# MEMORANDUM

TO: Police and Store Management

FROM: Renée Sánchez, Wohlner Kaplon Cutler Halford & Rosenfeld, Encino, CA

DATE: September 21, 2017

RE: Hand Billing and First Amendment Activity

I am counsel to the International Brotherhood of Teamsters (IBT). The IBT and some of its affiliated local unions are currently involved in a dispute with Vistar, a nationwide food distributor. The IBT and its affiliated local unions intend to publicize this dispute by engaging in peaceful hand billing at retail establishments, including movie theaters that utilize Vistar's products and services.

*First Amendment*

The First Amendment of the Constitution of the United States, as well as California law and the National Labor Relations Act protect the Teamsters' right to handbill on public sidewalks immediately adjacent to stores utilizing Vistar's products, including sidewalks of stores located within shopping centers. Interference with these rights will result in litigation in which the Teamsters will likely recover its legal fees from the other side. Your police department can avoid this by declining to arrest or otherwise interfere with handbillers and instead leaving the company to pursue its own remedies.

Sidewalks have long been viewed as "public forums" open to those who wish to publically air opinions and disputes. This fact was emphasized in *United States v. Grace*, 461 U.S. 171, 179 (1983), where the Supreme Court struck down a federal statute prohibiting handbilling on the sidewalk outside the Supreme Court Building. The Court noted:

> "Sidewalks, of course, are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property."

The Court emphasized that sidewalks occupy a "special position in terms of First Amendment protection" so the government's ability to restrict expressive activity there "is very limited." 461

U.S. at 180 & 177. *See also, Hague v. CIO*, 301 U.S. 496, 515 (1939) (sidewalks are "traditional public fora that 'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.")

Handbilling is activity protected by the First Amendment. *Lovell v. City of Griffin, Georgia*, 303 U.S. 444, 452 (1938) ("The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets.") This includes handbilling and other activity in public forums to publicize a labor dispute. *United States v. Hutcheson*, 312 U.S. 219, 243, (1941) (peaceful publication of labor dispute "is an exercise of the right of free speech guaranteed by the First Amendment which cannot be made unlawful by act of Congress."); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Trades Council*, 485 U.S. 568, 575-576 (1988).

Handbilling does not lose its protection because it is critical of a business or organization or is designed to put pressure on a business or organization. The Supreme Court applied this principle in *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) to invalidate an injunction prohibiting the distribution of handbills critical of a business, stating unequivocally "the activity of peaceful pamphleteering is a form of communication protected by the First Amendment" and "[t]he claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment." 402 U.S. at 419. *See also, NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 910 (1982) ("Speech does not lose its protected character, however, simply because it embarrasses others or coerces them into action."); *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (". . . speech cannot be restricted simply because it is upsetting or arouses contempt . . . government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."

*California Law*

California courts have held that Article I, §2 of the California Constitution grants broader rights to free expression than the United States Constitution. *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899, 153 Cal.Rptr. 854 (1979), *affirmed sub. nom. Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980). *United Brotherhood of Carpenters Local 586 v. NLRB*, 540 F.3d 957, 963 (9th Cir. 2008).

Publicity regarding labor disputes is further protected by the Moscone Act, Cal. Code Civ. Pro. §527.3, which specifically protects "giving publicity to, and obtaining or communicating information regarding the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be." Labor Code § 1138.1 provides additional protection by prohibiting California courts from issuing an injunction in a labor dispute except under narrow circumstances.

The California Supreme Court has ruled that the Moscone Act allows unions to publicize labor disputes on sidewalks directly outside of retail stores. *Schwartz-Torrance Investment Corp. v. Bakery & Confectionary Workers' Union*, 61 Cal.2d 766 (1964) (picketing); *In re Lane*, 71 Cal. 2d 872 (1969) (hand billing). The California Supreme Court recently reaffirmed this reading of the Moscone Act in the context of picketing and hand billing publicizing a labor dispute that

occurred on sidewalks located within a retail shopping center. The Court held that the California's Constitution protects speech in the common areas of privately owned shopping centers. *Ralphs Grocery Company v. UFCW Local 8*, 55 Cal. 4th 1083, 1091 (2012) (citing *Pruneyard Shopping Center*, 23 Cal.3d 899, 910 (1979)).

It should be noted that California law, like the First Amendment, protects union publicity of a labor dispute even where the publicity is aimed at persons or employers other than the employer with whom the union has a dispute. For example, in *Lane, supra*, the union sought to publicize its dispute with a newspaper by handbilling in front of a supermarket urging customers not to shop there because the store advertised in the newspaper. The California Supreme Court found this activity to be lawful. 71 Cal. 2d 875-877.

*National Labor Relations Act*

Because the IBT's activities arise in the context of a labor dispute, the National Labor Relations Act (NLRA), 29 U.S.C. §151, et. seq., provides additional protection. See, e.g., *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Trades Council*, 485 U.S. 568, 575-576 (1988) (hand billing protected activity under the NLRA). *See also*, *NLRB v. Calkins (Indio Grocery Outlet)*, 187 F.3d 1080 (9th Cir. 1999)(employer liable under NLRA for pursuing civil and criminal actions against union for demonstration on property opened up to public, even though technically private). Application of state and local laws is preempted under the NLRA when the union's activity is merely "arguably protected" by the NLRA. *San Diego Building Trades v. Garmon*, 359 U.S. 236 (1959). The NLRA protects publicity regarding labor disputes aimed at persons or employers other than the employer the union has a dispute with. *Edward J. DeBartolo Corp., supra*, (handbilling aimed at shopping center where store that was subject of dispute is protected).

If a city takes action against an individual that interferes with that person's federal constitutional right of free speech, or takes actions preempted by the NLRA (such as taking action or arresting union supporters distributing handbills), the locality is liable under the Klu Klux Klan Act, 42 U.S.C. §1983 for violating that person's civil rights, including liability for the plaintiff's attorney fees, actual damages and punitive damages under 42 U.S.C. §1988. *Golden State Transit v. City of Los Angeles*, 493 U.S. 103 (1989); *Livadas v. Bradshaw*, 512 U.S. 107 (1994); *Radcliffe v. Rainbow Constr.*, 254 F.3d 772, 780 (9th Cir. 2001).

Violations of state-law free speech rights by storeowners are remediable through state courts. See, *No. Cal. Newspaper Organizing Comm. v Solano Associates*, 193 Cal. 3rd 1644 (1987) (granting union declaratory and injunctive relief against interference with access). In such cases, the prevailing plaintiffs normally receive attorneys' fees under CCP 1021.5. See, *Press v. Lucky Stores* (1983) 34 Cal.3d 311 (1983).

Should there be any questions, my phone number is: (818) 501-8030.