See, e.g., Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539-41 (NLRA does not confer a right on nonemployee organizers to trespass on privately-owned store property, absent exceptional circumstances); *see also S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 23 P.3d 243 (Nev. 2001) ("The right to exclude others" has been held to constitute a "fundamental element of private property ownership. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights.") (internal quotation marks and citation omitted).

An image projected on the side of a privately owned building absolutely interferes with the property owner's right of possession of its property.[4] By ruling that this violation is not trespass, the entirety of the population is affected. If this conduct were to be allowed to continue unabated, such would be tantamount to a taking of an owner's private property without due process, including just

[4] Construed otherwise, any third party could project any lit image on any private property owner's building or physical structure. In fact, it has been occurring world-wide. For instance, Occupy San Diego projected dozens of politically defiant messages on commercial buildings, including the Convention Center and the San Diego County Courthouse, during the Democratic Party State Convention. *See* The OB Rag (Feb. 15, 2012), retrieved from http://obrag.org. In addition, "No" campaigners projected a large "No" on to the walls of Scotland's castles and Glasgow's Clyde Auditorium. *See* Daily Mail (Sept. 18, 2014) Pro-Union Campaigners End Campaign Highlight Vote No Activities Light Three Scotland's Tourist Attractions, retrieved from http://www.dailymail.co.uk. Recently, on Thursday, August 27, 2015, a New Jersey judge banned a union from projecting on the side of exterior walls of certain casinos in Atlantic City. *See* Associated Press (August 27, 2015) Judge blocks union from beaming messages onto Icahn casinos, *Jersey Tribune*, retrieved from http://jerseytribune.com.

compensation. Projection bombing will likely continue to escalate. Images concerning political candidates or adversary messages could be projected on the side of a hotel. An image concerning an escort service could be projected on the side of a church. Competitors could use the space to promote their own products and/or services. And as technology advances, light could be projected from above and wrap around an entire building, effectively changing the entire façade of the owner's property. According to Appellant, exerting dominion and control over the façade of a property owner's building or other physical structures with its projections is not an invasion of one's property rights. The *Amici* wholly disagree.

Here, Respondent is being denied its possessory rights and control over its own real property because it is no longer the sole decision-maker as to the outside appearance of the same, nor what is displayed thereon. When it projected an image on the façade of a building, that decision was being made by the Appellant. Respondent's private property rights are rendered meaningless if the Appellant or any other third parties are permitted to display whatever type of signage they deem appropriate at the time. And any misuse of property or deviation from the intended use of the property is a trespass. *See S.O.C., Inc.*, 117 Nev. at 409. Aside from acting in clear derogation of the owner's property rights, this conduct could cause the property owner to run afoul of local regulations and municipal ordinances regarding limitations on signage, lighting or other design qualities, which would

expose the owner to potential fines or other citations as a result of such violations. A property owner's private property rights will be of no consequence if the outside of its building can be used by any third party, including the Appellant, a religious congregation or a commercial entity.

III. CONCLUSION

The rights of a property owner to control the use of its private property must continue to be recognized. Privileging third parties to intentionally project lit images violates state-conferred property rights and invites the disruption of order. The Trial Court's preliminary injunction upheld an owner's inherent property rights and any labor activities involvement was peripheral and insignificant. This is a state-law matter that is not swept away by any defensive preemption argument. The Trial Court properly exercised its discretion to issue an injunction and it should, therefore, be affirmed.

DATED this 2nd day of September, 2015.

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

/s/ Anthony L. Martin
Anthony L. Martin
Nevada Bar No. 08177
Erica J. Kelly
Nevada Bar No. 12238
Wells Fargo Tower
Suite 1500
3800 Howard Hughes Parkway
Las Vegas, NV 89169
Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font, Times New Roman style. I further certify that this Brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 5,194 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

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I understand that I may be subject to sanctions in the event that this Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 2nd day of September, 2015.

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

/s/ Anthony L. Martin

Anthony L. Martin
Nevada Bar No. 08177
Erica J. Kelly
Nevada Bar No. 12238
Wells Fargo Tower
Suite 1500
3800 Howard Hughes Parkway
Las Vegas, NV 89169
Counsel for Amici Curiae

AFFIRMATION PURSUANT TO NRS 239B.030

Pursuant to Nevada Revised Statute 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 2nd day of September, 2015.

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

/s/ Anthony L. Martin

Anthony L. Martin
Nevada Bar No. 08177
Erica J. Kelly
Nevada Bar No. 12238
Wells Fargo Tower
Suite 1500
3800 Howard Hughes Parkway
Las Vegas, NV 89169
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.; that on or about September 2nd, 2015, the foregoing was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing System (Eflex). Participants in the case who are registered with Eflex as users will be served by the Eflex system as follows:

Kristina L. Hillman Law Offices of Kristina L. Hillman 1549 Mono Avenue P.O. Box 1987 Minden, NV 89423 *Counsel for Appellant*	Debbie Leonard McDonald Carano Wilson LLP 100 W. Liberty Street, 10th Floor Reno, NV 89505 *Counsel for Respondent*
David Rosenfeld Weinberg, Roger & Rosenfeld 119 Magnolia Ave. Piedmont, CA 94610 *Proposed Associated Counsel for Appellant*	Pat Lundvall Jeff S. Riesenmy McDonald Carano Wilson LLP 2300 W. Sahara Ave., Suite 1200 Las Vegas, NV 89102 *Counsel for Respondent*
Richard G. McCracken Andrew J. Kahn McCracken, Stemerman & Holsberry 1630 S. Commerce Street, Suite A-1 Las Vegas, NV 89102 *Counsel for Proposed Amici Curiae Nevada AFL-CIO, Int'l Bhd of Teamsters & UNITE HERE Int'l Union.*	

/s/ Carol Rojas
An Employee of OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.