Appellate Case No. G055842
Sup. Ct. 30-2015-00786580

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION THREE

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**CENTER FOR BIO-ETHICAL REFORM, INC**, and
**GREGG CUNNINGHAM**,

Plaintiffs and Appellants,

vs.

**THE IRVINE COMPANY, LLC**,

Defendant and Respondent.

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# APPELLANTS' OPENING BRIEF

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Appeal from Final Judgment of the Superior Court
State of California, County of Orange
Honorable Randall J. Sherman, Judge, Presiding

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

| COURT OF APPEAL APPELLATE DISTRICT, DIVISION | COURT OF APPEAL CASE NUMBER: G055842 |
|---|---|
| ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 132011<br>NAME: David Yerushalmi<br>FIRM NAME: American Freedom Law Center<br>STREET ADDRESS: 21731 Ventura Boulevard<br>CITY: Woodland Hills STATE: CA ZIP CODE: 91364<br>TELEPHONE NO.: (646) 262-0500 FAX NO.: (801) 760-3901<br>E-MAIL ADDRESS: dyerushalmi@americanfreedomlawcenter.org<br>ATTORNEY FOR (*name*): Center for Bio-Ethical Reform, Inc. & Gregg Cunningham | SUPERIOR COURT CASE NUMBER: 30-2015-00786580 |
| APPELLANT/ PETITIONER: Center for Bio-Ethical Reform, Inc. & Gregg Cunningham<br>RESPONDENT/ REAL PARTY IN INTEREST: The Irvine Company, LLC | |
| **CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**<br>(*Check one*): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE | |

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2. a. [ ] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. [X] Interested entities or persons required to be listed under rule 8.208 are as follows:

| Full name of interested entity or person | Nature of interest (*Explain*): |
|---|---|
| (1) Center for Bio-Ethical Reform, Inc. | The non-profit corporation is a party in this case. |
| (2) The Irvine Company, LLC | The company is a party in this case. |
| (3) | |
| (4) | |
| (5) | |

[ ] Continued on attachment 2.

**The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).**

Date: April 30, 2018

David Yerushalmi
(TYPE OR PRINT NAME)


(SIGNATURE OF APPELLANT OR ATTORNEY)



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## NATURE OF THE ACTION

Plaintiff/Appellant Center for Bio-Ethical Reform, Inc. ("CBR") is a nonprofit, California corporation that engages in anti-abortion expressive activity, including targeted, boycott picketing of businesses that fund Planned Parenthood. Plaintiff/Appellant Cunningham is the executive director of CBR, and he exercises his right to free speech through CBR's expressive activities. (Collectively referred to as "Plaintiffs"). [Appellants' Appendix ("AA"), Vol. I, pp. 38-41, 113-14].

Defendant/Respondent Irvine Company, LLC ("Defendant") is the owner and operator of the Irvine Spectrum Center and Fashion Island, which are shopping centers that are public forums for expressive activity under California law. [AA, Vol. I, pp. 39-41, 114].

In November 2014, Plaintiffs proposed to engage in their non-obstructive, boycott picketing of certain businesses in the Irvine Spectrum Center and Fashion Island. More specifically, Plaintiffs proposed engaging in their expressive activity with two anti-abortion signs: one depicting an image of a seven-week-old living human embryo and the other depicting an image of an eight-week-old dead human embryo. The request was rejected. Plaintiffs then proposed a third sign, which contained the image of a QR code that a viewer could choose to scan to watch an abortion video. This request was rejected as well. Defendant denied Plaintiffs' requests under its "Original Rules" and threatened to treat Plaintiffs as

criminal trespassers if they engaged in their free speech activity. In other words, if Plaintiffs engaged in their constitutionally protected activity, they would be subject to physical ejection. Defendant's threat interfered with (and, in fact, halted) Plaintiffs' exercise and enjoyment of their right to free speech, prompting Plaintiffs to file this lawsuit. [AA, Vol. I, pp. 10-36].

Defendant subsequently revised its rules. Per the agreement of counsel, Plaintiffs promptly resubmitted their modified request to engage in free speech activity at Defendant's shopping centers under the "Revised Rules." This request was also denied under the same threats of intimidation and coercion, prompting the filing of the First Amended Complaint. [AA, Vol. I, pp. 49-54].

Defendant made minor modifications to its Revised Rules during the pendency of this litigation under the First Amended Complaint, resulting in the "Second Revised Rules." However, this latest iteration of the rules did not change any of the challenged restrictions at issue here—restrictions which remain in effect today. [*See* Reporter's Transcript ("RT"), Vol. I, pp. 62:8-11, 63:5-9].

On October 23, 2017, a bench trial was held before the Honorable Randall J. Sherman. During this trial, documents were admitted as exhibits and the Court heard the testimony of Plaintiff Gregg Cunningham; Kevin Olivier, the Operations Officer for CBR; and Tanya Thomas, the Vice President and General Manager of Fashion Island. [RT, Vol. I, pp. 1-148].

On December 28, 2017, the trial court entered judgment in this case, ruling in favor of Plaintiffs on some issues and in favor of Defendant on others. [AA, Vol. I, pp. 369-71].

On January 9, 2018, Plaintiffs filed their notice of appeal. [AA, Vol. I, pp. 372-74]. In this appeal, Plaintiffs seek review of the trial court's ruling with regard to the following: (1) the application of Defendant's content-based "grisly or gruesome" imagery restriction to prohibit the display of Plaintiffs' "Dead 8 week human embryo moments after abortion" sign; (2) Defendant's refusal to permit Plaintiffs to engage in non-obstructive, expressive boycott activity near the entrances of certain targeted stores within Defendant's shopping centers; (3) Defendant's *ad hoc* restriction on the use of body cameras; and (4) the denial of statutory penalties under C.C. § 52.1.

## RELIEF SOUGHT

This case challenges Defendant's restrictions on Plaintiffs' right to free speech under the California Constitution. Plaintiffs seek declaratory and injunctive relief and statutory penalties under C.C. § 52.1. Also, Plaintiffs seek an award of their costs and attorneys' fees.

More specifically, Plaintiffs seek (1) an order declaring that Defendant's content-based "grisly or gruesome" imagery restriction facially and as applied to prohibit the display of Plaintiffs' "Dead 8 week human embryo moments after abortion" sign violated Plaintiffs' rights under the

California Constitution and an order enjoining the challenged restriction; (2) an order declaring Defendant's restrictions (location and size) on Plaintiffs' right to engage in non-obstructive, expressive boycott activity near the entrances of certain targeted stores within Defendant's shopping centers violated Plaintiffs' rights under the California Constitution and an order enjoining the challenged restrictions; (3) an order declaring that Defendant's *ad hoc* restriction on the use of body cameras violated Plaintiffs' rights under the California Constitution and an order enjoining the challenged restriction; and (4) an award of statutory penalties under C.C. § 52.1.

## FINAL JUDGMENT APPEALED FROM AND STATEMENT OF JURISDICTION

Following a bench trial held on October 23, 2017, the trial court issued its oral ruling from the bench on October 30, 2017. The ruling was incorporated in a Judgement, which was entered on December 28, 2017. This ruling disposed of all of the parties' claims and is thus a final judgment. [AA, Vol. I, pp. 369-71].

Plaintiffs timely filed a notice of appeal on January 9, 2018, appealing this final judgment. [AA, Vol. I, pp. 372-74].

This Court has jurisdiction pursuant to C.C.P. § 904.1(a)(1).

## STATEMENT OF QUESTIONS PRESENTED

I. Whether Defendant's content-based "grisly or gruesome" imagery restriction facially and as applied to prohibit the display of Plaintiffs' "Dead 8 week human embryo moments after abortion" sign violates Article I, § 2 of the California Constitution.

II. Whether Defendant's location and size restrictions on Plaintiffs' right to engage in non-obstructive, expressive boycott activity near the entrances of certain targeted stores within Defendant's shopping centers violate Article I, § 2 of the California Constitution.

III. Whether Defendant's *ad hoc* restriction on the use of body cameras violates Plaintiffs' rights protected by Article I, § 2 of the California Constitution.

IV. Whether Plaintiffs are entitled to an award of statutory penalties under C.C. § 52.1

## STATEMENT OF FACTS

CBR is a nonprofit, California corporation. Plaintiff Cunningham is the Executive Director of CBR. [AA, Vol. I, pp. 113-14].

Defendant is a limited liability company organized under the laws of Delaware and doing business in California, with its principal place of business in Orange County, California. Defendant is the owner of the Irvine Spectrum Center and Fashion Island, and it allows expressive activity at these shopping centers subject to certain rules, which are challenged here. [AA, Vol. I, p. 114].

CBR is an advocacy and educational organization. One of the areas it addresses is abortion. CBR engages in free speech activity to express a point of view in an attempt to influence public opinion in a way that creates the political consensus that would ultimately change the law. [RT, Vol. I, p. 13:12-24]. Plaintiff Cunningham exercises his right to freedom of speech through the free speech activity of CBR. [AA, Vol. I, p. 114; RT, Vol. I., p. 13:8-11].

As part of its expressive activity, CBR engages in boycott picketing. [AA, Vol. I, p. 113; RT, Vol. I, p. 13:25-26]. Plaintiffs engage in boycott picketing to, *inter alia*, convince the public that an injustice is efficiently egregious to motivate consumer decisions. For example, in this case, Plaintiffs want to demonstrate to consumers that abortion is egregious enough to convince them to boycott businesses that donate to Planned

Parenthood, the America's largest abortion provider. [RT, Vol. I, pp. 13:24-26 to 18:1-2].

Consequently, location for Plaintiffs' boycott activity is important because they are attempting to engage patrons of a specific business. Plaintiffs do not want to roam willy-nilly through the shopping centers. They are more than willing to be confined to an area within which they agree to operate, but that area has to be in sufficiently close proximity to the entrance to a targeted store to enable Plaintiffs to engage passersby who are the most likely potential customers for that business. [RT, Vol. I, p. 18:10-23].

As part of their targeted boycott activity, Plaintiffs use abortion imagery "because the atrocity of abortion is inexpressibly evil, and a ban on imagery depicting aborted babies . . . suppresses an entire category of speech, that portion of the facts, the truth, that cannot be expressed through the written and spoken word." [RT, Vol. I, p. 19:7-17]. Indeed, impactful images of injustice have long been a part of social reform. Examples include the use of imagery showing "slaves being tortured to death to produce commodities or little children in coal mines having their health broken when they should have been in elementary school. The Holocaust memorial movement uses very, very shocking death camp photos, because there are no words that are adequate to describe that sort of thing." [RT, Vol. I, p. 14:9-26 to 15:1-20].

Historically, many popular but unjust laws were reformed only when activists exercised the right to confront society with irrefutable visual evidence of social injustice. Their graphic images were not gratuitous, they were explanatory. They dramatized injustice in ways which many found insulting, but their purpose was not to insult. They were merely trying to accurately depict injustice which could only be fully understood visually. When words fail us, we must turn to photos. Photos make injustice more difficult to trivialize or ignore. [RT, Vol. I. p. 16:14-26 (discussing the use of imagery in the abolition of the slave trade in England)]. Abortion photos are informative in useful ways which no words can achieve. [RT, Vol. I, p. 14:9-25].

Defendant permits expressive activity at the Irvine Spectrum Center and Fashion Island, which are shopping centers that are open to the public for free speech activity to the extent required by California law. [AA, Vol. I, p. 114; *see also* pp. 369-71].

The Irvine Spectrum Center is visited by more than 15 million people annually. [AA, Vol. I, p. 114]. Stores located within this mall that Plaintiffs believe donate to Planned Parenthood, the nation's largest abortion provider, include Levi's and Starbucks Coffee. [AA, Vol. I, pp. 247, 252-53].

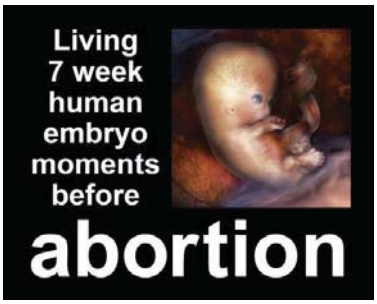
Fashion Island is visited by more than 13 million people annually. [AA, Vol. I, p. 114]. Stores located within this mall that Plaintiffs believe

donate to Planned Parenthood include Nike, Starbucks Coffee, Urban Decay, and Whole Foods Market. [AA, Vol. I, pp. 247, 251-52].

On November 25, 2014, Plaintiffs contacted Defendant, including its Chairman of the Board and other corporate officials associated with the Irvine Spectrum Center and Fashion Island, via letter informing them that Plaintiffs intend to conduct boycott picketing in close proximity to stores inside the malls for the purpose of informing prospective customers that the companies permit the targeted business entities under their corporate control to donate money to Planned Parenthood. Plaintiffs explained that their "picket signs are professionally designed, printed and fabricated to commercial standards. They conform to model hand-held sign specifications contained in the uniform sign code." [AA, Vol. I, pp. 114, 178-88].

Plaintiffs further explained that their "picketing activity will be conducted pursuant to the California Constitution, article I, section 2, subdivision (a) which provides that: 'Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.'" [AA, Vol. I, p. 179].

Attached to the letter were proposed signs that Plaintiffs intended to display in the malls as part of their picketing activity:




[AA, Vol. I, pp. 186-87, 114-15, 205-10].

The first sign shows a picture of a living human embryo at seven weeks gestational age, and the second sign shows a picture of a dead human embryo at eight weeks gestational age juxtaposed with a quarter to illustrate actual size. [AA, Vol. I, pp. 114-15, 205-10; RT, Vol. I, pp. 22:9-26 to 23:1-4].

On November 26, 2014, Plaintiff Cunningham received from Mr. Ernie Park an email stating that he is "counsel for The Irvine Company" and requesting "a complete copy" of Plaintiffs' letter. Plaintiff Cunningham promptly responded that day and provided a copy of the letter to Mr. Park. [AA, Vol. I, pp. 115, 189].

On December 1, 2014, Mr. Park sent an email to Plaintiff Cunningham, affirming that he was acting in his capacity as counsel for Defendant, the "owner of both the Irvine Spectrum and Fashion Island," and stating that he would send Plaintiff Cunningham the "usual time, manner and place rules for this type of activity at either of these two centers." Mr. Park further stated, "Our rules aside, we are prepared to

accommodate your group in the following particulars," offering Plaintiffs a location "in visual proximity" of the targeted store and a table with 2 chairs. The email further stated, "In exchange for the foregoing, [Plaintiffs] would agree not to have posters or other signage depicting the photographs (or comparable ones). We would have no objection to those images being available at your table as long as they were visible only if patrons came to the table." [AA, Vol. I, pp. 115, 190].

Later that day, Mr. Park sent an email to Plaintiff Cunningham, stating, in relevant part, "[P]lease find the rules for Fashion Island. They would be substantively the same for the Spectrum." Attached to the email was a document titled, "Rules for Non-Commercial Expressive Activities at Fashion Island Shopping Center" ("Original Rules"). [AA, Vol. I, pp. 115, 191-97].

In follow-on correspondence to Plaintiffs, Mr. Park stated that if Plaintiffs "intend to protest in violation of our rules," then Defendant "will understand [Plaintiffs'] conduct to be trespassory in nature" and will, therefore, "reserve [its] right to resort to its various remedies." [AA, Vol. I, pp. 115, 198-99]. Plaintiffs understood this to be a threat that would include their physical removal from the shopping centers—a threat that Defendant had the ability to carry out and which caused Plaintiffs to halt their free speech activity. [RT, Vol. I, pp. 30:20-26 to 31:1-25; 109:1-26 to 112:1-16].

Defendant employs private security to enforce its rules and regulations at its shopping centers, including Fashion Island and the Irvine Spectrum Center, and this security force is capable of carrying out Defendant's threat. [AA, Vol. I, p. 115; RT, Vol. I, pp. 31:18-25; 109:1-26 to 112:1-16; *see also* AA, Vol. I, p. 275]. Defendant also posts a sign on their Fashion Island property warning against trespassing. [AA, Vol. I, pp. 116, 200-01; RT, Vol. I, pp. 31:15-26 to 33:1-15].

Upon review of the rules and Mr. Park's correspondence, on December 18, 2014, Plaintiff Cunningham sent Mr. Park a lengthy email setting forth Plaintiffs' position on the issues. In that email, Plaintiff Cunningham stated the following:

> We do not trespass or engage in any other criminal misconduct. You will find us to be both responsible and willing to extend to your clients every courtesy—including making them aware of our picketing plans in advance of our arrival on private commercial property or even the public property adjacent thereto. Issues raised by your correspondence are as follows: 1) Notwithstanding your reference to our proposed expressive activity as a "protest," it is, in fact, an educational picket. 2) Your offer "to find a suitable location" for our group "in visual proximity of the store in question" is not acceptable if that location is not essentially in front of the targeted store. . . . "[T]he location of the employers is often the only effective locus; alternative locations do not call attention to the problem which is the subject of the picketing and may fail to apply the desired economic pressure." [citing and quoting *Diamond v. Bland*, 3 Cal. 3d 653, 662 (1970) ("*Diamond I*")]. 3) Your client's rules are unacceptable to the extent that they permit only "one-on-one communications as opposed to communications intended for a group of people simultaneously." The whole purpose of any educational picket is to communicate with the

largest groups possible. 4) Your rules appear to ban signs, brochures or conversation which mentions "either the center or tenants at the center." But the court in [*Glendale Associates v. NLRB*, 347 F.3d 1145 (9th Cir. 2003)] invalidated rules which banned criticism of a named tenant. 5) Rule 3 appears to permit expressive activity only in generic "designated areas" which are more restrictive than the store-front locations permitted in [*Diamond I* (*supra*)]. Again, this restriction is unlawful and therefore unacceptable. 6) Rule 9 seems to ban "gruesome pictures or displays," which language appears in [*H-Chh Assocs. v. Citizens for Representative Gov't*, 193 Cal. App. 3d 1193, 1216 (Cal. Ct. App. 1987)], but the state supreme court has not ruled on this issue and the majority in [*Fashion Valley Mall, LLC v. NLRB*, 42 Cal. 4th 850 (2007)] held that a mall's rule was not content-neutral because it barred an entire category of speech. The same defect is inherent in a ban on an entire category of speech which graphically depicts injustice which cannot be adequately described by the written or spoken word. Abortion is inexpressibly "gruesome" and "grisly," so banning photos of it betrays disapproval of pickets intended to prove to consumers that businesses which fund organizations that perform abortions should be boycotted. Photo bans render the moral depravity of abortion impossible to prove and thereby doom related boycotts to inevitable failure. That is not content-neutrality. 7) Rules 13, 14 and 20 deal with "insurance," "deposits" and "indemnification." We do not rule out the possibility that some accord can be reached on these issues, but we are confident that the courts will never grant to the wealthy expressive rights superior to those available to the poor simply because the former meet certain standards of financial responsibility which the latter cannot. 8) Rule 17 may also be unenforceable to the extent that it prohibits behavior "likely to cause significant . . . alarm," etc. Abortion is an act of violence which kills a baby. Proving that abortion is sufficiently alarming to warrant an economic boycott is vital to the success of that boycott campaign. Our behavior will not be "alarming" despite the fact our photos are "alarming" because abortion is "alarming"! 9) Rule 9 bans materials suggesting ". . . the owner supports the view of the applicants" and reserves to the owner a right to post a sign repudiating the position of the applicant. An owner who publicly and expressly rejects the

> content of an applicant's position cannot fairly be said to be imposing content-neutral restrictions. Our pictures are our message—by necessity. Such a sign is somewhat redundant if the owner bans depictions of the subject of the boycott. In so doing, the owner will obviously have taken the side of Planned Parenthood and its corporate donors, who desperately wish to trivialize abortion by concealing its horror. What better way to defeat boycotts and the accountability they impose? Partisanship of that intensity justifies pickets of the owner's entire mall, at the entrances to its parking lots, with signs which are far more disturbing than any we propose to display inside the mall. Regarding your solicitation of our agreement to not display the photos enclosed in our proposal letter, and only make them available to "patrons [who come] to the table," we reply as follows: We submitted for your approval, inside the mall, a picture of a human embryo before an abortion. There is nothing "grisly" or "gruesome" about it. You have no legal basis on which to ban it. We also submitted for your approval, inside the mall, a picture of a human embryo after an abortion, and since the California Supreme Court has not ruled on imagery proposed for display on private commercial property, we are prepared to litigate the question if negotiations prove fruitless. . . . Finally, we are willing to confine our presence to the store-front of a targeted business, but we are not willing to remain behind a table remotely located relative to that business. We have a right to approach patrons who, experience teaches, don't come to information tables. Those patrons have a right to rebuff that approach. We also have a duty to respect that rebuff. Regarding Fashion Island mall, we intend to picket Planned Parenthood donors Nike, Starbucks, Urban Decay, and Whole Foods—unless they can be persuaded to ban donations by each and every business entity over which they have control.

[AA, Vol. I, pp. 116, 202-04].

Following this communication, Plaintiff Cunningham requested a face-to-face meeting with the appropriate decision makers for Defendant in

order to discuss the issues. The request was granted. [RT, Vol. I, p. 34:3-8].

On February 9, 2015, Plaintiff Cunningham and his associate, Kevin Olivier, participated in a meeting held at the management office in the Irvine Spectrum Center. Present for Defendant were Mr. Park; Ms. Nancy Feightner, Vice President and General Manager of the Irvine Spectrum Center; and Ms. Tanya Thomas, Vice President and General Manager of Fashion Island. [RT, Vol. I, pp. 34:3-14, 107:10-20; AA, Vol. I, p. 116].

During this meeting, Plaintiff Cunningham described CBR's proposed activities at the two shopping malls and presented printouts containing the content of the two signs they intended to use. One sign showed a prenatal image and the other an abortion image. The content of these signs is the same as the content of the signs proposed in Plaintiffs' correspondence of November 26, 2014. [RT, Vol. I, pp. 34:3-26 to 37: 1-7].

As described by Plaintiff Cunningham at this meeting and consistent with his prior correspondence, Plaintiffs' proposed free speech activity would include the following: approximately 4 to 5 picketers in total standing at the entrance to the targeted store; some of the picketers (approximately 2 to 3) would be carrying hand-held signs depicting content similar to the signs previously identified; and the remaining picketers (2 to 3) would be distributing pro-life literature to passersby who would be

willing to accept the literature. At no time would any of the picketers block, impede, interfere with, harass, or annoy any of the mall's patrons, customers, tenants, or personnel, nor would Plaintiffs in any way impair or interfere with the smooth flow or free passage of such persons. And if requested, Plaintiffs would be willing to post courtesy signs at various locations in the mall to alert passersby of the abortion imagery, thereby giving them the option to physically avoid the imagery or to avoid it simply by averting their eyes. [RT, Vol. I, pp. 36:6-26 to 37:1-7, 52; *see also* AA, Vol. I, pp. 115, 205-10, 247-48].

Mr. Park and Defendant's other representatives listened to Plaintiff Cunningham's presentation and gathered the information. Defendant's representatives did not announce any decisions at this meeting, but they said that they would present the information to their superiors and get back with Plaintiffs. [RT, Vol. I, pp. 34:20-26 to 35:1-3]. Defendant also restated their warning to Plaintiffs that in the meantime, if they did engage in their free speech activity, they would be treated as trespassers and physically removed. [RT, Vol. I, pp. 35:4-12, 108:3-12].

On February 11, 2015, Mr. Park sent a letter to Plaintiffs stating, in relevant part, "[W]e are not prepared to alter our rules to accommodate your request. In particular, we will not permit the grisly photographs [plural] which you want to use (in the form of 3' x 4' color posters)." [AA, Vol. I, pp. 116, 211-12].

On February 13, 2015, Plaintiff Cunningham sent an email to Mr. Park stating the following: "We are in receipt of your message rejecting the two abortion-related photos we had proposed for display in your clients' malls. Please thank them for the courteous and thoughtful meeting they hosted regarding this matter and ask them if they would be willing to approve the following [QR code] sign:"


[AA, Vol. I, pp. 116, 213-215].

On February 28, 2015, Mr. Park responded via email to Plaintiff Cunningham's latest proposal, stating: "Mr. Cunningham: we have carefully considered [your recent] suggestion . . . as to the signage. While creative, it is equally problematic. While not obviously as grisly, instead what it does is invite our young patrons (who are all quite 'tech savvy') to go find these videos. In sum, we just cannot agree to other than what I suggested in my letter of February 11, 2015. Thank you." [AA, Vol. I, pp. 117, 216].

As a result of Defendant's rejection of Plaintiffs' proposed expressive activity under its Original Rules and its concomitant threat to

treat Plaintiffs as criminal trespassers, thereby preventing Plaintiffs from engaging in such activity, on May 5, 2015, Plaintiffs filed their original complaint against Defendant. [AA, Vol. I, pp. 10-36].

Following the filing of Plaintiffs' original complaint, Defendant informed Plaintiffs, through counsel, that it recently modified its rules for non-commercial expressive activity at Fashion Island and the Irvine Spectrum Center. Copies of these "Revised Rules" and accompanying maps designating certain expressive activity areas at these locations were provided to Plaintiffs, via counsel, on June 23, 2015. [AA, Vol. I, pp. 117, 217-45].

Upon review of the Revised Rules, Plaintiffs, through counsel, sent a letter to Defendant's counsel on July 3, 2015, stating, in relevant part, as follows:

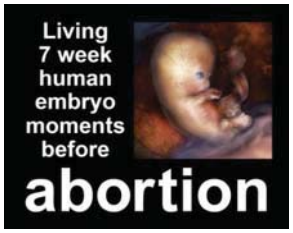
> We have reviewed your rule changes with our clients. The numbered paragraphs below represent what they would propose by way of free speech activity in light of these changes. This is consistent with what was previously proposed. However, in light of the rule changes and based on our prior communications, it is our understanding that our clients will <u>not</u> need to go through another approval process since we are currently in litigation and that you would stipulate as to the areas of agreement / disagreement so that we can properly amend our complaint and proceed with the litigation.

[AA, Vol. I, pp. 117, 246].

The letter set out Plaintiffs' request to engage in free speech activity at Defendant's shopping centers under the Revised Rules as follows:

1. Our clients wish to engage in free speech activity that targets various stores located within the Fashion Island and Irvine Spectrum Center retail shopping centers. Consequently, since the revised rules now permit such targeted activity (Section IV of the respective rules), our clients request alternate areas in close proximity to the targeted stores. The targeted stores include Nike, Starbucks Coffee, Urban Decay, and Whole Foods Market at Fashion Island and Levi's and Starbuck's Coffee at the Irvine Spectrum Center. Please note that our clients do not want to picket each of these stores at the same time—they wouldn't have the resources to do so—but want to establish separate dates for each. And of course, our clients will not physically obstruct or prevent anyone from going to or from any of these stores nor will *they* create a disturbance of any kind (*i.e.*, our clients do not intend to "be stationed directly in front of an entrance to the location or in any other location that interferes with or blocks entry into or exit from the location or any other location" per Section II.F. of the respective rules). Indeed, we can assure you that our clients' conduct will be (and always is) above reproach. If there is a disturbance of any kind, it will invariably come from the "listener" of our clients' speech. But of course, a listener's reaction to speech is not a lawful basis for suppressing the speech. This, as you know, is known as a "heckler's veto." In short, our clients will comply with your "decorum" requirements (Section XI), insofar as these requirements do not operate as a pretext for silencing disfavored speech (*e.g.*, "disparaging remarks" is hopelessly vague, particularly in the context of speech addressing a controversial public issue as abortion). Our clients intend to have approximately 4 to 5 "participants" at any one time, some with signs and some with literature. Attached to this correspondence is a document titled, "Expressive Activity Alternate Locations," which contains photos of the proposed locations for our clients' expressive activity.

2. The signs that our clients propose to use are the same as in the original complaint, and they appear below. Please note that our clients will abide by your size and number restrictions (Section IX.A. of the respective rules), so the only issue is the content of these signs.




3. Should any of the proposed signs be acceptable to your client, our clients request that you permit them to display courtesy signs on the avenues of approach so that the store patrons can be forewarned and thus make an informed decision as to whether they want to view or avoid the abortion-related signs.

4. In additions to the signs, our clients will be handing out pro-life literature to those persons willing to accept it, and they will be discussing pro-life issues and the purpose of the expressive activity with passersby willing to engage in such conversations. At no time will our clients block, impede, or physically harass anyone. Again, our clients will abide by the "decorum" rules discussed above, subject to the caveat that they will not allow the application of such rules to serve as a pretext to silence disfavored, public-issue speech.

5. Since it was not fully discussed during the meeting you had with our clients this past February, they wanted us to broach with you the issue of security. Our clients frequently hire their own private security from a licensed security firm (our clients can provide your security manager with the bona fides of the persons they hire). These security personnel will not participate in any of the expressive activity and so are not "participants." For our clients' proposed expressive activity, two security personnel will suffice. Permitting our clients to provide their own security will accomplish at least three important objectives: (1) it will ensure the safety of our clients; (2) it will serve as a deterrent to those who might want to cause a disturbance in response to our clients' expressive activity; and (3) it will free up whatever store security you presently have to remain focused on your typical security issues, such as shoplifting, etc. Experience has shown that the constant and continuous presence of security at the location of the expressive activity serves as the best

> deterrent for those who might want to consider causing a disturbance. In short, this will benefit all parties.
>
> 6. Consistent with our clients' goal of engaging in the safe and orderly exercise of their free speech rights, they intend to wear small security cameras to record their activity as well as the related activity of others. These cameras, which provide no physical interference whatsoever (*i.e.*, they are not tripod mounted cameras; they are very small and discreet body cameras), are beneficial for several reasons, including the following: (1) they will protect my clients from any false accusations of harassment, making "disparaging remarks," etc. and (2) while discreet, they are nonetheless visible and thus operate as an effective deterrent to bad behavior. Consequently, the presence of these cameras will also benefit all of the interested parties. And while there is nothing in your rules that should prohibit the wearing of these cameras (no doubt you allow visitors to take pictures and videotape using smartphones), we raise this with you because we want to demonstrate to you our clients' sincerity with regard to their desire that their free speech activity be peaceful and lawful for all involved.
>
> 7. Finally, while your client asserts a "right" to blackout certain "peak days" for expressive activity, our clients do not believe that such a "right" exists. Indeed, the very purpose of the right to free speech is to convey a message to the public in order [to] shape public opinion. It is not simply a right to catharsis. There is no better time to call for a boycott of a store than during the "peak" shopping time. Absent some specific traffic and safety concern related to a specific day and location, we oppose this generalized ban on speech activity during a time when such activity would be the most effective.

[AA, Vol. I, pp. 117, 247-53; *see* RT, Vol. I, pp. 48:7-26 to 49:1-17].

On July 20, 2015, Defendant, through counsel, rejected Plaintiffs' proposed expressive activity, stating, in relevant part: "We are not prepared to agree to either the presence of security guards or body cameras. Finally,

in addition to the photos issue, we also disagree as to the 'peak traffic' issue." [AA, Vol. I, p. 118 (stipulating that "Defendant will not permit Plaintiffs to engage in all of the expressive activity as requested in the July 3, 2015 correspondence"); pp. 257-59].

As a result of this latest rejection of their proposed speech activity, on July 23, 2015, Plaintiffs filed their First Amended Complaint. [AA, Vol. I, pp. 37-101].

Following the filing of their First Amended Complaint, Defendant made several additional modifications to its rules, none of which materially or substantively affected Plaintiffs' proposed free speech activity. [RT, Vol. I, pp. 62:8-11, 63:5-9; *see also* AA, Vol. I, p. 119, 317-356]. These rules have been referred to as the "Second Revised Rules." [AA, Vol. I, p. 118, 293-316].

While this case was still pending, Plaintiffs engaged in free speech activity on the *public sidewalks* outside of the Alton Retail Center, a strip mall that unbeknownst to Plaintiffs was owned by Defendant. Defendant warned Plaintiffs that they would be treated as trespassers if they came on the property and posted several large and intimidating men to watch them. [AA, Vol. I, pp. 262-63; RT, Vol. I, pp. 64:2-26 to 68:1-10; 109:1-12 to 112:1-16]. This confirmed Plaintiffs' fears regarding Defendant's threat to treat them as trespassers at the properties at issue in this appeal. [RT, Vol. I, pp. 64:2-26 to 68:1-10; 109:1-12 to 112:1-16].

During a bench trial held on October 23, 2017, Plaintiff Cunningham testified, *inter alia*, about the nature of the alternate locations within Defendant's shopping centers that they proposed under the Revised Rules. [RT, Vol. I, pp. 48:26 to 52:1-17; AA, Vol. I, pp. 357-59]. Unlike the small "designated areas"[1] that Defendant demanded and which confined Plaintiffs' expressive activity to locations away from their targeted businesses, Plaintiffs' proposed alternate locations would permit them to engage in their *targeted* boycott activity, thereby permitting them to reach their intended audience (those persons seeking to patron the *targeted* businesses) and for their expressive activity to have its intended effect (to encourage people to boycott the *targeted* businesses). [RT, Vol. I, pp. 48:26 to 52:1-17].

Plaintiff Cunningham also presented evidence (photographs) and personal testimony demonstrating how their proposed alternate locations for expressive activity at Defendant's shopping centers—locations containing seating areas and other amenities—were factually unlike the locations at issue in *Ralph's Grocery Co. v. United Food & Commercial Worker's Union,* 55 Cal. 4th 1083 (2012)—locations which did not contain

[1] The Original Rules restricted expressive activity to the "approximately 100 square foot portion of the [shopping center] designated" for such activity. [AA, Vol. I, pp. 114, 193]. Under the Revised Rules and the Second Revised Rules, a "designated area" was restricted to a "10' x 10'" area for Fashion Island and a "16' x 6'" area for the Irvine Spectrum Center. [AA, Vol. I, pp. 117, 221, 235]. This small size inhibits Plaintiffs' free speech activity. [RT, Vol. I, pp. 58:21-26 to 59:1-13].

such areas or amenities and which the Court held were not public fora for expressive activity under *Pruneyard*.[2] [RT, Vol. I, pp. 68:12-26 to 69:1-13]. Defendant never seriously considered [RT, Vol. I, pp. 132:14-26 to 133:1-20] but yet still rejects Plaintiffs' proposed alternate locations [*see* AA, Vol. I, pp. 118 (stipulation), 370].

During the trial, Plaintiffs presented testimony regarding how and why they use their body cameras, including how the cameras are an integral part of their expressive activity. Plaintiffs have vast experience with the use of these cameras, which allow them, *inter alia*, to reach a broader audience with their message, to fend against false accusations of improper behavior, to deter bad behavior by those who might oppose their message, and to permit the camera operator to operate "hands free," thereby ensuring his safety and permitting him to also engage in expressive activity. This latter point is critical since Defendant also limits the number of people that can engage in expressive activity at any one location. [RT, Vol. I, pp. 53:4-26 to 55:1-22; *see also* AA, Vol. I, pp. 254-56 (photographs of cameras)]. In comparison, Defendant admitted during trial that it has *no experience* with these cameras. [RT, Vol. I, p. 138:3-15]. In fact, Defendant's rules do not expressly forbid their use—Defendant's decision to deny Plaintiffs'

[2] Plaintiff Cunningham personally visited the shopping center at issue in *Ralph's Grocery Co.*, and he took photographs of the areas at issue in order to distinguish them factually from the proposed locations at issue in this case. [RT, Vol. I, pp. 68:12-26 to 69:1-13; AA, Vol. I, pp. 360-68].

request was an *ad hoc* decision. Moreover, Defendant permits its patrons to video record in its shopping centers with smart phones and hand-held cameras. [AA, Vol. I, p. 118 (stipulation)].

Following the bench trial, the trial court entered judgment in this case on December 28, 2017, ruling as follows:

> 1. As to plaintiffs' request for declaratory relief and injunctive relief as to the provisions of defendant's Rules for Non-Commercial Expressive Activity (collectively the "Rules") at Fashion Island Shopping Center and the Irvine Spectrum Center (collectively the "Centers") pertaining to "Designated Areas," the court determines as follows:
>
> A. The provisions of the Rules as to Designated Areas constitute a permissible, content-neutral restriction under Article I, § 2 of the California Constitution and defendant did not violate plaintiffs' rights under said provision by requiring compliance with these provisions of the Rules; and,
>
> B. The plaintiffs failed to prove that the areas where they sought to engage in their proposed activity constituted "public fora" within the meaning of *Ralph's Grocery Co. v. United Food & Commercial Worker's Union* (2012) 55 Cal. 4th 1083.
>
> Accordingly, plaintiffs shall take nothing by way of their complaint as to this issue.
>
> 2. As to plaintiffs' request for declaratory relief and injunctive relief as to the "black-out" days within the Rules, the court declares that defendant's rules do not constitute a permissible, content-neutral rule under Article I, § 2 of the California Constitution and it is enjoined from enforcing the same. Excepted from the foregoing determination is the provision of the subject rule at the Fashion Island Shopping Center pertaining to black-out days in the Bloomingdale's Court related to the defendant's Christmas tree display.
>
> 3. As to plaintiffs' request for declaratory relief and injunctive relief as to proposed signage at the Centers, the court declares and orders as follows:

A. The court finds that defendant's restriction on "grisly or gruesome" imagery as set forth in the Rules is a content-based restriction. Therefore, the court applies strict scrutiny when ruling on this issue.

B. As to plaintiffs' use of abortion-related imagery as set forth in Exhibits 10 and 11 ("Living 7 week human embryo moments before abortion" sign) and Exhibit 18 (QR code sign), the court determines that the application of the Rules to restrict the content of this signage violates Article I, § 2 of the California Constitution and defendant is enjoined from enforcing the same.

C. As to plaintiffs' use of abortion-related imagery as set forth in Exhibits 13 and 14 ("Dead 8 week human embryo moments after abortion" sign), the court determines that the content of said signage constitutes "grisly or gruesome" imagery under *H-CHH Associates v. Citizens for Representative Government* (1987) 193 Cal. App. 3d 1193, and, in accordance with said decision, defendant properly restricted the content of this sign under its Rules.

4. As to plaintiff's request for the use of body cameras, the court determines that plaintiffs do not have a constitutional right under Article I, § 2 of the California Constitution to videotape patrons of the Centers to whom plaintiffs are expressing their opinions. The court finds that plaintiffs' proposed use of body cameras is not expressive activity. Accordingly, plaintiffs shall take nothing by way of their complaint as to this issue.

5. As to plaintiffs' request for relief under C.C. § 52.1, plaintiffs shall take nothing by way of this cause of action.

6. The court does not address whether plaintiffs' challenge to prior versions of the Rules is moot. Rather, the court views the issue as follows: if the court says that defendant can (or cannot) have certain restrictions against plaintiffs, then that ruling applies whether such restrictions are found in old versions of the Rules, the current version of the Rules, or any future version of the Rules. And as the court ruled above, plaintiffs do not have a basis for money damages.

[AA, Vol. I, pp. 369-71]. Accordingly, Plaintiffs prevailed on some issues and Defendant prevailed on others. This appeal follows.

## STANDARD OF REVIEW

This case presents questions of law involving the application of the California Constitution and California statutes. This Court's review is *de novo*. *Prigmore v. City of Redding*, 211 Cal. App. 4th 1322, 1333 (Cal. Ct. App. 2012) ("[W]hen the trial court's order involves the interpretation and application of a constitutional provision, statute, or case law, questions of law are raised and those questions of law are subject to *de novo* (*i.e.*, independent) review on appeal."); *see also Apartment Ass'n of L.A. Cty., Inc. v. City of L.A.*, 24 Cal. 4th 830, 836 (2001) ("Before us is a question of law for the appellate courts to decide on independent review of the facts.") (internal quotations and citation omitted); *Bruns v. E-Commerce Exch., Inc.*, 51 Cal. 4th 717, 724 (2011) ("Statutory interpretation is a question of law that we review *de novo*.").

Moreover, because this case implicates Plaintiffs' right to free speech under the California Constitution, an independent examination of the record as a whole, without deference to the trial court, is appropriate. *See, e.g., Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 567 (1995) (requiring appellate courts to "conduct an independent examination of the record as a whole, without deference to the trial court. . . . because the reaches of the First Amendment are ultimately

defined by the facts it is held to embrace, and [the Court] must thus decide for [itself] whether a given course of conduct falls on the near or far side of the line of constitutional protection"); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (noting that in cases raising free speech issues appellate courts must make an independent examination of the whole record in order to ensure that lower court decisions do not infringe free speech rights); *Katzev v. Cnty. of L.A.*, 52 Cal. 2d 360, 365-66 (1959) (requiring the same duty of independent review under the California Constitution).

## ARGUMENT

### I. DEFENDANT'S RESTRICTIONS ON PLAINTIFFS' SPEECH CANNOT SURVIVE CONSTITUTIONAL SCRUTINY.

#### A. Legal Standard for Speech Restrictions in *Pruneyard* Shopping Centers.

There is no dispute that Plaintiffs' expressive activity—using hand-held signs, passing out literature, and engaging passersby to discuss their boycott message—is protected speech. *See Fashion Valley Mall, LLC v. N.L.R.B.*, 42 Cal. 4th 850, 851 (2007) ("*Fashion Valley*") (leafletting in front of a department store is protected speech under the California Constitution); *see also Hill v. Colo.*, 530 U.S. 703, 714-15 & 710 n.7 (2000) (recognizing that petitioners' "leafletting, sign displays, and oral communications are protected by the First Amendment" and noting that "[t]he fact that the messages conveyed by [the signs, which included

"bloody fetus signs,"] may be offensive to their recipient does not deprive them of constitutional protection").

Pursuant to *Robins v. Pruneyard Shopping Center*, private shopping centers like the Irvine Spectrum Center and Fashion Island must permit the public to engage in expressive activity on their premises as a matter of California constitutional law. *Robins v. Pruneyard Shopping Ctr.*, 23 Cal. 3d 899 (1979) ("*Pruneyard*"). And while *Pruneyard* does permit a shopping center to adopt "reasonable regulations" as to the "time, place and manner" of expressive activity, *see id*. at 908, it is well established that "privately-owned shopping centers are required to respect individual free speech rights on their premises to the same extent that government entities are bound to observe state and federal free speech rights." *Glendale Assocs., Ltd. v. N.L.R.B.*, 347 F.3d 1145, 1154 (9th Cir. 2003) (citing *Pruneyard*, 23 Cal. 3d at 911). Moreover, *it is the shopping center that bears the burden of justifying its speech regulations under the applicable standards*. *Lim v. City of Long Beach*, 217 F.3d 1050, 1054 (9th Cir. 2000) ("Traditionally and logically, . . . the party seeking to restrict protected speech has the burden of justifying that restriction.").

Accordingly, "a shopping center's power to impose time, place, and manner restrictions on [expressive] activity is . . . measured by federal constitutional standards." *Savage v. Trammell Crow Co.*, 223 Cal. App. 3d 1562, 1572 (Cal. Ct. App. 1990). Under these standards, a time, place, and

manner regulation must be content-neutral, and it must satisfy intermediate scrutiny. That is, the content-neutral regulation must be "*narrowly tailored* to serve a *significant governmental interest*" and leave open "*ample alternative channels* for communication of the information. The failure to satisfy *any single prong* of this test invalidates the requirement." *Grossman v. City of Portland*, 33 F.3d 1200, 1205 (9th Cir. 1994) (emphasis added).

A content-based regulation, however, is subject to strict scrutiny, which is the most demanding test known to constitutional law. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994) (stating that courts "apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content"). Thus, a content-based regulation must be "*necessary* to serve a *compelling state interest*, and . . . *narrowly drawn* to achieve that end." *Fashion Valley*, 42 Cal. 4th at 869 (emphasis added).

To determine whether a restriction is content based, the Court looks at whether it "restrict(s) expression because of its message, its ideas, its subject matter, or its content." *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 537 (1980). That is, "[a] rule is defined as a content-based restriction on speech when the regulating party must examine the speech to determine if it is acceptable." *Glendale Assocs., Ltd*., 347 F.3d at 1155.

Here, the trial court properly concluded "that defendant's restriction on 'grisly or gruesome' imagery as set forth in the Rules is a content-based restriction. Therefore, the court applies strict scrutiny when ruling on this issue." [AA, Vol. I, p. 370]. However, despite identifying the correct legal standard, the trial court failed to properly apply it to Plaintiffs' "Dead 8 Week Human Embryo" sign, as discussed further below.

Moreover, it is well established that regulations prohibiting the targeted, boycott picketing of a particular store within a shopping center are unconstitutional. "It has been the law . . . and remains the law, that a privately-owned shopping center must permit peaceful picketing of businesses in shopping centers, *even though such picketing may harm the shopping center's business interests*." *Fashion Valley*, 42 Cal. 4th at 864 (emphasis added). Consequently, "citizens have a strengthened interest, not a diminished interest, in speech that presents a grievance against a particular business in a privately-owned shopping center, including speech that advocates a boycott." *Id*.

Finally, Defendant's restrictions operate as *prior restraints* on Plaintiffs' speech. *Alexander v. United States*, 509 U.S. 544, 550 (1993) ("The term 'prior restraint' is used to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.") (internal quotations and citation omitted); *see also Lebron v. Wash. Metro. Area Transit Auth.*, 749

F.2d 893, 896 (D.C. Cir. 1984) (Bork, J.) (holding that the refusal to display the poster "because of its content is a clearcut prior restraint"). And "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (collecting cases). Consequently, Defendant "carries *a heavy burden* of showing justification for the imposition of such a restraint." *Lebron*, 749 F.2d at 896 (internal quotations and citation omitted) (emphasis added).

Having reviewed the controlling standards and legal principles, we turn now to apply these standards and principles to the facts of this case.

### B. Defendant's "Grisly" or "Gruesome" Image Restriction Is Unconstitutional Facially and as Applied to Restrict Plaintiffs' "Dead 8 Week Human Embryo" Sign.

At issue here is Defendant's content-based "grisly" or "gruesome" restriction, which Defendant has maintained under every version of its rules and which served as the basis for rejecting Plaintiffs' signs. While the trial court correctly held that Defendant violated the California Constitution by applying this restriction to prohibit Plaintiffs' "Living 7 Week Human Embryo" and "QR Code" signs, it incorrectly ruled that Defendant could employ this restriction to prohibit Plaintiffs' "Dead 8 Week Human Embryo" sign. [AA, Vol. I, p. 371]. In support of its erroneous conclusion, the trial court relied upon *H-Chh Associates v. Citizens for Representative Government*, stating, "the court determines that the content of said signage

constitutes 'grisly or gruesome' imagery under *H-CHH Associates v. Citizens for Representative Government* (1987) 193 Cal. App. 3d 1193, and, in accordance with said decision, defendant properly restricted the content of this sign under its Rules." [AA, Vol. I, p. 371].

In *H-Chh Associates*, the court stated, in *dicta*, as follows:

> Plaintiffs could regulate style, as opposed to content, requiring that it be compatible with the general aesthetics of the mall, *i.e.*, neat in appearance. The use of "fighting words," obscenities, grisly or gruesome displays or highly inflammatory slogans likely to provoke a disturbance, of course, could be prohibited. Examples of the latter would be pictures of aborted fetuses, gross racial caricatures or slogans such as "kill the pigs now."

*H-Chh Associates*, 193 Cal. App. 3d at 1216. This *dictum*, however, is incorrect as a matter of law. While there are well-established exceptions under the First Amendment for "fighting words," *see Chaplinsky v. N.H.*, 315 U.S. 568, 572 (1942), obscenity, *see Roth v. United States*, 354 U.S. 476, 485 (1957), and incitement, *see Brandenburg v. Ohio*, 395 U.S. 444 (1969), signs depicting "grisly or gruesome" images, including signs displaying "pictures of aborted fetuses," are fully protected, *Hill*, 530 U.S. at 715 & 710, n.7, and any such restriction of these images is content based and must survive strict scrutiny. Indeed, the trial court properly concluded that this restriction was content based and thus required the application of strict scrutiny. But the court failed to apply this standard when it upheld Defendant's restriction on Plaintiffs' "8 Week Dead Embryo" sign.

Furthermore, the *H-Chh Associates* court's *dictum* about restricting signs that are "likely to provoke a disturbance" is an obvious, but failed, attempt to incorporate the familiar standard set forth in *Brandenburg v. Ohio*, which, of course, is the standard required by the First Amendment (and the California Constitution) if the government (or a shopping center owner, as in this case) is seeking to restrict speech based on a claim that it will incite violence. However, insofar as the appellate court was attempting to refer to incitement speech by stating that speech which is "likely to provoke a disturbance" could be banned as a matter of course, the court got that wrong as well. Indeed, the "incitement" exception only applies in the first instance *if the speech itself is advocating for the use of force or violence*. *Brandenburg*, 395 U.S. at 447 ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe *advocacy* of the use of force or of law violation except where such advocacy is *directed* to inciting or producing *imminent* lawless action *and* is likely to incite or produce such action.") (emphasis added). Moreover, any restriction that is based on a listener's or viewer's reaction to speech is a content-based restriction that must survive strict scrutiny. *See Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep't*, 533 F.3d 780 (9th Cir. 2008); *Bible Believers v. Wayne Cnty.*, 805 F.3d 228 (6th Cir. 2015) (*en banc*).

Here, none of Plaintiffs' signs, including the one sign at issue in this appeal—the "Dead 8 Week Human Embryo" sign—advocates for the use of force or violence. Therefore, the signs do not constitute "incitement" speech as a matter of law. *Brandenburg*, 395 U.S. at 447. And none of the signs contain "fighting words" or obscenity.

Additionally, what makes Plaintiffs' signs "grisly" or "gruesome" to Defendant is the fact that they appear in the "abortion" context. During the deposition of Ms. Tanya Thomas—the witness designated by Defendant to be the most knowledgeable person on the subject and who applies the restrictions at issue and was part of the decision-making process in this case—testified that the *living* human embryo sign, for example, was "gruesome" because it also said "abortion"—that is, the content and *viewpoint* expressed by the sign made it "gruesome" or "grisly." Specifically, Ms. Thomas testified as follows:

> Q: What about that photograph, *according to The Irvine Company*, is gruesome or grisly?
>
> * * *
>
> THE WITNESS: I think it's a judgment call, but it could be perceived as gruesome and grisly because of the wording that goes with it.
> Q: This is one of the photographs that was considered to be gruesome or grisly by The Irvine Company, correct?
> A: Correct.
> Q: What about the word that comes at the end—the word is "abortion"—would make this poster gruesome or grisly?
> A: Because you're painting a picture for our guests of what's going to happen with this, what appears to be an embryo, if an abortion occurs.

> Q: But the poster itself, other than its implication about what might happen in the future, is not gruesome or grisly?
> A: *Very subjective*.

[AA, Vol. I, pp. 283-84] (emphasis added).

This testimony points to the fact that there is no *objective* standard by which Defendant makes its inherently subjective "grisly" or "gruesome" determination. As noted by the U.S. Supreme Court, "[T]he danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). Thus, "the definition of the standards for inclusion and exclusion must be unambiguous and definite." *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1375 (3d Cir. 1990). And the reason for this in the free speech context is evident: "The absence of clear standards guiding the discretion of the public official vested with the authority to enforce the enactment invites abuse by enabling the official to administer the policy on the basis of impermissible factors." *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 359 (6th Cir. 1998). Consequently, a speech restriction "offends the First Amendment when it grants a public official 'unbridled discretion' such that the official's decision to limit speech is not constrained by objective criteria, but may rest on 'ambiguous and subjective reasons,'" *id*. at 359 (citation omitted), as in this case. This lack of objective standard is an independent basis for

striking down Defendant's restriction and its application to the one sign at issue here.

Nevertheless, there is no dispute that Defendant's "grisly" or "gruesome" restriction is content based (both facially and as applied) in light of the simple and undisputed fact that "the regulating party must examine the speech to determine if it is acceptable." *Glendale Assocs., Ltd*., 347 F.3d at 1155. The trial court properly concluded as such. [AA, Vol. I, p. 370; *see also* RT, Vol. I. pp. 130:15-26 to 131:1-7 (testifying that the restriction is in fact content based)].

Consequently, it was Defendant's *heavy burden* to demonstrate that this restriction survives strict scrutiny—a burden which it cannot—and did not—carry. *See id*. at 1156 ("Content-based regulations are presumptively unconstitutional."). To begin, Defendant did not set forth *any* evidence to establish a "compelling" interest for restricting this content in the first instance, and the trial court cited to none. And the fact that a viewer may be offended by the content of a sign is not a compelling interest nor is any concern that "such picketing may harm the shopping center's business interests." *Fashion Valley*, 42 Cal. 4th at 864; *see also Wirta v. Alameda-Contra Costa Transit Dist.*, 68 Cal. 2d 51, 62 (1967) ("Annoyance and inconvenience, however, are a small price to pay for preservation of our most cherished right.").

As stated by the court in *Snatchko v. Westfield LLC*, 187 Cal. App. 4th 469, 489 (Cal. Ct. App. 2010):

> [W]e find providing a "stress-free shopping atmosphere" for patrons is not a compelling interest compared to the free speech rights of other individuals at the mall. Indeed, the California Supreme Court has already determined that a public forum shopping mall's business interest in ensuring its shopping customer's convenience and undisturbed comfort in order to prevent loss of customers and maximize profit is not a compelling interest justifying a content-based restriction of speech.

As stated the U.S. Supreme Court, "The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (citations omitted); *see also Terminiello v. City of Chi.*, 337 U.S. 1, 4-5 (1949) (famously stating that speech "best serve[s] its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger"). Moreover, restricting speech based on a listener's (or viewer's) reaction to the speech (*i.e.,* a "heckler's veto") is impermissible, *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (stating that a "[l]isteners' reaction to speech is not a content-neutral basis for regulation"); *Lewis v. Wilson,* 253 F.3d 1077, 1082 (8th Cir. 2001) ("The First Amendment knows no heckler's veto."), even if the "hecklers" are children, *see Ctr. for Bio-Ethical Reform, Inc.*, 533 F.3d at 790 (stating

in a case involving the display of graphic abortion imagery outside of a school that "[t]here is, however, no precedent for a 'minors' exception to the prohibition on banning speech because of listeners' reaction to its content" and that "[i]t would therefore be an unprecedented departure from bedrock First Amendment principles to allow the government to restrict speech based on listener reaction simply because the listeners are children").

Even assuming *arguendo* that Defendant had a *compelling* interest to restrict Plaintiffs' image of a dead human embryo in the abortion context, Defendant's restriction is not "necessary" nor is it "narrowly tailored." *Cohen v. California*, 403 U.S. 15 (1971), demonstrates this point. In *Cohen*, the U.S. Supreme Court famously stated that courts "cannot indulge the facile assumption that one can forbid particular words [or pictures, in this case] without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words [or pictures] as a convenient guise for banning the expression of unpopular views." *Id.* at 26. At issue in *Cohen* was whether California could, consistent with the First Amendment, prohibit Cohen from wearing a jacket bearing the slogan "F**K the Draft" in a public courthouse where women and children, among others, were present. The Court held that it could not. As the Court noted in *Cohen*, rather than suppressing the speech (or the pictures in this case), viewers "could

effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Id*. at 21. The same is true here. And to further assist viewers with protecting their "sensibilities," Plaintiffs offered "to display courtesy signs on the avenues of approach so that the store patrons can be forewarned and thus make an informed decision as to whether they want to view or avoid the abortion-related signs." [AA, Vol. I, pp. 117, 248; RT, Vol. I, pp. 36:6-26 to 37:1-9, 52:15-17; 108:18-26].

In sum, Defendant's content-based restriction on its face and as applied to Plaintiffs' "Dead 8 Week Embryo" sign does not survive strict scrutiny.

### C. Defendant's Designated Area Restrictions Are Unconstitutional.

Defendant's Original Rules restricted expressive activity to the "approximately 100 square foot portion of the [shopping center] designated" for such activity. [AA, Vol. I, pp. 114, 193; *see also* RT, 58:21-26 to 59:1-13 (testifying as to how this size restriction inhibits Plaintiffs' free speech activity)]. This restriction was maintained under the Revised Rules and the Second Revised Rules, which defined a "designated area" as a "10' x 10'" area for Fashion Island and a "16' x 6'" area for the Irvine Spectrum Center. [AA, Vol. I, pp. 117, 221, 235]. Per the Original Rules' regulatory scheme, Defendant had the sole discretion to determine a designated area's location, thereby effectively (and unlawfully) insulating

certain stores from boycott activity, including the stores that are the targets of Plaintiffs' boycott. *Best Friends Animal Soc'y v. Macerich Westside Pavilion Prop. LLC*, 193 Cal. App. 4th 168, 174-75 (Cal. Ct. App. 2011) ("[T]he right of free speech in California entitles a person or group to protest a business in a shopping mall within <u>*aural*</u> and visual range of that business.") (emphasis added). In *H-CHH Associates*, the court rejected a similar rule giving a shopping center discretion to decide the location of a designated area for expressive activity. 193 Cal. App. 3d at 1213. As stated by the court, "[The restriction] confers on [shopping center] management unbounded discretion to choose the site of petitioning activity . . . . Absent definite, objective written criteria for determining an alternative location or for refusing to provide any location, [the restriction] therefore is invalid." *Id*. Under the Revised Rules (and the Second Revised Rules), Defendant similarly fails to provide definite, objective written criteria for determining an alternative location or for refusing to provide a requested location, instead simply referring to the "Fire Marshall." [AA, Vol. I, pp. 221-22, 235-36; RT, Vol. I, pp. 145:8-24, 146:5-11 (affirming that there are no written criteria)]. This scheme also violates the California Constitution under *H-CHH Associates.*

Moreover, limiting expressive activity to a "100 square foot" designated area as stated in the Original Rules or a "10' x 10'" or "16' x 6'" designated area per the Revised Rules (and Second Revised Rules) creates

additional constitutional deficiencies: (1) it impermissibly denies picketers proper access to the targets of their boycott activity by placing them in an arbitrarily confined and restricted location; (2) it unreasonably restricts a picketer's ability and thus right to distribute literature; and (3) the permitted area is unreasonably small—it amounts to a postage-stamp-size location that unreasonably restricts the size and location, *and thus the impact*, of the expressive activity. Permitting picketers with hand-held signs or literature to spread out along entrance ways and avenues of approach to a targeted store (or stores) not only increases the effectiveness of the expressive activity, it provides less of an obstruction to store patrons than Defendant's restriction, which jams picketers into a square which then becomes an obstruction for pedestrians. In short, this restriction is unreasonable—it burdens more speech than necessary, and it is fails to advance any legitimate interest. *See, e.g., Pruneyard Shopping Ctr.*, 23 Cal. 3d at 908 (permitting "reasonable regulations" as to the "time, place and manner" of expressive activity in shopping centers). In fact, it undermines any legitimate interest in maintaining unobstructed access to the shopping center's stores.

Finally, Defendant's refusal to permit Plaintiffs to engage in their protected speech activity at the locations outside of the entrances of the stores they targeted for their boycott activity was also unlawful. The trial court concluded that "[t]he plaintiffs failed to prove that the areas where

they sought to engage in their proposed activity constituted 'public fora' within the meaning of *Ralph's Grocery Co. v. United Food & Commercial Worker's Union* (2012) 55 Cal. 4th 1083." [AA, Vol. I, p. 370]. The trial court was wrong.

In *Ralphs Grocery Co.*, the California Supreme Court stated:

> [T]o be a public forum under our state Constitution's liberty of speech provision, an area within a shopping center must be designed and furnished in a way that induces shoppers to congregate for purposes of entertainment, relaxation, or conversation, and not merely to walk to or from a parking area, or to walk from one store to another, or to view a store's merchandise and advertising displays.

*Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8*, 55 Cal. 4th 1083, 1093 (2012). The Court cited the appellate court's decision in relevant part as follows:

> The Court of Appeal stated that "the entrance area and apron" of the Foods Co store "were not designed and presented to the public as public meeting places," and therefore did not constitute a public forum under the state Constitution's liberty of speech provision. Because these areas did not constitute a public forum, the court concluded, Ralphs "could limit the speech allowed and could exclude anyone desiring to engage in prohibited speech."

*Id*. at 1090-91; *see also id*. at 1093 (agreeing with court of appeals).

Here, Plaintiff Cunningham presented photographs and testimony regarding the areas outside of the Food Co store discussed in *Ralphs Grocery Co.* as well as photographs and testimony regarding the proposed

areas at issue in this case. [AA, Vol. I, pp. 357-68 (photographs); RT, Vol. I, pp. 68:12-26 to 69:1-13].

This record demonstrates that Plaintiffs' proposed areas are readily distinguishable from the areas at issue in *Ralphs Grocery Co*. Plaintiffs' proposed areas, unlike those at Food Co, contain seating as well as other amenities encouraging people to gather, thereby making them public fora under the liberty of speech clause of the California Constitution. Indeed, Plaintiffs' proposed areas include park benches and outdoor seating as well as outdoor eating areas. [AA, Vol. I, pp. 357-59 (photographs); RT, Vol. I, pp. 48:26 to 52:1-17 (describing areas)].

Another case setting forth a useful comparison is *Albertson's, Inc. v. Young*, 107 Cal. App. 4th 106, 119-20 (Cal. Ct. App. 2003), which was cited by the California Supreme Court in *Ralphs Grocery Co., see Ralphs Grocery Co.,* 55 Cal. 4th at 1092-93. In *Albertson's, Inc.*, the court held that the location at issue—the front entrance to a grocery store—was not a public forum for election solicitors who wanted to obtain signatures, distinguishing it from a *Pruneyard* public forum as follows:

> Unlike the Pruneyard Shopping Center, Trader Joe's was a single structure, single-use store, *containing no plazas, walkways, or central courtyards for patrons to congregate and spend time together*. The store sold food but *had no restaurant or any place for patrons to sit and eat*. It did not have a cinema or any other form of entertainment. Although the store attracted a large number of persons, *they came for a single purpose, to buy goods*. *The store did not invite the public to meet friends, to eat, to rest, to congregate, or to be*

> *entertained at its premises*. Thus, the store's interest in maintaining exclusive control over its private property was stronger than the interest of a shopping mall owner.

*Albertson's, Inc.,* 107 Cal. App. 4th at 119-20 (emphasis added). In comparison, and as noted above, the shopping centers at issue here contain plazas, walkways, and central courtyards for patrons to congregate and spend time together; and the proposed locations contain places for patrons to sit and eat, and they invite the public to meet friends, to eat, to rest, and to congregate. In short, the proposed locations are public fora under the California Constitution. The trial court's contrary conclusion should be reversed.

**D. Defendant's Videotaping Restriction Is Unconstitutional.**

The Original Rules, the Revised Rules, and the Second Revised Rules are all silent on the question of whether Plaintiffs can use body cameras as part of their expressive activity. And Defendant admittedly permits its patrons to video record in its shopping centers with smartphones or hand-held video cameras. [AA, Vol. I, p. 118 (stipulation)]. However, Defendant will not permit Plaintiffs to employ discreet body cameras to video record their activity and the activity of others, which Plaintiffs routinely do as part of their expressive activity. The trial court upheld Defendant's restriction, stating,

> As to plaintiff's request for the use of body cameras, the court determines that plaintiffs do not have a constitutional right under Article I, § 2 of the California Constitution to videotape

> patrons of the Centers to whom plaintiffs are expressing their opinions. *The court finds that plaintiffs' proposed use of body cameras is not expressive activity*.

[AA, Vol. I, p. 371] (emphasis added).

The trial court is wrong as a matter of law. Videotaping is a constitutionally protected activity. The right to free speech includes not only the actual expression of one's political views, thoughts, opinions, and other information concerning matters of public interest, but also non-expressive conduct that intrinsically facilitates one's ability to exercise free speech rights, including efforts to gather evidence and information by videotaping, as in this case. *See, e.g., Smith v. City of Cumming,* 212 F.3d 1332 (2d Cir. 2000) (holding that the First Amendment protects the right to gather information through photographing or videotaping); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing a "First Amendment right to film matters of public interest"); *Robinson v. Fetterman*, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005) (holding that the First Amendment protected the plaintiff as he videotaped and noting that "[v]ideotaping is a legitimate means of gathering information for public dissemination and can often provide cogent evidence").

Additionally, by using a body camera, the person videotaping is permitted to continue with his expressive activity, whether it be holding a sign, handing out literature, or conversing with a passerby. By requiring the use of hand-held recording devices, such as a smartphone or a

traditional video camera, Defendant effectively prevents the videographer from actively participating in the boycott activity by preventing him from expressing his message via these protected methods of free speech (*i.e.*, holding signs, passing out literature, and conversing with passersby). In short, there is no basis for permitting a patron to video record using a smartphone or other hand-held device but preventing Plaintiffs from utilizing body cameras. *See City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) ("Exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They may diminish the credibility of the government's rationale for restricting speech in the first place.") And this restriction is particularly troubling in light of the fact that Defendant imposes an arbitrary limitation on the number (two under the Original Rules, six under the Revised Rules, and ten under the Second Revised Rules) of people who are permitted to engage in the expressive activity at any one time within the cramped, 10' x 10' or 16' x 6' designated area.

Finally, Plaintiffs' testimony in this case—testimony based on Plaintiffs' vast experience with using body cameras (compared with Defendant's testimony demonstrating a lack of experience and speculative reasons for restricting the cameras)[3]—demonstrates that, at a minimum,

[3] Defendant's witness, Ms. Thomas, testified as follows:

Q. So have you ever seen these body cameras being used by anyone

Defendant's restriction is unreasonable. *See, e.g., Pruneyard Shopping Ctr.*, 23 Cal. 3d at 908 (permitting "reasonable regulations" as to the "time, place and manner" of expressive activity in shopping centers).

## II. DEFENDANT IS LIABLE FOR STATUTORY DAMAGES.

Pursuant to § 52.1 of the California Civil Code, "Any individual whose exercise or enjoyment of rights secured by the [California Constitution] has been interfered with, or attempted to be interfered with, as described in subdivision (a)," may file a civil action seeking damages, including statutory damages under § 52 of the California Civil Code. Cal. Civ. Code § 52.1(b). Subdivision (a) provides that "[i]f a person or persons, whether or not acting under color of law, interferes by *threat*, *intimidation*, or *coercion*, or attempts to interfere by *threat*, *intimidation*, or *coercion*, with the exercise or enjoyment by any individual or individuals of rights secured by the [California Constitution]" is liable. Cal. Civ. Code § 52.1(a) (emphasis added). And § 52 provides for statutory damages in the amount of $25,000. Cal. Civ. Code § 52(b)(2).

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engaging in expressive activity at any of these shopping centers?
A. I have not.
Q. So you have no experience as to how people might react to those particular body cameras, isn't that correct?
A. That is correct.
Q. Whereas my client[s], who use these all the time, have far more experience, you would agree, than you do on how people react to these body cameras, wouldn't you agree?
A. Sounds like it.
[RT, Vol. I, p. 138:3-15].

In its order denying Defendant's motion to strike this claim, the trial court correctly stated:

> Civil Code § 52(b)(2) allows a private plaintiff to recover the civil penalty, and in *L.A. Co. Metro. Transp. Auth. v. Superior Court* (2004) 123 Cal. App. 4th 261, 276, the court held that the civil penalty in Civil Code § 52(b)(2) is somewhat compensatory in nature, thereby making it to some extent like statutory damages. The court explained that the civil penalty would help ensure that the plaintiff will receive a minimum amount of compensation even if there are little or no actual damages sustained. *Id*. The court also held that the legislature wanted to encourage private parties to seek redress, and make it more economically attractive for them to sue. *Id*. at 270-71. Thus, this court concludes that the legislative intent is consistent with allowing a plaintiff whose rights are violated under Civil Code § 52.1(b) to seek the $25,000 civil penalty set forth in Civil Code § 52(b)(2) as damages.

[AA, Vol. I, pp. 102-03].

Here, Defendant threatened to treat Plaintiffs as unlawful trespassers if they engaged in their constitutionally protected activity at Defendant's shopping centers, thereby interfering with, and in fact halting, Plaintiffs' expressive activity. Defendant has a small army of private security at its disposal to enforce its rules (and they have deployed this security in response to Plaintiffs' expressive activity at another location owned by Defendant). [RT, Vol. I, pp. 30:20-26 to 31:1-25; 109:1-26 to 112:1-16]. Defendant's "code of conduct" makes it clear that Plaintiffs are subject to arrest for violating Defendant's unlawful speech restrictions. [RT, Vol. I, pp. 31:26 to 33:1-3]. Defendant's Rules (Original, Revised, and Second Revised) make clear that an "arrest" may be used to "remove" the speaker

from Defendant's property. [AA, Vol. I, pp. 197, 226, 240, 301, 313]. In a letter to Plaintiffs, Defendant's counsel expressly stated that "[b]ased on the foregoing, we can only conclude that you intend to protest in violation of our rules. As such, we will understand your group's conduct to be trespassory in nature and the owner reserves the right to resort to its various remedies." [AA, Vol. I, pp. 198-99]. These remedies include, among others, physically removing Plaintiffs by ejecting them from the premises or having them arrested, including a citizen's arrest. *See, e.g., Hamburg v. Wal-Mart Stores, Inc.*, 116 Cal. App. 4th 497, 508 (Cal. Ct. App. 2004) ("A protestor who refuses to comply with reasonable 'time, place and manner' restrictions can, in appropriate circumstances, be enjoined by the landowner from carrying out expressive activities, or even ejected from the premises.") (citing *In re Cox*, 3 Cal. 3d 205, 217 (1970)). And during the meeting held between Plaintiffs and Defendant's representatives in February 2015, Plaintiffs were told that they would be subject to arrest if they engaged in their proposed expressive activity at Defendant's shopping centers. [RT, Vol. I, pp. 30:2-26 to 35:1-12; 65:8-26 to 68:1-10; 76:17-26; 82:6-9; 98:2-26 to 99:1-11; 103:17-26 to 105:1-4]. These threats are made all the more harmful and injurious by the fact that police officers "who take custody of a person arrested by a private person are not required to correctly adjudge whether the citizen who made the arrest was justified in doing so." *Hamburg*, 116 Cal. App. 4th at 511-12.

In sum, it was reasonable (and correct) for Plaintiffs to fear that they would be physically removed, against their will, from Defendant's shopping centers for engaging in their constitutionally protected speech activity, and Plaintiffs reasonably (and correctly) understood that Defendant, a powerful and influential organization in the community, had the ability to carry out its threat.

In the final analysis, Defendant's threats were an effort to intimidate, coerce, and ultimately prevent (successfully) Plaintiffs from engaging in their protected speech activity in direct violation of C.C. § 52.1. As a result, Defendant is liable for statutory damages.

## CONCLUSION

**WHEREFORE**, for the foregoing reasons, Plaintiffs respectfully request that this Court enter an Order: (1) declaring that Defendant's content-based "grisly or gruesome" imagery restriction facially and as applied to prohibit the display of Plaintiffs' "Dead 8 week human embryo moments after abortion" sign violated Plaintiffs' rights under the California Constitution and enjoining the restriction; (2) declaring Defendant's location and size restrictions on Plaintiffs' right to engage in non-obstructive, expressive boycott activity near the entrances of certain targeted stores within Defendant's shopping centers violated Plaintiffs' rights under the California Constitution and enjoining the restrictions; (3) declaring that Defendant's *ad hoc* restriction on the use of body cameras

violated Plaintiffs' rights under the California Constitution and enjoining the restriction; and (4) awarding statutory penalties under C.C. § 52.1.

Dated: May 1, 2018

Respectfully submitted,

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## CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I hereby certify that the text of this brief consists of 12,875 words as counted by the Microsoft Word program used to generate this brief.

Dated: May 1, 2018

Respectfully submitted,

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## PROOF OF SERVICE

I, Donna J. Wolf, am employed in the city of Cincinnati, Ohio. I am over the age of 18 and not a party to the within suit; my business address is 8790 Governor's Hill Drive, Suite 102, Cincinnati, Ohio 45249.

On May 2, 2018, I served the document described as: **Appellants' Opening Brief** on the interested parties in this action by sending [ ] the original [ or ] [ √ ] a true copy thereof to interested parties as follows [or] as stated on the attached service list.

See attached service list.

[ ] BY MAIL (**Enclosed in a Sealed Envelope**): I deposited the envelope(s) for mailing in the ordinary course of business. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, sealed envelopes are deposited with the US Postal Service that same day in the ordinary course of business with postage thereon fully prepaid.

[ ] BY E-MAIL: I hereby certify that this document was served by e-mail delivery on the parties listed herein at their most recent known e-mail address or e-mail of record in this action.

[ ] BY FAX: I hereby certify that this document was served from Washington, DC, by facsimile delivery on the parties listed herein at their most recent fax number of record in this action.

[ ] BY PERSONAL SERVICE: I personally delivered the document, enclosed in a sealed envelope, by hand to the offices of the addressee(s) named herein.

[ X ] BY OVERNIGHT FEDEX DELIVERY: I am "readily familiar" with this firm's practice of collection and processing correspondence for overnight delivery. Under that practice, overnight packages are enclosed in a sealed envelope with a packing slip attached thereto fully prepaid. The packages are picked up by the carrier at our offices or delivered by our office to a designated collection site.

I declare under penalty of perjury under the laws of Ohio that the foregoing is true and correct.

**SERVICE LIST**

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| Honorable Randall J. Sherman<br>Orange County Superior Court<br>700 Civic Center Drive West,<br>Santa Ana, CA 92701<br>***1 copy via FedEx*** | **Trial Court** |

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 2, 2018 in Cincinnati, Ohio.

Donna J. Wolf
Declarant


Signature