

No. 01-56579

**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

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INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS OF CALIFORNIA, INC., a California nonprofit, religious, corporation; EMIL BECA, one of its individual members; COMMITTEE FOR HUMAN RIGHTS IN IRAN, a California public benefit corporation; and REZA NABATI,

*Plaintiffs-Appellees,*

vs.

THE CITY OF LOS ANGELES, a California Municipal Corporation; STEPHEN YEE, Airport Manager; and GILBERT A. SANDOVAL, Chief of Airport Police,

*Defendants-Appellants.*

**On Appeal from the United States District Court for the Central District of California,  
The Honorable Consuelo B. Marshall, Judge**

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**BRIEF AMICUS CURIAE OF THE  
CRIMINAL JUSTICE LEGAL FOUNDATION  
IN SUPPORT OF APPELLANTS AND SUPPORTING REVERSAL**

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**CORPORATE DISCLOSURE STATEMENT**  
**(Rule 26.1)**

The Criminal Justice Legal Foundation is a California nonprofit public benefit corporation. The corporation has no parents or stockholders.

## TABLE OF CONTENTS

Corporate disclosure statement .....	i
Table of authorities .....	iii
Brief amicus curiae .....	1
Summary of facts and case .....	1
Summary of argument .....	4
Argument .....	5

### I

This case involves a district court decision based on an unsettled area of state law .....	5
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### II

The Ninth Circuit should stay all proceedings until the state courts have had an opportunity to determine the validity of the ordinance under the Liberty of Speech Clause .....	7
A. The <i>Pullman</i> case .....	8
B. Post- <i>Pullman</i> decisions .....	9
C. “Sensitive area of social policy” .....	13
D. A definitive ruling on the state issue does not bar further federal proceedings .....	14
E. State law is uncertain .....	15

### III

ISKCON’s federal claims border on the frivolous .....	18
---	----

### IV

The District Court abused its discretion in denying dismissal of the state law claim .....	21
Conclusion .....	25

## TABLE OF AUTHORITIES

### Cases

Acri v. Union Associates, Inc., 114 F.3d 999 (9th Cir. 1997) . . . . .	22
Agostini v. Felton, 521 U.S. 203, 138 L. Ed. 2d 391, 117 S. Ct. 1997 (1997) . . . . .	23
Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 77 L. Ed. 2d 837, 103 S. Ct. 3201 (1983) . . . . .	23
Askew v. Hargrave, 401 U.S. 476, 28 L. Ed. 2d 196, 91 S. Ct. 856 (1971) . . . . .	11
Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 98 L. Ed. 2d 720, 108 S. Ct. 614 (1988) . . . . .	24
Carreras v. City of Anaheim, 768 F.2d 1039 (9th Cir. 1985) . . . . .	17
City of Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639, 3 L. Ed. 2d 562, 79 S. Ct. 455 (1959) . . . . .	7
Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976) . . . . .	9, 17
Columbia Basin Apartment Ass'n. v. City of Pasco, 268 F.3d 791 (9th Cir. 2001) . . . . .	12, 14, 17
Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985) . . . . .	19
County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 3 L. Ed. 2d 1163, 79 S. Ct. 1060 (1959) . . . . .	17
Doe v. Sundquist, 106 F.3d 702 (6th Cir. 1997) . . . . .	24
England v. Medical Examiners, 375 U.S. 411, 11 L. Ed. 2d 440, 84 S. Ct. 461 (1964) . . . . .	9, 15
Examining Board Of Engineers, Architects and Surveyors v. Flores de Otero, 426 U.S. 572, 49 L. Ed. 2d 65, 96 S. Ct. 2264 (1976) . . . . .	18
Executive Software North America, Inc. v. United States District Court, 24 F.3d 1545 (9th Cir. 1994) . . . . .	21, 22, 23, 24
Golden Gateway Center v. Golden Gateway Tenants Assn., 26 Cal. 4th 1013, 29 P.3d 797 (2001) . . . . .	16

Harman v. Forssenius, 380 U.S. 528, 14 L. Ed. 2d 50, 85 S. Ct. 1177 (1965) .....	15
Harris County Comm’rs Court v. Moore, 420 U.S. 77, 43 L. Ed. 2d 32, 95 S. Ct. 870 (1975) .....	7, 9, 10, 11
Harrison v. NAACP, 360 U.S. 167, 3 L. Ed. 2d 1152, 79 S. Ct. 1025 (1959) .....	6
Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 81 L. Ed. 2d 186, 104 S. Ct. 2321 (1984) .....	19
In re Hoffman, 67 Cal. 2d 845, 64 Cal. Rptr. 97, 434 P.2d 353 (1967) .....	5, 6
International Soc. for Krishna Consciousness, Inc. v. Barber, 506 F. Supp. 147 (N.D.N.Y. 1980) .....	13
International Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 120 L. Ed. 2d 541, 112 S. Ct. 2701 (1992) .....	5, 13, 14, 19
International Society for Krishna Consciousness v. City of Los Angeles, No. 98-56215, 2000 U.S.App. LEXIS 38622 (2000) .....	3
ISKCON Miami, Inc. v. Metropolitan Dade County, 147 F.3d 1282 (11th Cir. 1998) .....	20
Isthmus Landowners Ass’n v. State of Cal., 601 F.2d 1087 (9th Cir. 1979) .....	13, 15
Jacobsen v. City of Rapid City, S.D., 128 F.3d 660 (8th Cir. 1997) .....	20, 21
Koon v. United States, 518 U.S. 81, 135 L. Ed. 2d 392, 116 S. Ct. 2035 (1996) .....	22
Lake Carriers’ Assn. v. MacMullan, 406 U.S. 498, 32 L. Ed. 2d 257, 92 S. Ct. 1749 (1972) .....	9, 14
Los Angeles Alliance for Survival v. City of Los Angeles, 157 F.3d 1162 (9th Cir. 1998) .....	2, 17, 18
Los Angeles Alliance for Survival v. City of Los Angeles, 22 Cal. 4th 352, 93 Cal. Rptr. 2d 1, 993 P.2d 334 (2000) .....	3, 4, 8, 14, 17, 18
Midkiff v. Tom, 702 F.2d 788 (9th Cir. 1983) .....	19

Mine Workers v. Gibbs, 383 U.S. 715, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966) .....	21
Newport Investments v. City of Laguna Beach, 564 F.2d 893 (9th Cir. 1977) .....	13
North Carolina v. Butler, 441 U.S. 369, 60 L. Ed. 2d 286, 99 S. Ct. 1755 (1979) .....	23
Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 39 L. Ed. 2d 73, 94 S. Ct. 772 (1974) .....	19
O'Connor v. State of Nevada, 27 F.3d 357 (9th Cir. 1994) .....	23
Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984) .....	23
Prisoners Union v. Department of Corrections, 135 Cal. App. 3d 930, 185 Cal. Rptr. 634 (1982) .....	6
PruneYard Shopping Center v. Robins, 447 U.S. 74, 64 L. Ed. 2d 741, 100 S. Ct. 2035 (1980) .....	16
Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 135 L. Ed. 2d 1, 116 S. Ct. 1712 (1996) .....	7, 9, 17
Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 85 L. Ed. 971, 61 S. Ct. 643 (1941) .....	6, 8, 9, 17
Rancho Palos Verdes Corp. v. City of Laguna, 547 F.2d 1092 (9th Cir. 1976) .....	13
Reetz v. Bozanich, 397 U.S. 82, 25 L. Ed. 2d 68, 90 S. Ct. 788 (1970) .....	7, 11, 15
Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (1979) .....	5, 6, 8, 16
Sea Ranch Ass'n v. Cal. Coastal Zone Cons. Comm'n, 396 F. Supp. 533 (N.D. Cal. 1975) .....	14
United States v. Kokinda, 497 U.S. 720, 111 L. Ed. 2d 571, 110 S. Ct. 3115 (1990) .....	18, 20
Vernon v. City of Los Angeles, 27 F.3d 1385 (9th Cir. 1994) .....	22
Wilson v. Superior Court, 13 Cal. 3d 652, 119 Cal. Rptr. 468, 532 P.2d 116 (1975) .....	8

Wisconsin v. Constantineau, 400 U.S. 433, 27 L. Ed. 2d 515,  
91 S. Ct. 507 (1971) ..... 14, 18

**United States Statute**

28 U. S. C. § 1367(c)(1) ..... 21

**State Constitutions**

Cal. Const., Art. I, § 2(a) ..... 16  
Wash. Const., Art. I, § 7 ..... 12

**Local Ordinance**

L.A. Admin. Code § 23.27 ..... 1

**Treatises**

R. Fallon, D. Meltzer, & D. Shapiro, Hart & Wechsler's The Federal  
Courts and the Federal System (4th ed. 1996) ..... 8  
17A C. Wright & A. Miller, Federal Practice and Procedure  
(2d ed. 1988) ..... 16  
C. Wright, Handbook of the Law of Federal Courts (3d ed. 1976) .... 15

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**SUMMARY OF CASE AND FACTS<sup>1</sup>**

In 1997, the Los Angeles City Council adopted an ordinance which prohibited solicitation for the immediate payment of funds in a continuous or repetitive manner in the terminals, parking lots, and adjacent sidewalks of Los Angeles International Airport (“LAX”). L.A. Admin. Code

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1. The statement required by FRAP 29(c)(3) is contained in the motion for leave to file accompanying this brief.

§ 23.27(c)(1)-(3). On May 13, 1997, the International Society for Krishna Consciousness of California, Inc. (“ISKCON”), Emil Beca, one of its individual members, the Committee for Human Rights in Iran, and Reza Nabati, one of its individual members, filed the present action in Federal District Court against the City of Los Angeles and airport officials (collectively, “the Airport”), seeking declarative and injunctive relief. The complaint challenged the ordinance as unconstitutional under the First Amendment of the U.S. Constitution and the California Constitution’s Liberty of Speech Clause.

The court granted summary judgment, holding that “[b]ecause the Ordinance singles out solicitation for regulation, it works an impermissible, content-based restriction under the California Constitution and is . . . facially invalid.” District Court Opinion at 3, *quoting* Judge Davies’ Order dated May 26, 1998, at 28. The Airport appealed to this Court.

In another case, *Los Angeles Alliance for Survival v. City of Los Angeles*, 157 F.3d 1162 (9th Cir. 1998) (*Los Angeles Alliance I*), this Court certified to the California Supreme Court the following question:

“Is an ordinance that seeks to regulate the time, place and manner of solicitation of money or other thing of value or the sale of goods or services content based under the Liberty of Speech Clause of the California Constitution? Cal. Const. art. I, § 2.” *Id.* at 1162 (footnote omitted).

On March 2, 2000, the California Supreme Court held that, under the Liberty of Speech Clause of the California Constitution, an ordinance banning solicitation for the immediate payment of money is content neutral. *Los*

*Angeles Alliance for Survival v. City of Los Angeles*, 22 Cal. 4th 352, 379, 993 P.2d 334, 330 (2000) (*Los Angeles Alliance II*). This Court then vacated the District Court's order and remanded the case to the District Court for further proceedings consistent with *Los Angeles Alliance II*. *International Society for Krishna Consciousness v. City of Los Angeles*, No. 98-56215, 2000 U.S.App. LEXIS 38622 (2000).

On cross-motions for summary judgment, the District Court noted that, in the wake of *Los Angeles Alliance II*, 22 Cal. 4th at 379, 993 P.2d at 350, the LAX solicitation ordinance is a content-neutral restriction under the Liberty of Speech Clause of the California Constitution. District Court Opinion at 6. However, the Court went on to find that "LAX is a public forum," citing *Carreras v. City of Anaheim*, 768 F.2d 1039, 1045 (9th Cir. 1985) in support of its holding. District Court Opinion at 7.

The Airport had argued that the "City of Los Angeles enacted the Ordinance due to concerns regarding pedestrian traffic, fraud and potential terrorist activities" and that other forms of solicitation, *i.e.*, speaking to travelers or distributing literature, were not banned. District Court Opinion at 9. The court agreed with the plaintiffs' claim that the ordinance is not "narrowly tailored to achieve the government's interest" and held that the ordinance "does not constitute a reasonable restriction on the time, place and manner of solicitation activities" and "violates the freedom guaranteed by California's Liberty of Speech Clause." *Ibid.* On August 2, 2001, the District Court granted plaintiffs' motion for summary judgment and denied defendants'. *Id.* at 10. The Airport appeals from that judgment.

## SUMMARY OF ARGUMENT

The District Court declined to address the federal First Amendment question and decided a purely state law issue. Based on the broader scope of the Liberty of Speech Clause, the court ruled that airports are public forums under the California Constitution. It held that the Los Angeles International Airport (“LAX”) ordinance is an unreasonable time, place, and manner restriction. The problem with this analysis lies in the absence of California precedent defining airports as public forums. Where state law is unsettled as to the interrelationship between a statute not yet construed by state courts and the pertinent state constitutional provision, state courts should resolve the uncertainty.

Abstention is appropriate in this case. Sound judicial policy dictates that federal courts defer to state courts where enjoining the enforcement of a local statute is based on a new interpretation of the state constitution. On occasion, California courts have held that certain finite categories of publicly accessible private property are public forums; however, classification of airports for free speech purposes has not yet been taken up. Recently, in *Los Angeles Alliance for Survival v. City of Los Angeles*, 22 Cal. 4th 352, 363, 367, 993 P.2d 334, 340, 350 (2000), the California Supreme Court held that ordinances banning the solicitation for funds in various venues to which the public have access—automated teller machines, banks, cars, restaurants—are constitutionally sound under the Liberty of Speech Clause. The Court has also considered and sometimes struck down bans on other forms of solicitation, such as leafleting in train stations and shopping centers. *In re*

*Hoffman*, 67 Cal. 2d 845, 434 P.2d 353 (1967); *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 592 P.2d 341 (1979). However, free speech law is far from settled in the airport context. Where state law is novel and uncertain, any federal court resolution of the issue can only be tentative.

After *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992), airports are nonpublic forums for First Amendment purposes. The *Lee* Court upheld a similar prohibition on the solicitation for immediate payment of funds as a valid time, place, and manner restriction. In light of the *Lee* decision, the federal question posited by ISKCON borders on frivolous, and the federal claim should be dismissed.

For reasons similar to those discussed under abstention, the District Court should have declined to exercise supplement jurisdiction pursuant to 28 U.S.C. § 1367(c)(1). The District Court’s failure to apply the correct rule of law to this decision constituted an abuse of discretion.

## ARGUMENT

### **I. This case involves a district court decision based on an unsettled area of state law.**

The District Court evaluated “the constitutionality of the Ordinance under California’s Liberty of Speech Clause” and found it unnecessary to “reach the issue of whether the Ordinance violates the First Amendment.” District Court Opinion at 6, 9. In a nutshell, the court simply stated that airports are public forums under the state’s free speech clause and that the ordinance is

not a reasonable restriction on the time, place, and manner of solicitation, and then declined to decide the First Amendment challenge.

When a state's courts have not been "afforded a reasonable opportunity to pass upon" the section under review, as its constitutionality has never been authoritatively interpreted by state courts, the federal court should either abstain under the *Pullman* doctrine,<sup>2</sup> or deny supplemental jurisdiction and dismiss the state claim. *See Harrison v. NAACP*, 360 U.S. 167, 176 (1959). California cases challenging the constitutionality of statutory solicitation restrictions or bans have not explicitly ruled upon the forum status of airports.

Certain types of property that are openly accessible to the public are considered public forums. *In re Hoffman*, 67 Cal. 2d 845, 847, 851, 434 P.2d 353, 354, 356 (1967) (leafleting in train station protected where public is free to use entire station); *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 909-911, 592 P.2d 341, 342, 346-348 (1979) (shopping center freely open to the public); *Prisoners Union v. Department of Corrections*, 135 Cal. App. 3d 930, 932, 185 Cal. Rptr. 634, 635 (1982) (upholding right to distribute pamphlets in prison parking lot "open to members of the general public"). Whether airports are public forums under the California Constitution is a highly debatable question that remains unclear. Any federal court determination about the validity of this ordinance under California constitutional standards intrudes upon an area of both local concern to the City of Los Angeles and special concern to the state. Analysis of

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2. *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

California's free speech clause and its relationship to and effect upon the enforcement of state laws and local ordinance are tasks properly left to the state's judiciary.

**II. The Ninth Circuit should stay all proceedings until the state courts have had an opportunity to determine the validity of the ordinance under the Liberty of Speech Clause.**

“Among the cases that call most insistently for abstention are those in which the federal constitutional challenge turns on a state statute, the meaning of which is unclear under state law. If the state courts are likely to construe the statute in a way that would avoid the need for a federal constitutional ruling or significantly modify the federal constitutional claim, the argument for abstention is strong. [Citations.] *The same considerations apply where, as in this case, the uncertain status of local law stems from the unsettled relationship between the state Constitution and a statute.*” *Harris County Comm'rs Court v. Moore*, 420 U.S. 77, 84-85 (1975) (emphasis added); *see also Reetz v. Bozanich*, 397 U.S. 82, 86-87 (1970); *City of Meridian v. Southern Bell Tel. & Tel. Co.*, 358 U.S. 639, 640-641 (1959) (per curiam); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716-717 (1996).

In the present case, the initial classification of airports as either public or nonpublic forums is critical in determining the applicable level of constitutional scrutiny. Such an important finding deserves thoughtful analysis, rather than the perfunctory conclusion offered by the District Court, which, in any event, is not binding precedent in California courts.

It is generally understood that, though the “California constitution is independent and that federal decisions regarding the First Amendment are not controlling” that “does not mean that it is broader than the First

Amendment in all its applications.” *Los Angeles Alliance for Survival v. City of Los Angeles*, 22 Cal. 4th 352, 367, 993 P.2d 334, 342 (2000) (*Los Angeles Alliance II*); see also *Wilson v. Superior Court*, 13 Cal. 3d 652, 658, 532 P.2d 116, 120 (1975) (Liberty of Speech Clause is “more definitive and inclusive than the First Amendment”). Amicus does not dispute that the definition of a public forum under California’s free speech clause is sometimes interpreted more broadly than its federal counterpart in that it encompasses certain types of private property open to the public. See *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 908, 592 P.2d 341, 346 (1979), *aff’d*, 447 U.S. 74 (1980). However, further expansion of such a fundamentally important provision of state law is not a function of the federal judiciary. The newness of this ordinance and the absence of state court precedent are significant considerations that warrant abstention under the *Pullman* doctrine. See R. Fallon, D. Meltzer, & D. Shapiro, *Hart & Wechsler’s The Federal Courts and the Federal System* 1239 (4th ed. 1996).

*A. The Pullman Case.*

In *Railroad Comm’n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), Justice Frankfurter classified the use of the abstention doctrine as part of the basic constitutional principle that federal courts will decide constitutional issues when there is no other alternative basis on which the controversy can be decided. When state issues are submitted to state courts, it is possible that the resulting state construction will avoid the constitutional issue in part or in whole. The doctrine applies to three categories of cases: 1) cases where the state courts are likely to construe the statute in a way that would avoid the

need for a federal constitutional ruling or significantly modify the federal constitutional claim, 2) cases where the state statute is unsettled, uncertain, or ambiguous, or 3) cases that involve sensitive social policy where the exercise of federal review would be disruptive of state efforts to establish a coherent policy in areas of substantial public concern. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976); *Lake Carriers' Assn. v. MacMullan*, 406 U.S. 498, 510-511 (1972); *Pullman*, 312 U.S. at 498.

Without question, “federal courts have a strict duty to exercise the jurisdiction that is conferred on them by Congress.” *Quackenbush*, 517 U.S. at 716; *Colorado River*, 424 U.S. at 821; *England v. Medical Examiners*, 375 U.S. 411, 415 (1964). “Unlike the outright dismissal or remand of a federal suit . . . an order merely staying the action ‘does not constitute abnegation of judicial duty. On the contrary, it is a wise and productive discharge of it. There is only postponement of decision for its best fruition.’” *Quackenbush*, 517 U.S. at 721, quoting *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 29 (1959). Thus, federal courts have discretionary power to either “stay the action based on abstention principles” or where appropriate, “decline to exercise jurisdiction altogether by either dismissing the suit or remanding it to state court.” *Ibid.*

#### *B. Post-Pullman Decisions.*

In *Harris County Comm'rs Court v. Moore*, 420 U.S. 77, 84 (1975), the Court held that the District Court should have abstained because the “uncertain status of local law stems from the unsettled relationship between

the state constitution and a statute.” Displaced judges and constables had brought suit in District Court, claiming that a Texas redistricting statute that eliminated their official positions was unconstitutional under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. Though no state law claim was expressly raised in their complaint, they argued in their pre-trial brief that the Texas statute was invalid under the state Constitution. *Id.* at 80-81. The District Court held that the Texas statute was unconstitutional on its face and enjoined its implementation. *Id.* at 81. Appellant, the County Commissioner’s Court, requested that the complaint be dismissed because the suit raised no substantial federal questions and because the appellees had failed to exhaust their state remedies before bringing suit in federal court. *Id.* at 82. The Supreme Court reasoned,

“Here resolution of the question whether the Texas Constitution permits the County Commissioners Court to replace constables and justices of the peace when several live in the same precinct will define the scope of Art. 2351½(c) and, as a consequence, the nature and continued vitality of the federal constitutional claim.” *Id.* at 84-85.

The Court noted, “These difficult state law questions intrude in yet another way that strengthens the case for abstention. The proper scope of the order entered by the District Court and the applicability of that order to the plaintiffs’ claims depend directly on questions of state law.” *Id.* at 87.

The Court reversed and remanded to the District Court with directions to dismiss the complaint “without prejudice so that any remaining federal claim may be raised in a federal forum after the Texas courts have been given the

opportunity to address the state law questions in this case.” *Id.* at 88-89, citing *England*, 375 U.S. at 421-422.<sup>3</sup>

*Reetz v. Bozanich*, 397 U.S. 82 (1970), provides another example of the Court directing the lower court to stay “its hand while the parties repaired to the state courts for a resolution of their state constitutional questions.” *Id.* at 87. In *Reetz*, a three-judge district court panel, for the district of Alaska, held that an Alaskan statute and implementing regulations limiting persons eligible for commercial fishing licenses were unconstitutional under both the Equal Protection Clause of the Fourteenth Amendment and under the provisions of the Alaskan Constitution. *Id.* at 83. Because the state constitutional provisions and statutes related to Alaska’s uniquely abundant fish resources, “the management of which is a matter of great state concern,” the Court vacated the lower court’s judgment and remanded to the District Court with directions to abstain. *Id.* at 87; *see also Askew v. Hargrave*, 401 U.S. 476, 477 (1971) (the District Court should have abstained from considering the federal action, in deference to a similar action pending in state court in which the same statute was challenged on state constitutional grounds).

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3. When the Court invokes the *Pullman* doctrine, “[o]rdinarily” the “proper course” “is to remand with instructions to retain jurisdiction but to stay the federal suit pending determination of the state law questions in state court.” *Id.* at 89 n.14. However, Texas cases require dismissal due to Texas Supreme Court precedent “that it cannot grant declaratory relief under state law if a federal court retains jurisdiction over the federal claim.” *Ibid.*

More recently, this Court applied the *Pullman* doctrine to a Washington state case involving implementation of a land use ordinance that required landlords to conduct warrantless searches of apartments. Washington's constitution provides more protection against warrantless searches than the Fourth Amendment, and no Washington court had evaluated the recently enacted ordinance under that more sweeping standard. *See Columbia Basin Apartment Ass'n. v. City of Pasco*, 268 F.3d 791 (9th Cir. 2001).

The Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const., Art. I, § 7. The Washington Supreme Court has held that " 'Const. Art. I, § 7 provides protection for the citizens of Washington which are qualitatively different from, and in some cases broader than those provided by the Fourth Amendment.' " *Columbia Basin*, 268 F.3d at 803, quoting *City of Seattle v. McReady*, 868 P.2d 134, 137-138 (Wash. 1994) and citing cases. The Court found that all three criteria, first utilized in the *Pullman* case, supporting abstention were present: 1) the City of Pasco's ordinance involves land use planning questions that " 'touch a sensitive area of social policy into which the federal courts should not lightly intrude,' " 2) that interpretation of the land use ordinance under the Washington Constitution "may eliminate the need to determine whether it also violates the federal constitution," and 3) "the validity of the Pasco ordinance under the Washington Constitution is uncertain." *Id.* at 802, quoting *Pearl Inv. Co. v. City & County of San Francisco*, 774 F.2d 1460, 1463 (9th Cir. 1985).

C. “Sensitive Area of Social Policy.”

Land use planning is an area in which the Ninth Circuit has often invoked or upheld the *Pullman* doctrine and has noted that it is “particularly appropriate that the California courts be afforded the initial opportunity of interpreting the constitution of their own state . . . .” *Newport Investments v. City of Laguna Beach*, 564 F.2d 893, 894 (9th Cir. 1977) (per curiam); *Rancho Palos Verdes Corp. v. City of Laguna*, 547 F.2d 1092, 1096 (9th Cir. 1976); *Isthmus Landowners Ass’n v. State of Cal.*, 601 F.2d 1087, 1091 (9th Cir. 1979). Abstention is even more appropriate in the present case. If government’s regulation of the use of private property by its owners is a “sensitive area,” then the government’s ability to control its *own* property and keep it safe and efficient for its intended use is much more so.

The Los Angeles City Council enacted this ordinance to address long-standing concerns regarding the activities of solicitors at LAX. Municipalities have long had a substantial interest in reducing the adverse consequences of solicitation at airports. *See* Appellant’s Opening Brief at 9-14 (“AOB”); *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 705-707 (1992) (Kennedy, J., concurring in the judgment) (cited below as “*ISKCON v. Lee*”). Solicitors in crowded public places often use tactics of duress and deceit that border on robbery or fraud, although they may not cross the line so as to be prosecuted criminally. The Krishnas in particular have long been notorious for these tactics. *See International Soc. for Krishna Consciousness, Inc. v. Barber*, 506 F. Supp. 147, 159-163 (N.D.N.Y. 1980), *rev’d on other grounds*, 650 F.2d 430 (2d Cir. 1981), cited

for this point in *ISKCON v. Lee*, 505 U.S. at 684 (majority opinion) and 706 (Kennedy, J., concurring in the judgment). State courts should not be precluded from addressing the state law issues here simply because potential solicitors wish to take a short cut through the federal courts. *See Wisconsin v. Constantineau*, 400 U.S. 433, 440-441 (1971) (Burger, J., dissenting).

*D. A Definitive Ruling on the State Issue Does Not Bar Further Federal Proceedings.*

Other than resolving the content-neutral v. content-based distinction, no prior state adjudication exists regarding ordinances regulating solicitation for funds in airports. Cases involving other “transportation nodes” do not necessarily apply to airports. *See ISKCON v. Lee*, 505 U.S. at 681; *see also Los Angeles Alliance II*, 22 Cal. 4th at 363, 379 (Ordinance restricting aggressive solicitation in “public places . . . where the public is afforded access, including . . . sidewalks, parking lots, transportation facilities” is “content neutral for purposes of article I, section 2(a)”). That this aspect of the California Constitution has not been definitively interpreted by the state courts is a further circumstance favoring abstention. *See Sea Ranch Ass’n v. Cal. Coastal Zone Cons. Comm’n*, 396 F. Supp. 533, 538-40 (N.D. Cal. 1975), *aff’d as to that ground*, 537 F.2d 1058 (9th Cir. 1976); *Lake Carriers’ Assn. v. MacMullan*, 406 U.S. 498, 511 (1972); *Columbia Basin*, 268 F.3d at 806.

Whether airports fall under the protection of California’s sometimes broader public forum definition lies at the heart of appellees’ claim. The “nub of the whole controversy” is the tension created by the unsettled forum

status of airports and the ongoing evolution of California’s constitutional jurisprudence under the Liberty of Speech Clause. *See Reetz*, 397 U.S. at 85. Abstention will enable the state courts to provide a “ ‘definitive ruling on the state issue’ ” that “ ‘would terminate the controversy’ ” for state law purposes. *Isthmus*, 601 F.2d at 1091, *quoting Canton v. Spokane School Dist. No. 81*, 498 F.2d 840, 845 (9th Cir. 1974). The federal court would, thereby, “ ‘avoid needless conflict with the administration by a state of its own affairs.’ ” *Isthmus*, 601 F.2d at 1091, *quoting* C. Wright, Handbook of the Law of Federal Courts § 52, p. 218 (3d ed. 1976). As Professor Wright notes, federal courts should abstain to “leave to the states the resolution of unsettled questions of state law.” *Wright* at 218.

Moreover, remanding to the District Court with instructions to abstain gives ISKCON the option of submitting both its state and federal claims to the state courts for final adjudication or reserving the First Amendment question for later decision by the federal court. *See England v. Medical Examiners*, 375 U.S. 411, 421-422 (1964). Even if the state constitutional question is resolved in the Airport’s favor, ISKCON may still proceed in federal court. *See ibid.* However, once there, its claim that the LAX ordinance violates the First Amendment must overcome the Supreme Court’s opinion in *ISKCON v. Lee*, *supra*. *See infra* Part III.

#### *E. State Law is Uncertain.*

State law must be uncertain or ambiguous in order to apply the abstention doctrine. *Harman v. Forssenius*, 380 U.S. 528, 534 (1965). Unlike the United States Constitution, which “couches the right to free speech as a limit

on congressional power,” California’s Liberty of Speech Clause provides for “individual liberties more expansive than those conferred by the Federal Constitution.” *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980), *affirming Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 993 (1979). It states: “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.” Cal. Const., Art. I, § 2(a). Given that California’s highest court has often defined its free speech clause as independent of the First Amendment, the state courts should be accorded the first opportunity to determine its limits in the instant case. *See Robins*, 23 Cal. 3d at 910, 592 P.2d at 347 (federal free speech provisions do not preclude a different result under the California Constitution); *Golden Gateway Center v. Golden Gateway Tenants Assn.*, 26 Cal. 4th 1013, 1036, 29 P.3d 797, 812 (2001) (George, J., concurring). “The proper line appears to be that abstention is in order if the case may turn on the interpretation of some specialized state constitutional provision, but not if the state provision is substantially similar to the federal provision that is the basis of the federal challenge.” 17A C. Wright & A. Miller, *Federal Practice and Procedure* § 4242 (2d ed. 1988).

The LAX ordinance implicates a state constitutional provision whose application may differ significantly from that of the First Amendment. Where such circumstances exist, denying a federal forum would serve the “important countervailing” interest in adhering to the principle that avoidance of piecemeal litigation encourages wise judicial administration,

regard for conservation of judicial resources, and comprehensive disposition of litigation. See *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 817 (1976); *Columbia Basin*, 268 F.3d at 806; *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996); *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189 (1959). The task of subjecting airports to forum analysis under the Liberty of Speech Clause necessarily involves careful, deliberate interpretation of California Supreme Court precedent. These are “novel and uncertain questions of state law.” *Columbia Basin*, 268 F.3d at 806. No reasonable purpose is served when federal courts provide a premature and “tentative answer which may be displaced tomorrow by a state adjudication.” *Railroad Comm’n of Texas v. Pullman Co.*, 312 U.S. 496, 500 (1941). For example, in *Carreras v. City of Anaheim*, 768 F.2d 1039 (9th Cir. 1985), this Court held that an ordinance regulating solicitation was content-based under the California Constitution and, hence, subject to strict scrutiny. *Id.* at 1048. Because *Carreras* was “binding on the federal courts in California” but not on the state courts, “plaintiffs ha[d] every incentive to file *state* constitutional challenges to such ordinances in *federal* district court . . . where they were much more likely to prevail.” *Los Angeles Alliance II*, 22 Cal. 4th at 361, 993 P.2d at 338 (emphasis in original).

Some years later, in *Los Angeles Alliance for Survival v. City of Los Angeles*, 157 F.3d 1162 (9th Cir. 1998) (*Los Angeles Alliance I*), the City of Los Angeles appealed a District Court holding that an ordinance prohibiting the solicitation for money was content-based under the California Liberty of Speech Clause. The District Court had rejected the City’s argument that

*Pullman* abstention was proper. Instead, it had granted the plaintiffs' request for a preliminary injunction. On appeal, this Court certified the content-based v. content-neutral question to the California Supreme Court noting that it must "determine whether . . . *Carreras* or *Kokinda* . . . properly reflects" the California Supreme Court interpretation of California's Liberty of Speech Clause. *United States v. Kokinda*, 497 U.S. 720, 736 (1990) (solicitation is "inherently" a "content-neutral ground"). *Los Angeles Alliance I*, 157 F.3d at 1164-1165.

In *Los Angeles Alliance II*, the California Supreme Court definitively held, in an opinion rejecting *Carreras*, that ordinances regulating solicitation for immediate receipt of funds are content-neutral for purposes of state constitutional analysis. *Los Angeles Alliance II*, 22 Cal. 4th at 379, 993 P.2d at 350. During the 15-year post-*Carreras* period, that decision had encouraged litigants to file their similar state constitutional claims in already overburdened federal courts. Such a waste of federal judicial resources could have been avoided if the original *Carreras* court had abstained to allow the state courts to decide the content-neutrality question.

### **III. ISKCON's federal claims border on the frivolous.**

If, with respect to the interpretation of solicitation statutes, California's Liberty of Speech Clause were authoritatively determined to be no broader than the First Amendment, then abstention would not be proper. See *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 598 (1976); *Wisconsin v. Constantineau*, 400 U.S. 433, 438-

439 (1971); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 237 n. 4 (1984); *Midkiff v. Tom*, 702 F.2d 788, 799-800 (9th Cir. 1983) (Poole, J., concurring). Where the provisions are similar, the federal court is bound by prior United States Supreme Court rulings. Because the Court upheld, as constitutional under the First Amendment, a similar enactment in *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992), appellees' federal claim has been "foreclosed" by a "prior" decision of the Court. See *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666 (1974). After *Lee*, statutes that ban solicitation in airports for immediate payment of funds are constitutionally sound for First Amendment purposes. *Lee* held that airports are nonpublic forums and the regulation at issue "reasonably limits solicitation." *Lee*, 505 U.S. at 679.

Appellees argued, and the District Court agreed, that section 23.27(c) is more restrictive than the ordinance upheld in *Lee* because it applies to sidewalks and parking areas, as well as terminals. However, ISKCON specifically seeks to solicit funds in the "general circulation areas" of LAX that "are open to the public" which contain "shops, restaurants, lounges, and other commercial establishments." Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment, June 18, 2001, at 6-7.<sup>4</sup> These are the very areas in which a solicitation ban was upheld in *Lee*. It is well settled that the relevant forum is defined by focusing on "the access sought by the speaker." *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S.

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4. More precisely, these areas *were* open to the public at the time of the District Court's decision. They are not now. See AOB, part IV.A.

788, 801 (1985). The LAX access that ISKCON challenges mirrors that denied in *Lee*; *Lee*'s holding undercuts and virtually eliminates ISKCON's First Amendment claim.

In *ISKCON Miami, Inc. v. Metropolitan Dade County*, 147 F.3d 1282, 1285 (11th Cir. 1998) is squarely on point. In that case, the Eleventh Circuit upheld an ordinance banning solicitation and sale of literature in the Miami International Airport (MIA) terminals, sidewalks, and parking lots. ISKCON Miami had unsuccessfully argued that the regulations were invalid because the Port Authority ordinance upheld in *Lee* covered only the New York terminals and not its sidewalks and parking lots. *Id.* at 1289. The Eleventh Circuit compared airport sidewalks and parking lots to the post office sidewalks at issue in *United States v. Kokinda*, 497 U.S. 720, 735 (1990) (plurality). Airport parking lots and sidewalks are nonpublic forums intended to facilitate air travel and are not part of daily commerce or neighborhood and city life. *ISKCON Miami, Inc.*, 147 F.3d at 1289.

Moreover, the Court rejected ISKCON Miami's argument that Miami International Airport differs from the New York airports in ways that render MIA a public forum. The Court stated that "*Lee*'s determination that airports are not public forums was not limited to the particular airports at issue, but constituted a categorical determination about airport terminals generally." *Id.* at 1288; *see also Jacobsen v. City of Rapid City, S.D.*, 128 F.3d 660, 664 (8th Cir. 1997).

In *Jacobsen*, the Eighth Circuit agreed with Rapid City and its local airport that safety, security, operational efficiency, and proprietary revenue

interests were legitimate government interests that could be promoted through reasonable means. *See Jacobsen*, 128 F.3d at 662-663. Jacobsen, a newspaper vendor, had challenged the city's decision to enforce its exclusive contract with its small airport's sole concessionaire, a gift shop. *See id.* at 662. Commercial newsracks were banned in the terminal; however, Jacobsen could sell his newspapers in the gift shop. *See ibid.* From the city's perspective, granting concession rights to one shop maximized leasing revenues and minimized leasing costs. The Court recognized that revenues raised in this manner were not a pretext for discrimination against protected First Amendment activity. It held that "the Airport is a non public forum, and the City has a legitimate revenue interest in operating the Airport." *Id.* at 664.

#### **IV. The District Court abused its discretion in denying dismissal of the state law claim.**

Defendants asked the District Court to decline to exercise supplemental jurisdiction over the claim that the ordinance violates the California Constitution. The District Court responded that "this approach is inconsistent with how courts evaluate constitutional claims." District Court Opinion 5-6. There is no discussion, mention, or apparent awareness of 28 U. S. C. § 1367(c)(1), *Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966), *Executive Software North America, Inc. v. United States District Court*, 24 F.3d 1545 (9th Cir. 1994), or the factors to be considered under those authorities.

The statute vests the District Court with considerable discretion. *See Acri v. Union Associates, Inc.*, 114 F.3d 999, 1000 (9th Cir. 1997) (en banc). If the court actually considers the appropriate factors, it would be a rare case where the resulting decision is reversible on appeal. In the present case, however, the District Court did not even consider the proper factors, but instead relied erroneously on an inapposite rule. Preceding its ruling on supplemental jurisdiction, the District Court discussed the rule of *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1391-1392 (9th Cir. 1994), regarding deciding cases on state constitutional grounds to avoid deciding the federal question. In *Vernon*, however, no one asked the court to decline supplemental jurisdiction, and courts are not required to raise that issue *sua sponte*. *See Acri*, 114 F.3d at 1000.

Failure to exercise discretion on the correct legal standard is reversible on appeal. “The abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions.” *Koon v. United States*, 518 U.S. 81, 100 (1996). “A district court by definition abuses its discretion when it makes an error of law.” *Ibid*.

*Executive Software, supra*, is this Court’s most extensive discussion on declining to exercise supplemental jurisdiction under § 1367(c). *Executive Software* reviewed the prestatutory case law of “pendent” jurisdiction, primarily *Gibbs, supra*. See 24 F.3d at 1552. Particularly pertinent to the present case, it noted this admonishment from *Gibbs*: “Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of

applicable law.” *Ibid.*, quoting *Mine Workers*, 383 U.S. at 726. *Executive Software* went on to discuss circuit cases implementing *Gibbs*, including one “approving a remand of pendent state law claims in part because of ‘the existence of an issue of state constitutional law not previously addressed by the state supreme court.’ ” *Id.* at 1553, quoting *Jones v. Fitch*, 665 F.2d 586, 593 (5th Cir. Unit A 1982).

The reason for avoiding federal court decision of these issues is explained in *Pennhurst State School and Hospital v. Halderman*, 465 U.S.89, 122 n. 32 (1984), which also implies a connection between declining pendent jurisdiction and abstention. Because the state supreme court has the final word on the meaning of the state constitution, *North Carolina v. Butler*, 441 U.S. 369, 376, n. 7 (1979); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 561 (1983), and decisions of a federal court cannot be reviewed there, a decision that a state statute or local ordinance violates the state constitution leaves the true status of that enactment in doubt. Injunctive relief would not even be final between the parties, because the party enjoined would be entitled to have the injunction lifted if the state supreme court subsequently disapproved the rationale on which it was granted. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997).

When Congress enacted 28 U. S. C. § 1367, it included subdivision (c)(1), “novel or complex issue of State law,” to codify the application described in *Gibbs* and *Pennhurst*. *See Executive Software*, 24 F.3d at 1556-1557. In particular, difficult questions of state constitutional law are precisely the kinds of issues that Congress had in mind. *See O’Connor v. State of Nevada*,

27 F.3d 357, 363 (9th Cir. 1994). In *Doe v. Sundquist*, 106 F.3d 702, 708 (1997), the Sixth Circuit applied § 1367(c)(1) to a claim that a state statute violated the state constitution. “From respect for the right of a state court system to construe that state’s own constitution . . . , we choose not to rule on the merits of the state claims.’ ”

The District Court’s complete failure to consider the appropriate factors would require a remand at the very least. See *Executive Software*, 24 F.3d at 1562. However, since the factors in this case are so lopsided in one direction and since judicial economy is itself one of the considerations, see *id.* at 1557, it may be more appropriate to decide the issue at the appellate level. The propriety of exercising supplemental jurisdiction remains at issue “at every stage of the litigation.” *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988).

The case is here on summary judgment. There is no trial that would have to be retried if the plaintiffs filed a new action in state court. The plaintiffs’ federal argument was flimsy to begin with, as a Supreme Court precedent establishes the legitimacy of excluding their soliciting activities from the area they are primarily interested in. See *supra* at 19. Whatever shred of a “public forum” argument remained after *Lee* was eliminated on September 11. The federal constitutional tail should not be allowed to wag the state constitutional dog. The state claim belongs in state court, where it can be reviewed by the state supreme court in due course. The state claims should be dismissed from this case.

## CONCLUSION

The order granting an injunction should be reversed. The case should be remanded with direction to dismiss the state law claim. The federal question should either be stayed pending resolution of the state question by state courts or decided in favor of the ordinance on summary judgment.

February 7, 2002

Respectfully submitted,

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**Form 8. Certificate of Compliance Pursuant to Fed. R. App. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 01-56579.**

**(see next page) Form Must Be Signed By Attorney or Unrepresented Litigant And Attached to the Back of Each Copy of the Brief**

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February 7, 2002  
Date

\_\_\_\_\_  
Signature of Attorney or  
Unrepresented Litigant

## **DECLARATION OF SERVICE BY MAIL**

The undersigned declares under penalty of perjury that the following is true and correct: I am over eighteen years of age, not a party to the within cause, and employed by the Criminal Justice Legal Foundation, with offices at 2131 L Street, Sacramento, California 95816. On the date below I served the attached document by depositing true copies of it enclosed in sealed envelopes with postage fully prepaid, in the United States mail in the County of Sacramento, California, addressed as follows:

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Executed on February 7, 2002, at Sacramento, California.

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Irma H. Abella