Case No. S185544

IN THE SUPREME COURT OF CALIFORNIA

RALPHS GROCERY COMPANY,
Plaintiff and Appellant
v.
UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 8,
Defendant and Respondent.

After a Decision of the Court of Appeal
Third Appellate District, Case No. C060413
(Sacramento Superior Court Case No. 34-2008-00008682-CU-OR-GDS,
The Honorable Loren McMaster, Judge)

PETITION FOR REVIEW

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CALIFORNIA RULES OF COURT, RULE 8.29(C)(1)

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TO THE HONORABLE CHIEF JUSTICE RONALD M. GEORGE AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Defendant-Respondent United Food and Commercial Workers Union Local 8 petitions this Honorable Court to grant review of the published decision of the California Court of Appeal, Third Appellate District, filed on July 19, 2010. A copy of the opinion is attached as Exhibit A.

STATEMENT OF ISSUES PRESENTED

1. Did the Court of Appeal err in holding that Labor Code §1138.1 violates the First Amendment to the United States Constitution because it sets procedural requirements for issuing injunctions in cases involving or growing out of labor disputes that do not apply in other cases?

2. Did the Court of Appeal err in holding that the Moscone Act, Code of Civil Procedure §527.3, violates the First Amendment because it prohibits injunctions against a labor union's peaceful picketing on the privately owned sidewalk surrounding a retail store?

3. Did the Court of Appeal err in holding that the Moscone Act and Labor Code §1138.1 violate commercial property owners' First Amendment rights by requiring them to accommodate other speakers' messages on their property?

4. Do the walkways and parking lots abutting a retail store in a larger shopping center qualify as public fora under *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899 when they connect the retail store to the shopping center's common areas and when they are used to communicate a message related to the retail store's business?

WHY REVIEW SHOULD BE GRANTED

The Third Appellate District's opinion declares unconstitutional two California statues—Labor Code §1138.1 and the Moscone Act—that are drawn *verbatim* from the federal Norris-LaGuardia Act.

In so holding, the opinion warps the First Amendment doctrine of content-discrimination to prohibit California from passing viewpoint-neutral, speech-promoting legislation that provides targeted procedural protections or selectively abrogates the common law. Labor Code §1138.1 sets heightened procedural standards for issuing injunctions against peaceful activity in labor disputes, including expressive activity, whether the injunction is sought by (or against) an employer, a union, an individual employee, or anyone else. As interpreted by this Court in *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters* (1979) 25 Cal.3d 317 (*Sears II*), the Moscone Act prohibits injunctions against peaceful picketing by labor unions on the sidewalks outside of retail stores. Both statutes reflect the Legislature's reasoned conclusion—based on decades of

federal and state experience—that labor disputes should be open to vigorous, public debate and should be regulated primarily by administrative tribunals rather than the State's courts.

Neither statute *abridges* anyone's speech, even indirectly. (See U.S. Const., amend. I ["Congress shall make no law . . . abridging the freedom of speech."].) Ralphs Grocery Company invokes *private property rights* to limit labor union speech that it does not want customers to hear. Labor Code §1138.1 simply makes it more difficult for Ralphs to get an injunction furthering this fundamentally private goal. The Moscone Act restricts Ralphs's ability to invoke trespass law to limit speech about a labor dispute.

The Third Appellate District nevertheless concluded that both statutes are content-discriminatory and unconstitutional. It found Labor Code §1138.1 violates the First Amendment because it "adds requirements for obtaining an injunction against labor protesters that do not exist when the protest, or other form of speech, is not labor related." (Opn. at p. 28.)[1] It held that the Moscone Act is unconstitutional because it "favors speech related to labor disputes over speech related to other matters." (Opn. at p. 17.)

The court based these erroneous conclusions on *Police Department v. Mosley* (1972) 408 U.S. 92 and *Carey v. Brown* (1980) 447 U.S. 455,

[1] Citation herein is to the Opinion issued July 19, 2010 (attached as Exhibit A). The published decision is also available at (2010) 186 Cal.App.4th 1078.

two Supreme Court decisions involving entirely different constitutional concerns. In both cases, the law in question expressly prohibited speech in a public forum based on its content and exempted labor-related picketing from this prohibition. It was the government's content-based restriction on speech that made the laws unconstitutional. (*Mosley*, *supra*, 408 U.S. at p. 99; *Carey*, *supra*, 447 U.S. at p. 462.)

But *Mosley* and *Brown* do not permit a court to invalidate legislation that is exclusively *speech-protective* simply because the legislation does not extend the same protection to all forms of speech. The U.S. Supreme Court has never held that a state's selective abrogation of potentially speech-limiting common law rights violates the First Amendment. The Third Appellate District's premise—that *any* differential treatment of speech based on its content is invalid—has never been the law. (*Davenport v. Washington Educ. Assn.* (2007) 551 U.S. 177, 188; *Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 368.)

If left unreviewed, the Third Appellate District's expansive view of content-discrimination would threaten a significant amount of uncontroversial state and federal legislation. California has many procedural protections that recognize particular dangers to specific types of speech. Tenants are protected from landlords' right of unlawful detainer when that right is invoked in retaliation for speech involving tenant-landlord disputes. (Civ. Code §§798.51, 1942.5 & 1942.6.) Journalists and

doctors enjoy content-based statutory protection from common-law defamation that is not extended to others. (Civ. Code §§48a & 43.7.) Doctors, lawyers, and psychiatrists have content-based speech privileges under the Evidence Code. (See, e.g., Evid. Code §990 *et seq.*) Under the Third Appellate District's theory, these laws are unconstitutional because their protections do not apply to everyone.

Federal statutes, too, would be unconstitutional under this view. The Norris-LaGuardia Act, which Congress passed in 1932, contains the same limitations on equity jurisdiction and heightened standards for issuing injunctions in labor disputes as do Labor Code §1138.1 and the Moscone Act. (See 29 U.S.C. §§104, 107.) The National Labor Relations Act, 29 U.S.C. §151 *et seq.* (NLRA), gives employees a statutory right to speak about unions on their employer's private property, but does not protect these same employees if they wish to talk to their co-workers about religion or politics. (See *Republic Aviation Corp. v. NLRB* (1945) 324 U.S. 793.) Both of these statutes would be constitutionally suspect under the Third Appellate District's reasoning.

There would be no principled basis for sparing laws that are part of our basic statutory fabric from the court's constitutional axe. This demonstrates that something is very wrong with the court's approach.

Indeed, to reach its result, the Third Appellate District had to override this Court's settled precedent, contrary authority from other courts

of appeal, and its own prior opinion. In *Sears II*, this Court affirmed the constitutionality of the Moscone Act. (25 Cal.3d at pp. 331-32.) But the Court of Appeal dismissed this holding as a non-binding "plurality" view, ignoring the fact that a fourth Justice concurred in the lead opinion's constitutional holding. (*Id.* at p. 333 [Newman, J., concurring].)

The Third Appellate District created a conflict with the First Appellate District, which upheld the constitutionality of the Moscone Act in *M Restaurants Inc. v. San Francisco Local Joint Executive Board* (1981) 124 Cal.App.3d 666. *M Restaurants* held that "section 527.3 does not deny equal protection" and that its classification "bears a rational relationship with its purpose." (*Id.* at p. 677.) Yet the Third Appellate District wrongly dismissed this constitutional holding as "dicta." (Opn. at p. 26-27.)

The Third Appellate District also overruled its own prior decision upholding Labor Code §1138.1 over content-discrimination and equal protection claims. (*Waremart Foods v. United Food & Commercial Workers* (2001) 87 Cal.App.4th 145 [*Waremart I*].)

Finally, and most radically, the court avoided the central problem with its constitutional theory—the lack of any governmental abridgement of speech—by creating a new First Amendment right to *exclude* speech from commercial property. Without any briefing on the subject, the court held *sua sponte* that the Moscone Act and Labor Code §1138.1 infringe on Ralphs's *First Amendment* right not to be forced to "host or accommodate

another speaker's message." (Opn. at p. 3.) But the Supreme Court has repeatedly rejected the notion that commercial property owners like Ralphs have any First Amendment right to exclude speakers from their property. (*Pruneyard Shopping Center v. Robins* (1980) 447 U.S. 74, 88; *Rumsfeld v. Forum for Academic & Institutional Rights* (2006) 547 U.S. 47, 63-65 [*FAIR*].)

Even if Labor Code §1138.1 and the Moscone Act did not bar Ralphs's request for an injunction, the shopping center walkway and parking lot on which United Food & Commercial Workers 8 (the "Union") was demonstrating is a public forum under *Pruneyard I, supra*, 23 Cal.3d 899. The Union—like the missionaries, signature solicitors, and vendors who use these areas—has a right to picket and handbill in this public forum even if the Moscone Act and Labor Code §1138.1 did not apply.

In fact, the Union's constitutional right to publicize its boycott is *greater*, since this speech relates to Ralphs's business: "'citizens have a strengthened, 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.'" (*Fashion Valley Mall, LLC v. NLRB* (2007) 42 Cal.4th 850, 864 [internal citation omitted].) The Third Appellate District ignored *Fashion Valley*'s holding and effectively overruled *In re Lane* (1969) 71 Cal.2d 872 and *Schwartz-Torrance Investment Corp. v. Bakery & Confection Workers Union* (1964) 61 Cal.3d

766, both of which *Fashion Valley* expressly endorsed. (Opn. at pp. 15-16; see *Fashion Valley*, *supra*, 42 Cal.4th at pp. 864, fn.6.)

Instead, the Court held that the walkways and parking lots abutting retail stores located in larger shopping centers are *categorically* non-public, even when the center is a *Pruneyard*-type forum, the walkway connects the retail store to the shopping center's common-use courtyards, and the speech in question presents a grievance against the store. (Opn. at pp. 14-15.)

In short, the Third Appellate District struck down California statutes using reasoning that would invalidate many other state and federal statutes; misapplied First Amendment content-discrimination doctrine to statutes that do not abridge anyone's speech; endorsed a new First Amendment right to exclude speech that has been rejected by the Supreme Court; and disregarded this Court's opinions. Respondent respectfully requests that this Court grant review of the Third Appellate District's decision in order to reverse and return the law to its previous equilibrium.

FACTUAL AND PROCEDURAL BACKGROUND

Factual Background

Ralphs[2] operates a Foods Co grocery store in a mixed-use, outdoor mall in South Sacramento called College Square. College Square also

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[2] The grocery store operates under the name Foods Co and is associated with Ralphs, a subsidiary of the Kroger Company. (1JA 003.)

includes restaurants, other retail establishments, a bank, nail and hair salons, and several storefronts yet to be leased. (RT 20, 21, 35-36, 70-71.)[3]

There are three common courtyards in College Square, one of which is directly adjacent to Foods Co and connected to the store by a walkway that passes the store's entrance. (3JA 0486, 508-512.) College Square's courtyards offer benches, eating tables, a mechanical hobbyhorse for children, vending machines, and shade trees. (RT 34-35; 3JA 0486, 508-512.) The mall's name derives from its proximity to a nearby community college, and the mall invites visitors, including visitors from the college and a nearby high school, to congregate in the public space.

The public gains access to the courtyards and the mall's stores by following a shared driveway to a shared parking lot containing several hundred parking spaces. (RT 26, 37.) Sidewalks and walkways wind through the mall, allowing visitors to stroll freely from shop to restaurant and to any of the three courtyards. (3JA 511-512.) There are no segregated areas designated for Foods Co customers only.

The Union established a picket line at Foods Co in July 2007, and maintained it until July 2010. (See RT 10.) The picketers held signs announcing the Union's dispute with Foods Co and offered leaflets to customers, asking them to boycott the store. (RT 12, 28, 58.) The Union's

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[3] The Record of Transcript from the trial court is referred to herein as "RT." The Joint Appendix is referred to by volume and page number, *i.e.*, "3JA 000."

dispute with Foods Co concerned the store's non-union status and failure to provide adequate family health benefits, which undermined the viability of benefits provided at Foods Co's unionized competitors. (See 3JA 0489.)

It is undisputed that the picket line was entirely peaceful. (RT 57.) The picketers did not enter the store or block ingress or egress. (3JA 494-495.) They did not approach shoppers before they exited their cars. (3JA 494.) There was no vandalism. (RT 26-27.) No delivery trucks were blocked. No customers were prevented from shopping. The trial court specifically found that there was no evidence of any violence, threats, fraud, or property damage. (3JA 642-643.)

During this time, several other groups and individuals used College Square and the sidewalk in front of Foods Co to convey their messages. Missionaries distributed materials and solicited money, often on the walkway in front of Foods Co. (RT 59, 66; 3JA 498-504.) Solicitors for the Sacramento Bee stood inside the doors of Foods Co, approaching shoppers to sell subscriptions. (RT 33, 58, 63-64; 3JA 502-503.) Signature-gatherers seeking support for political petitions approached College Square visitors, including on the walkway in front of Foods Co. (RT 31, 64, 66-67; 3JA 504-507.) A group was permitted to use the parking lot to sell fireworks, and this group put leaflets on the cars in the parking lot. (RT 34.) Other individuals sold items by approaching College

Square visitors in the parking lot and on the sidewalk in front of Foods Co. (RT 58.)

After six months of peaceful Union picketing, Ralphs created onerous new rules to limit the Union's criticism. (RT 24; 3JA 487-88.) The new policy prohibited any demonstrating from Sunday through Friday between 11:00 a.m. and 1:30 p.m. and between 4:00 p.m. and 7:00 p.m. (3JA 487-88.) It banned all demonstrating in the weeks preceding Martin Luther King Day, Presidents Day, and several other holidays, resulting in a total ban for at least seven weeks. (*Ibid.*) The rules also limited the number of demonstrators on the walkway in front of Foods Co to two people, among other restrictions. (*Ibid.*)

The Union peacefully continued its actions, maintaining the same behavior and hours it had established, as did the missionaries, signature-gatherers, subscription agents, and other solicitors who used the walkway and parking lot. (RT 62-67.) After several more months, Ralphs sought court intervention to force the Union, and only the Union, to comply with its restrictive rules.

Procedural Background and Decision Below

On May 28, 2008, the trial court held that the Moscone Act was unconstitutional and set an evidentiary hearing pursuant to Labor Code §1138.1. (2JA 440-42.) After the evidentiary hearing, the trial court denied Ralphs's motion for a preliminary injunction, finding that Ralphs

had not met the requirements for injunctive relief set forth in Labor Code §1138.1. The trial court also found that Ralphs had failed to carry its burden that its rules were reasonable time, place, and manner restrictions under the guidelines of *Fashion Valley*, *supra*, 42 Cal.4th 850. The court issued an Order Denying Motion for Preliminary Injunction on October 3, 2008. (3JA 639-643.)

Ralphs appealed. Recognizing the importance of the case, the Attorney General filed an amicus curiae brief supporting the Union, and industry groups filed an amicus curiae brief supporting Ralphs.

The Third Appellate District reversed. It held that the Moscone Act and Labor Code §1138.1 violate the First and Fourteenth Amendments to the U.S. Constitution because they allow "the state, based on the content of the speech, [to] force the owner or possessor of real property that is not a public forum to give an uninvited group access to the private property to engage in speech." (Opn. at p. 2.) Doing so, the court held, violated Ralphs's First Amendment rights because "[f]orcing a speaker to host or accommodate another speaker's message violates the host's free speech rights." (Opn. at p. 3 [citing *Hurley v. Irish-American Gay, Lesbian & Bisexual Group* (1995) 515 U.S. 557, 566].)

The Third Appellate District first concluded that the "entrance area and apron"[4] of the Foods Co store is private under California law. (Opn. at pp. 11-16.) The court found it necessary to address this issue because "if the front entrance and apron of the Foods Co store is a public forum, we need not consider the constitutionality of the Moscone Act and Labor Code section 1138.1 because Ralph's time, place, and manner restrictions were unreasonable for a public forum and that conclusion by itself supports the trial court's decision to deny injunctive relief." (Opn. at p. 12.)

According to the court, "[t]he Foods Co store in College Square is indistinguishable from the stand-alone stores in shopping centers in [*Van v. Target Corp.* (2007) 155 Cal.App.4th 1375], a case in which the Court of Appeal held that the entrance areas and aprons of such stores are not public forums." (Opn. at pp. 12-13.)

The court rejected the Union's reliance on *Lane*, *supra*, 71 Cal.2d 872 and *Schwartz-Torrance*, *supra*, 61 Cal.2d 766, which hold "that a privately owned shopping center must permit peaceful picketing of businesses and shopping centers, even though such picketing may harm the shopping center's business interests." (*Fashion Valley*, 42 Cal.4th at p. 864.) Although this Court endorsed *Lane* and *Schwartz-Torrance* in *Fashion Valley*, the Third Appellate District held that these cases "are no

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[4] Elsewhere, the court referred to the walkway in front of Foods Co as a "sidewalk or apron." (Opn. at p. 7.) The court did not define the term "apron."

longer independently viable" and "cannot be read to expand the rights of individuals engaging in speech on private property beyond the analysis of *Pruneyard* and *Fashion Valley*." (Opn. at pp. 15-16.)

The Third Appellate District next held that the Moscone Act is unconstitutional, finding it "denies the property owner involved in a protest over a labor dispute access to the equity jurisdiction of the courts even though it does not deny such access if the protest does not involve a labor dispute." (Opn. at p. 22.) Relying on *Mosley*, *supra*, 408 U.S. 92, and *Carey*, *supra*, 447 U.S. 455, the Third Appellate District held that the Moscone Act is therefore unconstitutionally content-based under the First Amendment.

The court recognized an "obvious difference" between the Moscone Act and the laws at issue in *Mosley* and *Carey*. The Moscone Act "selectively *allows* speech in a *private* forum" by "withdrawing a remedy of the property owner," while the laws at issue in *Mosley* and *Carey* "selectively *excluded* speech from a *public* forum based on content." (Opn. at p. 21 [emphasis added].) But the court found this distinction legally irrelevant because the Moscone Act "forces Ralphs to provide a forum for speech based on its content." (Opn. at pp. 21-22 [citing *Pacific Gas & Elec. Co. v. Pub. Utils. Commn.* (1986) 475 U.S. 1].)

The Third Appellate District then held that Labor Code §1138.1 "suffers from the same constitutional defect as the Moscone Act" because it

"adds requirements for obtaining an injunction against labor protesters that do not exist when the protest, or other form of speech, is not labor related." (Opn. at p. 28.) According to the court, Labor Code §1138.1 therefore "abridges Ralphs's free speech rights by forcing it to host or accommodate speech with which it disagrees." (Opn. at p. 33.)

The Third Appellate District concluded that the Moscone Act and Labor Code §1138.1 violate Ralphs's First Amendment rights *sua sponte*. Neither party argued that Ralphs's free speech rights were implicated in the case.

Having ruled the statutes unconstitutional, the court held that Ralphs met the general requirements for a preliminary injunction. (Opn. at p. 36.) It accordingly reversed and remanded with instructions to grant the preliminary injunction. (Opn. at p. 37.)

This Petition for Review is timely filed, pursuant to California Rules of Court, Rule 8.500(e)(1), after the Court of Appeal's July 19, 2010 decision, for which Respondent did not seek a petition for rehearing.

LEGAL DISCUSSION

I. The Court Should Grant Review to Correct the Third Appellate District's Misapplication of First Amendment Content-Discrimination Doctrine.

The Third Appellate District struck down two California statutes using constitutional reasoning that would apply equally to many

uncontroversial laws. To reach its conclusion, the Court of Appeal overrode this Court's precedent and created a conflict with the First Appellate District. This Court's intervention is necessary to return the law to its previously settled state.

A. Labor Code §1138.1 is a procedural statute that does not abridge speech.

Labor Code §1138.1 establishes the procedural prerequisites a party must meet before an injunction may issue in a labor dispute. It is modeled after the Norris-LaGuardia Act, 29 U.S.C. §107 (see *Waremart I*, *supra*, 87 Cal.App.4th at p. 159), and requires, among other things, that the party seeking the injunction demonstrate that unlawful acts have been threatened and will be committed absent an injunction; that substantial and irreparable injury to the complainant's property will follow; and that the police are unable or unwilling to furnish adequate protection. (Lab. Code §1138.1(a); *cf.* 29 U.S.C. §107(a)-(e).)

Like Norris-LaGuardia, Labor Code §1138.1 was designed to remedy judicial abuse of injunctions in labor disputes and to limit state-court involvement in matters better resolved by administrative tribunals. (*Waremart I*, 87 Cal.App.4th at p. 159; see also *Marine Cooks & Stewards v. Panama S.S. Co.* (1960) 362 U.S. 365, 369, fn.7 [enactment of Norris-LaGuardia "was prompted by a desire . . . to withdraw federal courts from a

type of controversy for which many believed they were ill-suited"].)[5] The Legislature, like Congress, recognized that the peculiar nature of labor disputes means that injunctive relief frequently dictates the outcome of the dispute. (See *Burlington No. Santa Fe Ry. Co. v. Int'l Bhd. of Teamsters Local 174* (9th Cir. 2000) 203 F.3d 703, 707.)

By its terms, Labor Code §1138.1 applies whenever an injunction is sought in a case "involving or growing out of a labor dispute," regardless of the injunction's subject. (Lab. Code §1138.1(a).) It does not apply exclusively, or even primarily, to speech. Even when applied to injunctions against expressive activity, Labor Code §1138.1 is viewpoint neutral—its restrictions apply equally when the injunction is sought by (or against) a union, an employer, or an individual employee.[6] And while the Third Appellate District characterized Labor Code §1138.1's procedural requirements as "virtually impossible" to meet (Opn. at p. 2), federal courts issue injunctions against unions under similar requirements.[7]

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[5] Labor Code §1138.1 is also similar to the "Little Norris-LaGuardia" statutes passed in many other states. (See *M Restaurants*, *supra*, 124 Cal.App.3d at p. 674.) In *Senn v. Tile Layers Union* (1937) 301 U.S. 468, the Supreme Court found Wisconsin's Little Norris-LaGuardia statute—and by implication those of other states—to be constitutional under the Fourteenth Amendment.

[6] See, e.g., *Amalg. Transit Union Div. 1384 v. Greyhound Lines* (9th Cir. 1977) 550 F.2d 1237; *Aluminum Workers v. Consolidated Aluminum Corp.* (6th Cir. 1982) 696 F.2d 437, 441.

[7] See, e.g., *San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters* (9th Cir.1997) 125 F.3d 1230.

Prior to the decision below, no other court had questioned the constitutionality of Labor Code §1138.1 or of the Norris-LaGuardia Act on which it is based. And to reach its conclusion, the Third Appellate District had to overrule its own precedent. In *Waremart I*, *supra*, 87 Cal.App.4th at pp. 157-159, the Third Appellate District upheld Labor Code §1138.1 over an identical challenge, holding that the statute "places no limitations on the location or content of speech. It is, rather, a rule of procedure applicable to the obtaining of injunctive relief in state court and does not address speech[.]" (*Id.* at p. 158.) The court specifically rejected the appellant's reliance on the Supreme Court's *Mosley* and *Carey* opinions—the same cases the court now cites to strike down the statute. (See *id.* at pp. 157-58.)

The court below characterized *Mosley* and *Carey* as holding that "treating speech concerning a labor dispute differently from other types of speech constitute[s] unconstitutional content-based discrimination under the First and Fourteenth Amendments." (Opn. at p. 17.) But *Mosley* and *Carey* do not stand for this broad principle. (See *R.A.V. v. City of Saint Paul* (1992) 505 U.S. 377, 420 (Stevens, J., concurring) ["Contrary to the broad *dicta* in *Mosley*, our decisions demonstrate that content-based distinctions, far from being presumptively invalid, are an inevitable and indispensable aspect of a coherent understanding of the First Amendment."]; cf. *id.* at pp. 387-88 [Scalia, J.].)

Both cases involved laws that restricted speech on public sidewalks based on content. In *Mosley*, the ordinance barred picketing and demonstrating on a "public way" within 150 feet of a school, except for peaceful picketing of a school involved in a labor dispute. (*Mosley*, *supra*, 408 U.S. at pp. 92-93.) *Carey* struck down a statute that prohibited picketing of residences on public streets and sidewalks, but exempted picketing places of employment subject to labor disputes. (*Carey*, *supra*, 447 U.S. at pp. 457, 460.) In each case, it was the law's content-based restriction on speech that made the law constitutionally suspect. (*Mosley*, *supra*, 408 U.S. at p. 99 ["In this case, the ordinance itself describes impermissible picketing not in terms of time, place, and manner, but in terms of subject matter."]; *Carey*, *supra*, 447 U.S. at p. 462 ["[I]t is the content of the speech that determines whether it is within or without the statute's blunt prohibition."].)

As the Third Appellate District implicitly recognized (see Opn. at p. 21), Labor Code §1138.1 is fundamentally different from the laws in *Mosley* and *Carey*, in at least three respects. First, section 1138.1 does not restrict anyone's speech, even indirectly. It selectively, and without regard to viewpoint, *protects speech* by making it more difficult for private parties to get speech-restraining injunctions. Only *abridgements* of speech, whether content-based or not, violate the First Amendment. (U.S. Const., amend. I; *Ysursa v. Pocatello Educ. Assn.* (2009) 555 U.S. __ [129 S.Ct.

1093, 1098]; *Los Angeles Police Dept. v. United Reporting Pub. Corp.* (1999) 528 U.S. 32, 40.) It is "the government's ability to impose content-based *burdens* on speech [that] raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." (*Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.* (1991) 502 U.S. 105, 116 [emphasis added].) No similar concern exists here.

Second, Labor Code §1138.1 does not involve *governmental* abridgement of speech. It simply makes it more difficult for *private parties* to get injunctions to enforce their right against trespass. A private property owner's invocation of common law trespass is not state action under the First Amendment. (*Hudgens v. NLRB* (1976) 424 U.S. 507, 513; *Central Hardware Co. v. NLRB* (1972) 407 U.S. 539, 547.)

Finally, as *Waremart I* correctly ruled, Labor Code §1138.1 is essentially a procedural statute—it restricts state court equity jurisdiction; it does not directly regulate speech. (*Waremart I*, 87 Cal.App.4th at p. 158.) The Third Appellate District's novel conclusion that identical judicial procedures must be available regardless of the character of speech involved is contrary to the Supreme Court's approach to defamation suits in the media and labor contexts. (See *New York Times v. Sullivan* (1964) 376 U.S. 254; *Farmer v. United Bhd. of Carpenters, Local 25* (1977) 430 U.S. 290, 299 [requiring heightened actual malice standard in defamation suits arising out of labor disputes].) Presumably, it would also invalidate

content-based procedures such as California's anti-SLAPP statute, which protects only speech about an "issue of public interest," and California's many content-based evidentiary privileges. (See Code Civ. Proc. §425.16; Evid. Code §990 *et seq.*)

The Third Appellate District's absolutist position—that *any* differentiation between speech on the basis of its content is subject to strict scrutiny—has never been the law. [*Davenport v. Washington Educ. Assn.*, *supra*, 551 U.S. at p. 188 ["It is true enough that content-based regulations of speech are presumptively invalid. We have recognized, however, that '[t]he rationale of the general prohibition . . . is that content discrimination "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." ' And we have identified numerous situations in which that risk is inconsequential, so that strict scrutiny is unwarranted."] [internal citations omitted]; *Los Angeles Alliance for Survival*, *supra*, 22 Cal.4th at p. 368 ["Contrary to plaintiffs' view, [the Supreme Court's] decisions do not require literal or absolute content neutrality, but instead require only that the regulation be 'justified' by legitimate concerns that are unrelated to any 'disagreement with the message' conveyed by the speech."].) Even in the realm of speech *restrictions*, the government is permitted to impose content-based prohibitions in many circumstances, including in limited public fora such as

military bases, student organizations, and state-sponsored charity events;[8] to promote particular categories of speech through the tax code and other subsidies;[9] and to address detrimental secondary effects of the speech.[10]

The Third Appellate District's invalidation of Labor Code §1138.1 threatens a substantial amount of legislation. In addition to the state procedural statutes discussed above, the Court of Appeal's reasoning would invalidate speech-protective legislation that limits landlords' contractual and property rights when invoked against certain tenant speech (see Civ. Code §§798.51, 1942.5 & 1942.6), and statutes protecting journalists and doctors, but not other speakers, from common-law defamation (see Civ. Code §§48a & 43.7; cf. *Werner v. S. Cal. Associated Newspapers* (1950) 35 Cal.2d 121, 130-31 [rejecting equal protection challenge to Civil Code §48a's extension of privileges to newspapers and radio stations that are denied to others]). Whistleblower statutes such as Labor Code §1102.5 and Government Code §8547 would be subject to strict scrutiny, since they protect only speech on specified subjects. The Third Appellate District's reasoning would invalidate the federal Norris-LaGuardia Act, as well as the

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[8] See, e.g., *Greer v. Spock* (1976) 424 U.S. 828; *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.* (1985) 473 U.S. 788; *Christian Legal Soc. Chapter of the Univ. of Cal., Hastings v. Martinez* (2010) __ U.S. __; [130 S.Ct. 2971].

[9] *See, e.g., Rust v. Sullivan* (1991) 500 U.S. 173; *Regan v. Taxation Without Representation* (1983) 461 U.S. 540.

[10] See, *e.g., Ward v. Rock Against Racism* (1989) 491 U.S. 781, 791.

"Little Norris-LaGuardia" Acts enacted by many other states. (See *M Restaurants*, *supra*, 124 Cal.App.3d at p. 676.)

The number of uncontroversial statutes that the opinion below threatens shows that it is the court's constitutional reasoning—and not this legislation—that is invalid. This Court should grant review to correct the Third Appellate District's destabilizing misapplication of the First Amendment to Labor Code §1138.1.[11]

B. This Court's interpretation of the Moscone Act in *Sears II* does not render that statute unconstitutional.

The Moscone Act differs from Labor Code §1138.1 because it includes both procedural and substantive components. Separate analysis is therefore warranted.

Like Labor Code §1138.1, the Moscone Act limits the equity jurisdiction of state courts. Enacted in 1975, it provides in relevant part that "no court nor any judge nor judges thereof, shall have jurisdiction to issue any restraining order or preliminary or permanent injunction which, in specific or general terms, prohibits any person or persons" from "[g]iving publicity to . . . the facts involved in, any labor dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, or by any other method not involving

[11] If Labor Code §1138.1 applies, there is no need to go further, since it is undisputed that Ralphs failed to meet that statute's requirements.

fraud, violence or breach of the peace." (Code Civ. Proc. §527.3(b)(1).)[12] These portions of the Act were "pattered after the [federal] Norris-LaGuardia Act, adopting its purposes as well as incorporating its statutory definitions of a labor dispute." (*M Restaurants*, *supra*, 124 Cal.App.3d at p. 674; cf. 29 U.S.C. §104.)

To the extent the court below found the Moscone Act's limitations on equity jurisdiction unconstitutionally content-based, this portion of the opinion suffers from the same defects as the opinion's discussion of Labor Code §1138.1.

As interpreted by a plurality of this Court in *Sears II*, *supra*, 25 Cal.3d at pp. 324-30, the Moscone Act also incorporates a substantive right, immunizing certain kinds of labor-related speech on private property from trespass law. The Moscone Act thus differs from Labor Code §1138.1 in that it categorically bars injunctions against certain labor-related speech.

This distinction, however, does not make the Moscone Act unconstitutional. Like Labor Code §1138.1, the Moscone Act is exclusively speech-protective. It simply abrogates a common law rule that may be wielded by a *private party* to limit speech. The Supreme Court has never held that such selective abrogation is unconstitutional. So holding would freeze the common law at its 19th century state of development and "represent a return to the era of *Lochner v. New York* [(1905) 198 U.S. 45] .

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12 The Act does not rule out declaratory relief or a damages action.

. . . when common-law rights were also found immune from revision by State or Federal Government." (*Pruneyard*, *supra*, 447 U.S. at p. 93 [Marshall, J., concurring].) Indeed, under the Third Appellate District's approach, the NLRA would be unconstitutional, since that Act requires employers to allow their employees access to the worksite—common law trespass and employment-at-will notwithstanding—in order to communicate about union matters, but not about other subjects. (*Republic Aviation*, *supra*, 324 U.S. 793.)

In striking down the Moscone Act, the court below attempted to overrule another aspect of *Sears II*. There, the Court rejected a Fourteenth Amendment challenge to the Moscone Act, holding that the statute "indisputably bears a reasonable relationship to legitimate state objectives," and does not violate the due process clause or a property owner's right to access the courts. (*Sears II*, *supra*, 25 Cal.3d at pp. 331-32 & fn.12.) The Third Appellate District decided that *Sears II* was not even "persuasive" authority because it did not discuss the Act's constitutionality under the First Amendment and because it was a non-binding, "plurality" decision. (Opn. at pp. 23-24.) But *Sears II* made clear that the primary purpose of the Act—"the elimination of unnecessary judicial intervention into labor disputes"—is a constitutionally legitimate one. The Court's holding in this regard was endorsed by four Justices; only two dissented to it. (*Sears II*, *supra*, 25 Cal.3d at p. 333 [Newman, J., concurring]; *id.* at pp. 336-337

[Richardson, J., dissenting].) And this Court ratified *Sears II*'s core holding two years later. (*In re Catalano* (1981) 29 Cal.3d 1, 13.)

The decision below also creates a conflict with the First Appellate District, which rejected an equal protection challenge to the Moscone Act. (*M Restaurants*, *supra*, 124 Cal.App.3d at pp. 677-78 [The "classification created by the statute bears a rational relationship to its purpose as enunciated in section 527.3, subdivision (a)."].) The Third Appellate District sought to avoid this conflict by characterizing the First Appellate District's extensive analysis and constitutional ruling as "dicta." (Opn. at pp. 26-27.) But the First Appellate District's holding on the Moscone Act's constitutionality was integral to its decision, as it applied the Act's requirements to the employer's injunction motion. (*M Restaurants*, *supra*, 124 Cal.App.3d at pp. 679-83.)[13]

This Court should grant this Petition and review the Third Appellate District's misapplication of First Amendment content-discrimination doctrine to the Moscone Act.

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[13] The Third Appellate District relied on *Waremart Foods v. NLRB* (D.C. Cir. 2004) 354 F.3d 870, 874-875 (*Waremart II*), which—in a scant paragraph—predicted that this Court would hold that the Moscone Act violates the First Amendment. (Opn. at p. 27.) But *Waremart II* did not address any of the fundamental differences between the Moscone Act and the laws at issue in *Mosley* and *Carey*. Nor did it address the broad constitutional implications of such a holding, discussed herein.

II. The Court Should Grant Review to Correct the Third Appellate District's Erroneous Conclusion that Commercial Property Owners Have a First Amendment Right to Exclude Unwanted Speech.

As discussed, the court below recognized the crucial difference between the content-based laws struck down in *Mosley* and *Carey* and the laws at issue here. The former "selectively *excluded* speech from a *public* forum"; the Moscone Act and Labor Code §1138.1 "selectively *allow*[] speech in a private forum." (Opn. at p. 21 [emphasis added].) In other words, the Moscone Act and Labor Code §1138.1 do not involve governmental abridgement of anyone's speech.

The Court of Appeal avoided this fundamental problem with its constitutional theory by holding that the statutes infringe on Ralphs's First Amendment rights.[14] Citing *Hurley*, *supra*, 515 U.S. at p. 566 and *Pacific Gas & Electric*, *supra*, 475 U.S. 1, the court held that the Moscone Act and Labor Code §1138.1 abridge "Ralphs's free speech rights by forcing it to host or accommodate speech with which it disagrees." (Opn. at pp. 31, 33.)

This holding is wrong. A commercial property owner like Ralphs has no First Amendment right to exclude speech with which it disagrees.

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[14] The court thereby also avoided addressing Ralphs's lack of third-party standing to complain that the statutes discriminate against other, non-labor speakers whom Ralphs may want to silence. (See *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 61 [no third-party standing unless party's interests are "inextricably bound up with" with absent party's interests and absent party faces some "genuine obstacle" in asserting his or her own interests].)

The Supreme Court first rejected this argument in *Pruneyard*, *supra*, 447 U.S. 74. There, the appellants "contend[ed] that a private property owner has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others." (*Id.* at p. 85.) The Supreme Court disagreed. It noted the government was not compelling speech—"no specific message is dictated by the State to be displayed on appellants' property." (*Id.* at p. 87.) Furthermore, because a shopping center is "a business establishment that is open to the public to come and go as they please[,] . . . [t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner." (*Ibid.*) To the extent there is any danger of confusion, shopping centers "are free to publicly dissociate themselves from the views of the speakers or handbillers." (*Ibid.*)

In *FAIR*, *supra*, 547 U.S. 47, the Supreme Court again rejected the view endorsed by the Third Appellate District. There, an association of law schools challenged the Solomon Amendment, which specifies that if any part of a university denies military recruiters access equal to that provided other recruiters, the entire institution loses certain federal funds. The Supreme Court dismissed the argument that "by forcing law schools to permit the military on campus to express its message, the Solomon Amendment unconstitutionally requires law schools to host or accommodate the military's speech." (*Id.* at p. 60.)

The Supreme Court distinguished *Hurley* and *Pacific Gas & Electric*—the two cases relied upon by the Third Appellate District. The compelled-speech violation in each of these cases "resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." (*FAIR*, *supra*, 547 U.S. at p. 63.) Citing to its decision in *Pruneyard*, the Supreme Court held that "accommodating the military's message does not affect the law schools' speech, because the schools are not speaking when they host interviews and recruiting receptions." (*Ibid.*) As in *Pruneyard*, there "was little likelihood that the views of those engaging in the expressive activities would be identified with the owner, who remained free to disassociate himself from those views and who was 'not . . . being compelled to affirm [a] belief in any governmentally prescribed position or view.' " (*Ibid.* [internal citation omitted].)[15]

The Third Appellate District reached its erroneous conclusion *sua sponte*, without any briefing on the issue. It failed to address or even mention the Supreme Court's decisions in *Pruneyard* and *FAIR*. This Court should grant review to correct the Court of Appeal's misreading of the First Amendment.

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[15] The Supreme Court has separately made clear the "right of employers to exclude union organizers from their private property emanates from state common law." (*Thunder Basin Coal Co. v. Reich* (1994) 510 U.S. 200, 217, fn. 21.)

III. The Court Should Grant Review to Clarify the Application of *Pruneyard* and Its Progeny to Walkways Abutting Retail Stores Located in Larger Shopping Centers and to Speech Related to Such Retail Stores.

The Third Appellate District recognized that if the sidewalk in front of Foods Co is a public forum, there is no need to address the constitutionality of the Moscone Act or Labor Code §1138.1, since Ralphs's time, place, and manner restrictions are unreasonable. (Opn. at p. 12.) The court held, however, that the "entrance area and apron" abutting Foods Co is not a public forum "because they were not designed and presented to the public as public meeting places." (Opn. at p. 14.) The court so held even though this sidewalk connects Foods Co to College Square's common areas, numerous other speakers recognize the sidewalk to be a public area for speech, and the Union's speech related directly to Foods Co's business.

The Court should grant review to consider two important issues on which the State's courts need guidance: (1) whether retail store walkways and parking lots are public fora under California's free speech clause when they are located in *Pruneyard*-type shopping centers and connect the retail store to the center's common areas; and (2) whether such walkways and parking lots are public fora for speech related to a retail store's business.

A. The Court should grant review to address whether walkways and parking lots abutting retail stores in larger shopping centers are public fora.

Noting that central business districts—traditional and quintessential fora for free speech—"have continued to yield their functions more and more to suburban centers," this Court held that the California Constitution, art. I, §2(a), "protect[s] speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." (*Pruneyard*, *supra*, 23 Cal.3d at pp. 907, 910.) The Court recently re-affirmed this principle , holding that "private property can constitute a forum for free speech if it is open to the public in a manner similar to that of public streets and sidewalks." (*Fashion Valley*, *supra*, 42 Cal.4th at p. 858.)

Pruneyard recognized a limited exception to its holding for what it termed "modest retail establishments." (23 Cal.3d at p. 910.) But several recent appellate decisions, culminating in the decision below, have created an "exception" to *Pruneyard* that threatens to swallow the rule and make the doctrine unworkable.

These snowballing exceptions began with *Albertson's v. Young* (2003) 107 Cal.App.4th 106, in which the Third Appellate District held that the walkway in front of a grocery store was not a *Pruneyard* forum. The court considered whether the grocery store's location in a larger shopping center impressed the walkway "with the character of a public forum." (*Id.* at p. 121.) Relying on the fact that the shopping center contained "no

enclosed walkways, plazas, courtyards, picnic areas, gardens, or other areas that might invite the public to congregate" the court ruled that the grocery store's location in the shopping center did "not impress the walkways of Albertson's store with the character of a traditional public forum." (*Ibid.*)

Next, in *Van v. Target Stores* (2007) 155 Cal.App.4th 1375, the court held that the "apron and perimeter area" of the respondents' big-box retail stores were not public fora, despite the fact that the stores were located "in larger, *Pruneyard*-type shopping centers." (*Id.* at pp. 1389-90.) The court acknowledged that, unlike in *Albertson's*, the shopping centers in which the respondents' stores were located contained "a uniform architectural scheme" and "plazas and courtyards that encourage patrons to congregate." (*Id.* at p. 1390.) But the "particular location" involved—the stores' aprons and perimeter areas—did not possess the characteristics of a public forum.

The decision below goes further and places the walkways and parking lots abutting retail stores located in *Pruneyard*-type shopping centers categorically outside of California's free speech clause. The Third Appellate District did not dispute that College Square is itself a *Pruneyard* forum—despite Ralphs's argument to the contrary. (Cf. Opn. at pp. 13-14.) The walkway and parking lot in front of Foods Co are connected to the shopping center's three courtyards through an integrated system of sidewalks. One courtyard abuts Foods Co and is reached using the

sidewalk (or "apron") passing in front of the store. Religious, political and commercial speakers use this sidewalk and the parking lot to communicate with the public, further demonstrating that these areas are designed to further College Square's function as a public meeting place. (RT 33-34, 58-59, 63-67; 3JA 498-504.)

The decision below thus takes recent, questionable exceptions to *Pruneyard* to a radical extreme. Under the court's artificial distinction, courtyards, plazas, outdoor restaurants, and other "common areas" in a *Pruneyard*–type shopping center are free-speech zones, but not the parking lots and sidewalks that the public uses to traverse the center and reach these common areas. The court thus jettisoned *Pruneyard's* central analogy—that the "streets and sidewalks of the central business district, which 'have immemorially been held in trust for the use of the public,'" are available for free speech even if they are located within a private shopping center. (See *Fashion Valley*, *supra*, 42 Cal.3d at p. 858 [internal citation omitted].)[16]

If left standing, the decision below will greatly erode the constitutional rights this Court affirmed in *Fashion Valley*. Simply by "designing and presenting" as purely commercial all but a few out-of–the-

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[16] The court's conclusion that *Pruneyard* does not apply to sidewalks and parking lots outside commercial buildings is also inconsistent with federal cases construing *Pruneyard*. (See *NLRB v. Calkins* (9th Cir. 1999) 187 F.3d 1080, 1090-1092; *Kuba v. 1-A Agric. Assn.* (9th Cir. 2004) 387 F.3d 850, 856; *Cuviello v. City of Stockton* (E.D. Cal. 2008) 2008 WL 4283260; *Cuviello v. City of Oakland* (N.D. Cal. 2007) 2007 WL 2349325.)

way "common areas," shopping centers will regain the veto over free speech rights that *Pruneyard* held unconstitutional. The Court should grant review to square the Third Appellate District's decision with *Pruneyard* and *Fashion Valley*.

B. The Court should grant review to clarify the constitutional right to use sidewalks in front of retail businesses for speech related to the business.

The Third Appellate District found it irrelevant that the Union's speech advocated a boycott of Foods Co. But in *Fashion Valley*, this Court held that "[i]t has been the law since we decided *Schwartz-Torrance* in 1964, 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*, *supra*, 42 Cal.4th at p. 864.) This Court made clear that *Schwartz-Torrance* and *Lane*, although originally based on a federal interpretation of the First Amendment that subsequently took a divergent path, remain precedent for interpreting California's free speech clause. (*Fashion Valley*, 42 Cal.4th at p. 864, fn.6 [citing *Pruneyard*, *supra*, 23 Cal.3d at p. 908; *Golden Gateway Ctr. v. Golden Gateway Tenants Assn.* (2001) 26 Cal.4th 1013, 1032].)

Even prior to this Court's re-affirmation of *Schwartz-Torrance* and *Lane*, courts of appeal recognized these cases to mean that state free speech rights can outweigh private property rights even in non-*Pruneyard* fora, when the speech presents a grievance against a particular business. (See, e.g., *Costco Co. v. Gallant* (2002) 96 Cal.App.4th 740, 755 ["Admittedly, where the property owner itself is the subject of a public dispute or controversy—as for instance a labor dispute—its property may as a practical matter be the only available forum to effectively express views on the controversy and it may be required to give its opponents access to its property."]; *Slauson Partnership v. Ochoa* (2003) 112 Cal.App.4th 1005, 1028-1029 [fact that religious protest was related to strip club in shopping center weighs in favor of allowing protestors on private property].)[17]

Ignoring this Court's affirmation of *Lane* and *Schwartz-Torrance* under California's free speech clause, the Third Appellate District held that "those cases were based on the now-discredited notion that the First Amendment of the United States Constitution may prohibit private property owners from restricting expressive activities on their properties." (Opn. at

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[17] Other courts of appeal interpret *Lane* and *Schwartz-Torrance* to be part of a general balancing test for determining whether a particular store is a *Pruneyard* public forum. (See, e.g., *Albertson's*, *supra*, 107 Cal.App.4th at p. 123 [questioning *Lane*'s continued viability but holding that "[t]he fact that the expressive activity was specifically related to the business use of the property in that case tipped the balance in favor of expressive access."]; *Trader Joe's Co. v. Progressive Campaigns* (1999) 73 Cal.App.4th 425, 435-436.)

p. 15.) Effectively overruling this Court's opinions, it held that "*Lane* and *Schwartz-Torrance* are no longer independently viable . . . [and] cannot be read to expand rights of individuals engaging in speech on private property beyond the analysis in *Pruneyard* and *Fashion Valley*." (Opn. at p. 16.)

But in *Fashion Valley*, this Court interpreted its prior cases to mean that "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." (*Fashion Valley*, *supra*, 42 Cal.4th at p. 864.) *Lane*'s interpretation of the First Amendment applies equally to California's free speech clause: "If we were to hold the particular sidewalk area to be 'off limits' for the exercise of First Amendment rights in effect we would be saying that by erecting a '*cordon sanitaire*' around its store, [the store] has succeeded in immunizing itself from on-the-spot public criticism." (*Lane*, *supra*, 71 Cal.3d at p. 871.)

The Third Appellate District's opinion rejects *Lane* and *Schwartz-Torrance*, conflicts with *Fashion Valley*, and parts with the approach taken by other courts of appeal in balancing private property rights against the constitutional interest in on-the-spot public criticism of commercial businesses. This Court should grant review to clarify the relation of *Lane* and *Schwartz-Torrance* to *Pruneyard* and its progeny.

CONCLUSION

For all the foregoing reasons, United Food & Commercial Workers 8 respectfully requests that the Court grant this Petition for Review.

Dated: August 27, 2010

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, counsel hereby certifies that the above brief is produced using 13 point Times New Roman font, with 13-point and 14-point Cambria font for the headers, and contains 8,378 words, including footnotes, and excluding the cover, the signature block and this certificate. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: August 27, 2010

DAVIS, COWELL & BOWE, LLP

By: _____
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Local 8

EXHIBIT A

Filed 7/19/10

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

RALPHS GROCERY COMPANY, Plaintiff and Appellant, v. UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 8, Defendant and Respondent.	C060413 (Super. Ct. No. 34-2008-00008682-CU-OR-GDS)

APPEAL from a judgment of the Superior Court of Sacramento County, Loren E. McMaster, Judge. Reversed with directions.

Morrison & Foerster, Miriam A. Vogel, Timothy F. Ryan, and Tritia M. Murata, for Plaintiff and Appellant.

Littler Mendelson, William J. Emanuel, and Natalie Rainforth for Employers Group, California Grocers Association, and California Hospital Association, as Amici Curiae on behalf of Plaintiff and Appellant.

Davis, Cowell & Bowe, Sarah Grossman-Swenson, Elizabeth A. Lawrence, and Andrew J. Kahn, for Defendant and Respondent.

Edmund G. Brown, Jr., Attorney General, J. Matthew Rodriquez, Chief Assistant Attorney General, Manuel M. Medeiros, Solicitor General, Louis Verdugo, Jr., Senior Assistant Attorney General, Angela Sierra and Antonette Benita Cordero, Deputy Attorneys General, as Amici Curiae on behalf of Defendant and Respondent.

In this case, a union peacefully picketed in front of a grocery store, a private forum, contrary to the grocery store's demands that the union not use the private property for its expressive activities (its "speech," using the term generally). When the grocery store sought injunctive relief against the picketing, the court denied the relief based on California's statutory scheme making it virtually impossible for an employer to obtain injunctive relief in a peaceful labor dispute.

This case presents the question of whether the state, based on the content of the speech, can force the owner or possessor of real property that is not a public forum to give an uninvited group access to the private property to engage in speech. We conclude that such legislation violates the First and Fourteenth Amendments of the United States Constitution and, therefore, is invalid.

Accordingly, we reverse and remand.

LEGAL BACKGROUND

"The First Amendment to the United States Constitution provides that 'Congress shall make no law . . . abridging the freedom of speech . . . .' This fundamental right to free speech is 'among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action.' [Citations.]" (*Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141, 1147.) "For corporations as for individuals, the choice to speak includes within it the choice of what not to say. [Citation.]" (*Pacific Gas & Electric Co. v. Public Utilities Com.* (1986) 475 U.S. 1, 16 [89

L.Ed.2d 1, 12].) Forcing a speaker to host or accommodate another speaker's message violates the host's free speech rights. (*Hurley v. Irish-American Gay Group* (1995) 515 U.S. 557, 566 [132 L.Ed.2d 487, 498-499] (*Hurley*) [state cannot require parade to include group whose message the parade's organizer does not wish to send].)

The California Constitution protects, among other things, liberty of speech and private ownership of real property. The liberty of speech clause of the California Constitution 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, subd. (a).) Concerning private property, the constitution states: "All people are by nature free and independent and have inalienable rights. Among these are . . . acquiring, possessing, and protecting property . . . ." (Cal. Const., art. I, § 1.)

"As a general rule, landowners and tenants have a right to exclude persons from trespassing on private property; the right to exclude persons is a fundamental aspect of private property ownership. [Citation.] An injunction [exercising the court's equity jurisdiction] is an appropriate remedy for a continuing trespass. [Citation.]" (*Allred v. Harris* (1993) 14 Cal.App.4th 1386, 1390 (*Allred*).) However, if the private property is a public forum under the California Constitution, the courts may not enjoin those who enter the private property and engage in speech, conforming with the reasonable time, place, and manner

restrictions of the property owner, because, under those circumstances, the owner has no right to exclude, and, therefore, it is not a trespass. (*Ibid.*)

The elements of a common law trespass are (1) the plaintiff's ownership or control of the property; (2) the defendant's intentional, reckless, or negligent entry on the property; (3) lack of permission to enter the property, or acts in excess of the permission; (4) actual harm; and (5) the defendant's conduct as a substantial factor in causing the harm. (See CACI No. 2000.)

Whether the areas within shopping centers and around large retail stores are public forums for the purpose of speech under California law has been the subject of litigation for many years. In *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899 (*Pruneyard*), the California Supreme Court held that the liberty of speech clause of the California Constitution protected speech in a privately-owned shopping center, subject to the owner's reasonable time, place, and manner restrictions, because the owner had created a public forum for speech. (See *Fashion Valley Mall, LLC v. National Labor Relations Bd.* (2007) 42 Cal.4th 850, 858 (*Fashion Valley*) [following *Pruneyard*].) The shopping center at issue in *Pruneyard* consisted of 21 acres, with 65 shops, 10 restaurants, and a cinema. (*Pruneyard, supra*, at p. 902.)

Subsequent cases decided by the Courts of Appeal have distinguished the large *Pruneyard*-type shopping center from large individual retail stores, even though those stores are

located within a larger retail development. These cases have held that the entrance areas and aprons of these large retail stores do not present a public forum. (See, e.g., *Van v. Target Corp.* (2007) 155 Cal.App.4th 1375 (*Van*); for a detailed analysis of the cases leading to this holding, see *Albertson's, Inc. v. Young* (2003) 107 Cal.App.4th 106, 113-120 (*Albertson's*).)

In addition to the constitutional provisions that may restrict a court from granting relief to a private property owner when California's liberty of speech clause is implicated, two statutes apply to relief that may or may not be granted when the speech relates to a labor dispute. Those statutes are Code of Civil Procedure section 527.3, also known as the Moscone Act, enacted in 1975 (Stats. 1975, ch. 1156, § 1, p. 2845), and Labor Code section 1138.1, enacted in 1999 (Stats. 1999, ch. 616, § 1).

The Moscone Act limits the equity jurisdiction of the courts in cases involving labor disputes. (*Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters* (1979) 25 Cal.3d 317, 321 (*Sears II*).) (We refer to this case as *Sears II* because that is how it is referred to in most cases and literature on the subject, even though there is no reason here to discuss the prior decision arising from that case.) The Moscone Act declares that conduct relating to a "'labor dispute,'" such as peaceful picketing, "shall be legal, and no court nor any judge nor judges thereof, shall have jurisdiction to issue any restraining order or preliminary or permanent injunction which, in specific or general terms, prohibits any

person or persons, whether singly or in concert, from [engaging in the specified conduct]." (Code Civ. Proc., § 527.3, subd. (b).) The Moscone Act defines "'labor dispute'" broadly. (Code Civ. Proc., § 527.3, subd. (b)(4).)

Without referring to the Moscone Act, Labor Code section 1138.1 restricts the authority of the courts to issue a preliminary or permanent injunction in a case involving a labor dispute. It requires the court in such a case to hold a hearing with live witnesses and to make findings of fact as prerequisites to issuing an injunction. (Lab. Code, § 1138.1, subd. (a).) Before a court may grant injunctive relief in a labor dispute, the court must make all of the following factual findings:

"(1) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorized those acts.

"(2) That substantial and irreparable injury to complainant's property will follow.

"(3) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief.

"(4) That complainant has no adequate remedy at law.

"(5) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection." (Lab. Code, § 1138.1, subd. (a).)

With this legal background in mind, we turn to a discussion of the facts and procedure unique to this case.

FACTS AND PROCEDURE

Plaintiff Ralphs Grocery Company (Ralphs) owns Foods Co, a large warehouse grocery store located in Sacramento in a retail development called College Square. The employees of Foods Co are not represented by a union. Defendant United Food and Commercial Workers Union Local 8 (the Union) has negotiated with Ralphs to make Foods Co a union store, but the parties reached an impasse.

The store has only one entrance for customers. In front of the entrance of Foods Co is a sidewalk or apron that extends out about 15 feet to the asphalt of a driving lane that separates the apron from the parking lot. The entrance area (including the exit door) is about 31 feet wide.

Around the corner on the left side of the Foods Co building, looking at the building from the front, there is a courtyard area with three benches and a large circular planter. The benches are up against the side of the Foods Co building. Beyond the courtyard is a separate building with a hair salon, a nail salon, and a beauty supply store. College Square, not Foods Co, maintains the courtyard area. There was no evidence that the Union was using or intended to use this courtyard area for its speech.

On the right side of Foods Co, attached to the Foods Co building, are an empty retail space and two fast-food restaurants. Several more retail establishments are located in College Square, some of them restaurants with outside seating. A large parking lot serves the customers of all the retail establishments in College Square.

Foods Co opened on July 25, 2007. On that day, between eight and 10 agents of the Union picketed the store, encouraging people not to shop at Foods Co because it is not a union store. They walked back and forth in front of the doors, carrying picket signs and handing out flyers. The Union's agents returned generally five days each week and engaged in the same activities, staying about eight hours.

In January 2008, Ralphs gave to the Union a memorandum containing Foods Co's rules for speech on the premises. The rules prohibited distribution of literature, physical contact with any person, and display of signs larger than two feet by three feet. The rules also prohibited speech within 20 feet of the store entrance and banned all speech during specified hours of the day and for a week before designated holidays.

The Union's agents generally did not adhere to Foods Co's rules for speech. They handed out flyers and stood within five feet of the doors. Foods Co management called the Sacramento Police Department and asked the officers to remove the Union's agents. The officers gave the Union's agents a copy of Foods Co's rules for speech and told Foods Co management that giving the rules to the Union's agents was all they would do at that

point because the Sacramento Police Department is unwilling to remove peaceful picketers from Ralphs's property. After the officers left, the Union's agents continued to violate Foods Co's rules.

Several other groups or individuals have used Foods Co's entrance area and apron, as well as the parking lot, to engage in speech. Groups or individuals have solicited money for causes, panhandled, gathered signatures on petitions, and sold, at various times, subscriptions to a newspaper, DVDs, and tamales or burritos.

On April 15, 2008, Ralphs filed a complaint against the Union in the Sacramento Superior Court. The complaint alleged trespass and sought declaratory and injunctive relief to prevent the Union from using Ralphs's property as a forum for expression of the Union's views. Ralphs applied for a temporary restraining order, which the trial court denied. However, the court issued an order to show cause and set an evidentiary hearing on whether to issue a preliminary injunction.

Before the evidentiary hearing was held, the parties submitted briefing on the law involved in the dispute. The trial court issued a tentative ruling concerning the law in which the court held that (1) the Moscone Act violates the First and Fourteenth Amendments of the United States Constitution, considering United States Supreme Court precedent, and is therefore unenforceable; (2) the trial court is bound by the decision of this court in *Waremart Foods v. United Food & Commercial Workers Union* (2001) 87 Cal.App.4th 145 (*Waremart I*),

in which we held that Labor Code section 1138.1 does not violate federal and state constitutional guarantees of equal protection; and (3) the evidentiary hearing would focus on whether, applying Labor Code section 1138.1, "Ralphs is entitled to injunctive relief under California law, considering the issue of whether the location in question is a public forum, and if so, whether the time, place and manner restrictions on expressive speech are reasonable."

Concerning the Moscone Act, the trial court stated that it "constitutes content based discrimination that violates the [First] [A]mendment and Equal Protection Clause. And, the Court is bound by the U.S. Supreme Court cases holding that statutes that favor one type of speech over another violate the [First] [A]mendment. [Citation of two United States Supreme Court cases, discussed below.]"

Concerning Labor Code section 1138.1, the trial court stated that it would have similarly found that statute unconstitutional if the court was not bound by *Waremart I* (also discussed below). The court believed our decision was "based on an erroneous interpretation of the holding of the U.S. Supreme Court cases . . . ." However, because the trial court was bound by the case from this court, the trial court set a date for the evidentiary hearing pursuant to Labor Code section 1138.1.

After the evidentiary hearing, the trial court concluded that Ralphs had failed to introduce evidence sufficient to carry its burden of proof as to any of the five elements enumerated in Labor Code section 1138.1. The court stated:

"The Court finds that [Ralphs] operates a grocery store, Foods Co, at which the defendant Union has picketed five days a week, 8 hours a day, since the store opened in July 2007. The evidence did not establish that the Union had committed any unlawful act, or that it had threatened to do so. There was no evidence that anything the [Union was] doing would cause any 'substantial and irreparable injury' to the store property, or that public officers were unable or unwilling to furnish adequate protection to plaintiff's property.

"The evidence established that other persons on the property to solicit money or signatures for their own causes placed themselves in the zone that Ralphs had declared off-limits (e.g.[,] in front of the doors), but apparently did not cause any undue disruption to Ralphs' business since little effort was made to remove them. No evidence established that anything that the [Union] did was any more disruptive tha[n] the actions of others. Ralphs has failed to carry its burden of proof that its rules are reasonable time, place and manner restrictions within the guidelines of [*Fashion Valley*]."

The trial court therefore denied Ralphs's motion for a preliminary injunction.

DISCUSSION

I

Public or Private Forum

We first turn to the question of whether the entrance area and apron of the Foods Co store is a public or private forum. Rejecting the Union's argument, discussed below, that we need

not consider this question, we conclude that the entrance area and apron of the Foods Co store is a private forum under California law.

The Union asserts that we need not consider this issue because the trial court denied the injunction on other grounds -- namely, that Ralphs failed to bear its burden on the elements required by Labor Code section 1138.1 for an injunction. We disagree with the Union for two reasons. First, the trial court found that Ralphs's time, place, and manner restrictions were unreasonable, citing *Fashion Valley*. Such an analysis is necessary only if we are dealing with a public forum. Therefore, even though the trial court did not expressly find that the front entrance and apron of the Foods Co store is a public forum, it did so implicitly by applying the public forum analysis. And second, if the front entrance and apron of the Foods Co store is a public forum, we need not consider the constitutionality of the Moscone Act and Labor Code section 1138.1 because Ralphs's time, place, and manner restrictions were unreasonable for a public forum and that conclusion by itself supports the trial court's decision to deny injunctive relief. It is against the policy of the courts of this state to "to reach out and unnecessarily pronounce upon the constitutionality of any duly enacted statute." (*Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 65.)

The Foods Co store in College Square is indistinguishable from the stand-alone stores in shopping centers in *Van, supra,* 155 Cal.App.4th 1375, a case in which the Court of Appeal held

that the entrance areas and aprons of such stores are not public forums.

In *Van*, a group sued Target, Wal-Mart, and Home Depot for prohibiting their signature gathering activities at a table off to the side of the entrance to each store. (*Id.* at pp. 1378-1379.) Each of these large retail stores was located in "larger retail developments," with "amenities provided by those centers, including their restaurants, theaters, and community events." (*Id.* at p. 1380.) Applying *Pruneyard* and its progeny, the *Van* court stated that "the apron and perimeter areas of [the] stores do not act as the functional equivalent of a traditional public forum." (*Id.* at p. 1388.)

The *Van* court continued: "[The defendants'] stores -- including the store apron and perimeter areas -- are not designed as public meeting spaces. The stores' invitation to the public is to purchase merchandise and no particular societal interest is promoted by using the stores for expressive activity. As such, [the defendants'] interest in maintaining control over the area immediately in front of their stores outweighs society's interest in using those areas as public fora. We are not persuaded by [the plaintiff's] central argument that the presence of [the] stores in larger, *Pruneyard*-type shopping centers alters this balance." (*Van, supra,* at p. 1390.)

Distinguishing the front of the large, individual stores from the common areas of the shopping centers, the *Van* court concluded: "We decline to extend the holding in *Pruneyard* to

the entrance and exit area of an individual retail establishment within a larger shopping center. [The plaintiffs'] evidence concerning the public nature of certain shopping centers' common areas failed to raise a triable issue of fact as to whether apron and perimeter areas at the entrances and exits of [the defendants'] stores served as public fora." (*Van, supra,* at p. 1391; see also *Albertson's, supra,* 107 Cal.App.4th at pp. 109-110 [holding that entrance area of grocery store not a public forum even though store located in shopping center].)

The same is true here. Although there was evidence that College Square included common areas and restaurants where outdoor seating was available, the entrance area and apron of Foods Co did not include such areas. Thus, because they were not designed and presented to the public as public meeting places, the entrance area and apron of Foods Co is not a public forum under the liberty of speech clause of the California Constitution. And because the area was not a public forum, Ralphs, as a private property owner, could limit the speech allowed and could exclude anyone desiring to engage in prohibited speech.

This remains true even though Ralphs granted the right to other groups to use the entrance and apron area of Foods Co for speech. The trial court found that groups unrelated to the Union were allowed to solicit money or signatures in the front entrance area. But this did not transmute the property into a public forum. A private owner may selectively permit speech or prohibit speech in a private forum without affecting the private

nature of the forum. (*Albertson's, supra,* 107 Cal.App.4th at p. 125.)

Despite this authority supporting our conclusion that the area in front of the Foods Co store is a private forum and, therefore, the Union cannot assert free speech rights as a bar to injunctive relief, the Union cites cases of the California Supreme Court which, as the *Fashion Valley* court stated, held that "a privately owned shopping center must permit peaceful picketing of businesses and shopping centers, even though such picketing may harm the shopping center's business interests." (*Fashion Valley, supra,* 42 Cal.4th at p. 864.) Those cases include *In re Lane* (1969) 71 Cal.2d 872 (*Lane*) and *Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union* (1964) 61 Cal.2d 766 (*Schwartz-Torrance*). We have noted, as did the *Fashion Valley* court, that those cases were based on the now-discredited notion that the First Amendment of the United States Constitution may prohibit private property owners from restricting expressive activities on their properties. (*Fashion Valley, supra,* at p. 861; *id.* at p. 880, diss. opn. of Chin, J.; *Albertson's, supra,* 107 Cal.App.4th at p. 123.)

Considering the United States Supreme Court and California Supreme Court cases decided since *Lane* and *Schwartz-Torrance*, which relied on the First Amendment, the only continuing vitality of *Lane* and *Schwartz-Torrance* lies in the jurisprudence of the analogous liberty of speech clause in the California Constitution. *Lane* and *Schwartz-Torrance* are no longer independently viable. Thus, *Lane* and *Schwartz-Torrance* cannot

be read to expand the rights of individuals engaging in speech on private property beyond the analysis in *Pruneyard* and *Fashion Valley*. That analysis requires, as a starting point, a determination of whether the area is a public or private forum. Applying that analysis, we conclude that, because the area in front of the Foods Co store is not a public forum, the Union's free speech rights, whether under the federal First Amendment or the state liberty of speech clause, are not infringed.

II

Constitutionality of Statutes

Having determined that the front entrance and apron of the Foods Co store is a private forum where Ralphs can restrict speech without constitutional constraints, we are faced squarely with the constitutionality of the Moscone Act and Labor Code section 1138.1, which withdraw from Ralphs the ability to obtain injunctive relief, the only peaceful means to protect Ralphs's property and free speech rights. The Union's agents entered Ralphs's private property to engage in speech despite Ralphs's prohibition and regulation of such conduct. Thus, unless state laws can be interpreted to make such conduct lawful, the Union's agents were trespassing. We must decide whether the Moscone Act and Labor Code section 1138.1 validly prevented the trial court from enjoining the trespass. Applying binding precedents, we conclude that the Moscone Act and Labor Code section 1138.1 are unconstitutional.

A. *Moscone Act*

The trial court concluded that the Moscone Act, which limits the court's equity jurisdiction in labor relations cases, incurably violates the First and Fourteenth Amendments of the United States Constitution. We agree that the Moscone Act favors speech related to labor disputes over speech related to other matters, based on the content of the speech. Consequently, we also agree that the Moscone Act is unconstitutional and that the defect cannot be cured to render constitutional the application of the act to the facts of this case.

We first discuss the enactment of the Moscone Act, along with the California Supreme Court's 1979 plurality decision in *Sears II*, interpreting the Moscone Act and finding that the act provides a right to engage in speech related to labor disputes on private property, regardless of whether the private property is a public forum under *Pruneyard*. We then discuss two decisions of the United States Supreme Court, *Police Department v. Mosley* (1972) 408 U.S. 92 [33 L.Ed.2d 212] (*Mosley*) and *Carey v. Brown* (1980) 447 U.S. 455 [65 L.Ed.2d 263] (*Carey*), which held that treating speech concerning a labor dispute differently from other types of speech constituted unconstitutional content-based discrimination under the First and Fourteenth Amendments. We finally conclude that the Moscone Act, as interpreted by the *Sears II* plurality, violates the First and Fourteenth Amendments

of the United States Constitution because it favors speech relating to a labor dispute over other types of speech.

The Legislature passed the Moscone Act in 1975 "to promote the rights of workers to engage in concerted activities for the purpose of collective bargaining, picketing or other mutual aid or protection, and to prevent the evils which frequently occur when courts interfere with the normal processes of dispute resolution between employers and recognized employee organizations . . . ." (Code Civ. Proc., § 527.3, subd. (a).)

In *Sears II*, the California Supreme Court reviewed an order restraining union agents from peacefully picketing on a privately owned sidewalk surrounding the plaintiff's stand-alone department store. While the case was pending on appeal, the Legislature passed the Moscone Act, which the Supreme Court considered in reviewing the trial court order. (*Sears II*, 25 Cal.3d at pp. 320-321.) Three justices of the court cited the court's prior decisions as establishing the legality of picketing on private sidewalks outside the store as a matter of state labor law. (*Id.* at p. 328.) Thus, the plurality concluded that "the sidewalk outside a retail store has become the traditional and accepted place where unions may, by peaceful picketing, present to the public their views respecting a labor dispute with that store. Recognized as lawful by the decisions of this court, such picketing likewise finds statutory sanction in the Moscone Act, and enjoys protection from injunction by the terms of that act. In such context the location of the store whether it is on the main street of the downtown section of the

metropolitan area, in a suburban shopping center or in a parking lot, does not make any difference. Peaceful picketing outside the store, involving neither fraud, violence, breach of the peace, nor interference with access or egress, is not subject to the injunction jurisdiction of the courts." (*Id.* at pp. 332-333.)

The *Sears II* plurality expressly declined to base its decision on *Pruneyard's* interpretation of the California Constitution. Instead, the decision was based entirely on the Moscone Act. (*Sears II, supra,* 25 Cal.3d at pp. 327-328, fn. 5.) The Moscone Act therefore protects peaceful picketing on an employer's private property if the picketing relates to a labor dispute.

We next turn to the constitutional jurisprudence of the United States Supreme Court and the two cases, *Mosley* and *Carey,* that are most relevant to whether the Moscone Act violates the United States Constitution.

In *Mosley,* a 1972 case, the United States Supreme Court considered a Chicago ordinance that generally prohibited picketing within 150 feet of a school, but made a specific exception for picketing in a labor dispute. The plaintiff was a man who frequently picketed, always peacefully, outside a high school, carrying a sign that stated that the high school discriminated racially. He sued for injunctive and declaratory relief because he was told that, if he picketed after the effective date of the ordinance, he would be arrested. (*Mosley, supra,* 408 U.S. at pp. 92-93.) The court held that the

ordinance violated the First Amendment and the Equal Protection Clause of the Fourteenth Amendment because of the ordinance's "impermissible distinction between labor picketing and other peaceful picketing." (*Mosley, supra,* at p. 94.) "The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign. But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. [Citations.]" (*Mosley, supra,* at p. 95.)

The *Mosley* court concluded: "Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference

to content alone." (*Mosley, supra,* 408 U.S. at p. 96, fn. omitted.)

In 1980, eight years after *Mosley*, the United States Supreme Court again considered selective prohibition of speech based on content. In *Carey*, the court found unconstitutional an Illinois statute that prohibited picketing on the public streets and sidewalks adjacent to residences but exempted picketing of a place of employment in a labor dispute. (*Carey, supra,* 447 U.S. at pp. 457, 471.) The court rejected the argument that the state's interest in allowing labor protests justified the differential treatment. "The central difficulty with this argument is that it forthrightly presupposes that labor picketing is more deserving of First Amendment protection than are public protests over other issues, particularly the important economic, social, and political subjects about which these appellees wish to demonstrate. We reject that proposition. [Citation.]" (*Id.* at p. 466.)

The obvious difference between the Moscone Act and the laws scrutinized in *Mosley* and *Carey* is that the Moscone Act selectively allows speech in a private forum based on the content of the speech by withdrawing the remedy of the property owner or possessor while the laws scrutinized in *Mosley* and *Carey* selectively excluded speech from a public forum based on content. This difference, however, is not legally significant. The effect on speech is the same: the law favors speech related to labor disputes over speech related to other matters -- it forces Ralphs to provide a forum for speech based on its

content. (See *Pacific Gas & Electric Co. v. Public Utilities Com., supra,* 475 U.S. 1.)

Governmental discrimination based on the content of speech is subject to strict scrutiny. (*Fashion Valley, supra,* 42 Cal.4th at p. 865.) It "may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." (*Consolidated Edison v. Public Serv. Comm'n* (1980) 447 U.S. 530, 541 [65 L.Ed.2d 319, 330].) Here, the Union makes no argument that the Moscone Act passes strict scrutiny, that the Moscone Act is a narrowly-tailored law justified by a compelling state interest. Indeed, *Mosley* and *Carey* establish that there is no compelling government interest in forcing a property owner or possessor to allow speech related to a labor dispute when speech relating to other issues can be prohibited. (*Carey, supra,* 447 U.S. at pp. 464-467.)

Accordingly, as applied in this case, the Moscone Act violates the First and Fourteenth Amendments of the United States Constitution. The Act affords preferential treatment to speech concerning labor disputes over speech about other issues. It declares that labor protests on private property are legal, even though a similar protest concerning a different issue would constitute trespassing. And it denies the property owner involved in a protest over a labor dispute access to the equity jurisdiction of the courts even though it does not deny such access if the protest does not involve a labor dispute.

Citing *Sears II* and the opinion of the Court of Appeal in *M Restaurants, Inc. v. San Francisco Local Joint Exec. Bd. Culinary Etc. Union* (1981) 124 Cal.App.3d 666 (*M Restaurants*), the Union claims that the constitutionality of the Moscone Act has already been established. To the contrary, *Sears II* is not binding precedent on the issue, and *M Restaurants* did not involve private property and is therefore not persuasive. As did the trial court in this case, we agree with the opinion of the United States Court of Appeals for the District of Columbia in *Waremart Foods v. N.L.R.B.* (D.C. Cir. 2004) 354 F.3d 870 (*Waremart II*). In that case, the federal court concluded that the Moscone Act violates the First and Fourteenth Amendments.

The *Sears II* plurality decision did not consider the First Amendment issue. The decision stated: "[T]he Moscone Act, interpreted in light of prior decisions of this court, declares such peaceful picketing [on the private property sidewalks surrounding the store] to be legal and thus not subject to injunction. Rejecting Sears' contention that it enjoys a federally protected right to enjoin peaceful picketing on property it has opened to public use, we conclude that the trial court lacks jurisdiction to enjoin the picketing at issue here." (*Sears II, supra,* 25 Cal.3d at p. 321.) Thus, the decision found that the Moscone Act applies to a case such as ours in which union agents are peacefully picketing on private property and that there is no federal right to enjoin such peaceful picketing. However, the *Sears II* decision did not consider the First and Fourteenth Amendment implications of its decision,

whether the statute's provisions declaring labor picketing on private property to be legal constituted content-based discrimination. Those are the implications of *Sears II* that we consider today. Since *Sears II* did not consider the constitutional issue, it does not stand as authority, binding or persuasive, on that issue. (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 127 [cases not authority for propositions not considered].)

Also clear from the *Sears II* decision is that the Moscone Act requires the courts to treat speech that can be characterized as "union activity" differently from speech that cannot be so characterized. The court stated: "Although the reach of the Moscone Act may in some respects be unclear, its language leaves no doubt but that the Legislature intended to insulate from the court's injunctive power all union activity which, under prior California decisions, has been declared to be '*lawful activity.*'" (*Sears II, supra,* 25 Cal.3d at p. 323, original italics.) But these conclusions do not establish the constitutionality of the Moscone Act.

Furthermore, the *Sears II* opinion was signed by just three justices of the court, a plurality, and therefore did not reflect the views of a majority of the court. "The case thus lacks authority as precedent [citations], and the doctrine of stare decisis does not require us to defer to it [citation]." (*Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 918.)

Neither *Sears II* nor any other decision of the California Supreme Court has dealt with the issue we consider here. One commentator noted that in *Fashion Valley*, the Supreme Court's most recent case analyzing *Pruneyard*-type rights, the court did not discuss *Sears II* or the Moscone Act: "[A] perplexing aspect of the *Fashion Valley* decision is the omission from the majority's detailed historical account of any reference to the earlier decision in *Sears II*, in which a plurality of the Court had held that the *Moscone Act* authorized a union to picket on the privately owned sidewalk surrounding a stand-alone department store. This omission seems to be an implied recognition that *Sears II* and the *Moscone Act* are unconstitutional as content discrimination under the First Amendment, as the D.C. Circuit held in *Waremart* [*II*] by relying on the United States Supreme Court's decisions in *Police Department of Chicago v. Mosley* and *Carey v. Brown*." (Emanuel, *Union Trespassers Roam the Corridors of California Hospitals: Is a Return to the Rule of Law Possible*? (2009) 30 Whittier L.Rev. 723, 764, fns. omitted.)

The Union's reliance on *M Restaurants* as a precedent that the Moscone Act is consistent with the First and Fourteenth Amendments is also misplaced for two reasons. First, *M Restaurants* did not consider picketing on private property, and, second, any pronouncements in *M Restaurants* about the constitutionality of denying injunctive relief based on the Moscone Act are dicta because injunctive relief was granted.

In *M Restaurants*, the employer sought an injunction against union picketers who were picketing at the entrances to a restaurant, blocked the doorways, harassed employees and potential customers, and lied to potential customers about the sanitary conditions in the restaurant. (*M. Restaurants, supra*, 124 Cal.App.4th at pp. 671-672.) While the opinion does not explicitly state whether the property on which the union picketed was public or private, it implies that the property was public by quoting from a case upholding the constitutionality of statutes limiting injunctive relief available when labor protesters picket on a public street. (*Id.* at pp. 675-676, quoting *Senn* v. *Tile Layers Union* (1937) 301 U.S. 468 [81 L.Ed. 1229].) The trial court granted injunctive relief to the restaurant. (*M Restaurants, supra*, at pp. 671-672.)

On appeal, the *M Restaurants* court considered whether injunctive relief could be sustained under the newly-enacted Moscone Act. On the subject of equal protection, the court stated that "the statute bears a rational relationship to its purpose" (*M Restaurants, supra*, 124 Cal.App.3d at p. 677), but the court did not discuss whether the statute treats speech related to labor disputes differently from speech relating to other issues. After finding no constitutional problems with the Moscone Act, the court nevertheless concluded that the picketers' conduct was unlawful and the Moscone Act did not prevent the trial court from exercising its equity jurisdiction to enjoin the unlawful conduct. (*Id.* at pp. 685-686.) Therefore, the court's discussion of the constitutionality of

the Moscone Act was unnecessary to the decision. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 620 [decisions authority only for points actually involved and decided].)

Accordingly, *M Restaurants* is unpersuasive.

The District of Columbia Circuit of the United States Court of Appeals determined that the Moscone Act, as interpreted by the California Supreme Court in *Sears II*, violates the First Amendment because it discriminates based on the content of the speech. (*Waremart II, supra,* 354 F.3d at p. 875.) The D.C. Circuit relied on *Mosley* and *Carey* in making this determination. To avoid content discrimination and render the statute constitutionally valid, the D.C. Circuit concluded that "under California law labor organizing activities may be conducted on private property only to the extent that California permits other expressive activity to be conducted on private property." (*Waremart II, supra,* at p. 875.)

Although decisions of the federal circuit courts are not binding on us, the reasoning and logic of *Waremart II* are persuasive. (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 58 [decisions of lower federal courts not binding but may be persuasive].)

Therefore, as did *Waremart II*, we conclude that the Moscone Act violates the First and Fourteenth Amendments as applied to the circumstances of this case because it favors speech related to a labor dispute over speech related to other issues. To render it constitutional, the Moscone Act must be read to allow speech, in a private forum, related to a labor dispute only to

the extent that speech related to other issues is allowed. Because the Union's agents were trespassing in this case, the Moscone Act cannot be construed to prohibit the courts from exercising their equity jurisdiction as they would in a case not involving a labor dispute.

B. *Labor Code section 1138.1*

Labor Code section 1138.1 suffers from the same constitutional defect as the Moscone Act -- it favors speech relating to labor disputes over speech relating to other matters. It adds requirements for obtaining an injunction against labor protesters that do not exist when the protest, or other form of speech, is not labor related.

"An injunction is an appropriate remedy for a continuing trespass. [Citation.]" (*Allred, supra,* 14 Cal.App.4th at p. 1390, fn. omitted.) "To obtain a preliminary injunction, the plaintiff must establish the defendants should be restrained from the challenged activity pending trial. [Citations.] The plaintiff must show (1) a reasonable probability it will prevail on the merits and (2) that the harm to the plaintiff resulting from a refusal to grant the preliminary injunction outweighs the harm to the defendant from imposing the injunction. [Citation.]" (*Bank of Stockton v. Church of Soldiers* (1996) 44 Cal.App.4th 1623, 1625-1626.) "[I]n order to obtain injunctive relief the plaintiff must ordinarily show that the defendant's wrongful acts threaten to cause irreparable injuries, ones that cannot be adequately compensated in damages. [Citation.] Even in an action for trespass to real property, in which damage to

the property is not an element of the cause of action, 'the extraordinary remedy of injunction' cannot be invoked without showing the likelihood of irreparable harm. [Citation.]" (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1352, italics omitted.)

While some of the requirements of Labor Code section 1138.1 for obtaining injunctive relief in a labor dispute are the same as the requirements when there is no labor dispute involved, other requirements of Labor Code section 1138.1 are unique to labor disputes. For example, to obtain an injunction against trespass in a labor dispute, the property owner or possessor must show that (1) unlawful acts have been threatened and will be committed (Lab. Code, § 1138.1, subd. (a)(1)), (2) substantial and irreparable injury to the property will follow (Lab. Code, § 1138.1, subd. (a)(2)), and (3) public officers will not or cannot intercede (Lab. Code, § 1138.1, subd. (a)(5)). On the other hand, when no labor dispute is involved, (1) the trespass itself, without a further unlawful act, justifies an injunction (*Allred, supra,* 14 Cal.App.4th at p. 1390 [injunction available against trespass]; but see *Waremart I, supra,* 87 Cal.App.4th at p. 158 [peaceful picketing not unlawful act under statute]); (2) any irreparable harm, not necessarily to the property, supports injunctive relief (*Uptown Enterprises v. Strand* (1961) 195 Cal.App.2d 45, 52 [injury to reputation and business interest suffices]); and (3) the inability or unwillingness of public officers to provide

adequate protection is not an element of trespass or a requirement of injunctive relief.

Therefore, when a property owner seeks injunctive relief against a trespass by labor protesters, that owner cannot protect its ownership interest (or a tenant, its possessory interest) to prevent a trespass without overcoming difficult obstacles not applicable to injunctive relief against trespassers not engaged in a labor dispute. Those additional obstacles include showing an unlawful act other than the trespass, irreparable harm to the property itself, and inability or unwillingness of public officers to provide protection. Based on the content of the speech of the protester, an injunction against trespass in a labor dispute is much more difficult to obtain than an injunction against trespass under any other circumstances.

As we explained with respect to the Moscone Act, the strict scrutiny test applies to differential treatment of speech based on its content. (*Fashion Valley, supra,* 42 Cal.4th at p. 865; *Consolidated Edison v. Public Serv. Comm'n, supra,* 447 U.S. at p. 541.) As in the case of the Moscone Act, there is no compelling state interest justifying this differential treatment. (See *Carey, supra,* 447 U.S. at pp. 464-467.) Therefore, as applied to the circumstances of this case, Labor Code section 1138.1 violates the First and Fourteenth Amendments of the United States Constitution.

We recognize that we reached a contrary result in *Waremart I, supra,* 87 Cal.App.4th 145. In that case, we stated that

Labor Code section 1138.1 passes constitutional muster under the rational relationship test. But we applied the rational relationship test because the plaintiff made no argument and presented no authority to apply the strict scrutiny test. (*Waremart I, supra,* at p. 158.)

We also stated that Labor Code section 1138.1 does not limit the content of speech but is, instead, merely "a rule of procedure . . . and does not address speech[.]" (*Waremart I, supra,* 87 Cal.App.4th at p. 158.) This observation, however, did not consider the effect of the rule of procedure. Just like a poll tax designed to prevent certain groups from voting (see *Harper v. Virginia State Bd. of Elections* (1966) 383 U.S. 663 [16 L.Ed.2d 169] [state's poll tax violates equal protection clause]), Labor Code section 1138.1 is not just a procedural prerequisite -- it is an impediment designed to prevent an owner or possessor of real property from obtaining an injunction in a labor dispute, even though injunctive relief would otherwise be available.

Labor Code section 1138.1 is more than just a rule of procedure. In effect, it differentiates speech based on its content and imposes prerequisites that make it virtually impossible for a property owner to obtain injunctive relief. The statute thereby forces the private property owner to provide a forum for speech with which the owner disagrees and it bases that compulsion on the content of the speech. (See *Hurley, supra,* 515 U.S. at pp. 575-576; *Pacific Gas & Electric Co. v. Public Utilities Com., supra,* 475 U.S. at p. 16.)

The Union cites several cases in an attempt to establish that Labor Code section 1138.1 does not violate the First and Fourteenth Amendments because it restricts judicial remedies limiting speech instead of limiting speech itself. This is a distinction without a difference. And the cases cited by the Union do not support its argument.

For example, the most recent case cited by the Union, *Ysursa v. Pocatello Educ. Ass'n* (2009) __ U.S. __ [172 L.Ed.2d 770] (*Ysursa*), is inapposite. In that case, a state law prohibited use of union dues for political speech if the dues were deducted from a state employee's wages. The unions sued, asserting that the ban on payroll deductions for political activities was a restriction on speech based on its content, violating the First and Fourteenth Amendments. The United States Supreme Court disagreed. It held that, although content-based restrictions "are 'presumptively invalid' and subject to strict scrutiny" (*Ysursa, supra,* at p. __ [172 L.Ed.2d at p. 777]), this was not a content-based restriction because the state was not obligated to provide payroll deductions at all, and the law did not abridge the union's freedom of speech -- "they are free to engage in such speech as they see fit." (*Id.* at p. __ [172 L.Ed.2d at pp. 777-778].) Here, on the other hand, the government is effectively forcing Ralphs to provide a forum for speech with which it disagrees by withholding the only real peaceful remedy for excluding the Union from using Ralphs's private property for the Union's speech. Unlike the situation in *Ysursa*, Labor Code section 1138.1 abridges Ralphs's free

speech rights by forcing it to host or accommodate speech with which it disagrees.

Under the circumstances of this case, Labor Code section 1138.1 violates the First and Fourteenth Amendments of the United States Constitution.

The Union asserts that, if we find that Labor Code section 1138.1 violates the United States Constitution by favoring speech related to labor, we should apply the statute to all speech-related cases, regardless of the content. We conclude that the statute may not be extended to apply to all cases because the Legislature did not intend such a drastic invasion of property rights.

"When a statute's differential treatment of separate categories of individuals is found to violate equal protection principles, a court must determine whether the constitutional violation should be eliminated or cured by extending to the previously excluded class the treatment or benefit that the statute affords to the included class, or alternatively should be remedied by withholding the benefit equally from both the previously included class and the excluded class. A court generally makes that determination by considering whether extending the benefit equally to both classes, or instead withholding it equally, would be most consistent with the likely intent of the Legislature, had that body recognized that unequal treatment was constitutionally impermissible. [Citations.]" (*In re Marriage Cases* (2008) 43 Cal.4th 757, 856.) In the case cited, the California Supreme Court opted to extend marriage to

same-sex couples rather than withholding marriage from everyone. (*Ibid.*)

Here, there is nothing to indicate that the Legislature desired to override dozens of cases involving whether a forum is public or private and, in one fell swoop, force property owners and possessors to allow all forms of peaceful speech in a private forum by withholding the remedy of injunction. The Union simplistically suggests that doing so would be "consistent with the goals of [Labor Code section 1138.1]." While that may be true if one considers only the stated goal of promoting speech relating to labor disputes, it does not mean that the Legislature also had an unstated goal of promoting all forms of speech in a private forum. It is apparent from the very limited nature of the statute, applying only to labor disputes, that the Legislature did not intend to drastically change the law concerning speech in a private forum. Therefore, the proper remedy is simply to invalidate the statute.

III

Injunctive Relief

The Union contends that, even if we conclude that the Moscone Act and Labor Code section 1138.1 cannot be applied to this case, we should still affirm the trial court's judgment because the court made findings that would result in denial of the preliminary injunction even without applying the Moscone Act and Labor Code section 1138.1. The Union asserts that (1) there was no unlawful act, (2) there was no irreparable harm; and (3) Ralphs failed to carry its burden of showing that

its rules on expressive activities were reasonable time, place, and manner restrictions under *Fashion Valley*. While the trial court made these findings, they do not support the Union's argument because (1) there is no requirement that an unlawful act beyond the trespass be committed, (2) a continuing trespass under these circumstances constitutes irreparable harm as a matter of law for which damages are not adequate, and (3) time, place, and manner restrictions under *Fashion Valley* do not apply to a private forum.

A continuing trespass is, for purposes of injunctive relief, an unlawful act. Apart from the additional requirement of Labor Code section 1138.1, which we hold cannot be applied here, a party seeking an injunction need not establish an unlawful act beyond the trespass. (See *Allred, supra,* 14 Cal.App.4th at p. 1390 [injunction appropriate remedy for continuing trespass].)

And the continuing trespass itself also causes irreparable harm. "'[T]he extraordinary remedy of injunction' cannot be invoked without showing the likelihood of irreparable harm. [Citations.]" (*Intel Corp. v. Hamidi, supra,* 30 Cal.4th at p. 1352.) "Injunction is a proper remedy against threatened repeated acts of trespass [citations], particularly where the probable injury resulting therefrom will be 'beyond any method of pecuniary estimation,' and for this reason irreparable. [Citation.]" (*Uptown Enterprises v. Strand, supra,* 195 Cal.App.2d at p. 52.) When a trespasser engages in activities to discourage the public from patronizing a business, the effect

of the activity cannot be quantified because there is no way of knowing who would have patronized the business but for the trespasser's activities. Therefore, the unquantifiable loss of business caused by the Union's activities on Ralphs's property constitutes irreparable harm here, as a matter of law.

The trial court's contrary ruling may be attributed to Labor Code section 1138.1's requirement of "substantial and irreparable injury to complainant's property" (Lab. Code, § 1138.1, subd. (a)(2)), which is a different standard from the standard for obtaining an injunction generally. The standard for obtaining an injunction generally does not require a showing that the likely injury will be to the property itself. Therefore, the trial court's finding, applying Labor Code section 1138.1, is not binding, and the showing was sufficient to establish a likelihood of irreparable harm.

Finally, as noted above, the reasonableness of time, place, and manner restrictions is irrelevant unless the property is a public forum under *Pruneyard* and its progeny or other state or federal constitutional precedent. The area at issue in this litigation is not a public forum, so the Union's argument fails.

Because Ralphs made an unrebutted showing of a continuing trespass on the part of the Union, Ralphs established a reasonable probability it will prevail on the merits and the harm resulting from a refusal to grant the preliminary injunction outweighs the harm to the Union. (See *Bank of Stockton v. Church of Soldiers, supra,* 44 Cal.App.4th at p. 1626

[requirements for preliminary injunction against trespass].) Ralphs is therefore entitled to a preliminary injunction.

DISPOSITION

The order denying a preliminary injunction is reversed and remanded with instructions to grant the preliminary injunction. Ralphs is awarded its costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

NICHOLSON, Acting P. J.

We concur:

RAYE, J.

ROBIE, J.

PROOF OF SERVICE

Re: **Case Number: S185544**
Case Title: *Ralphs Grocery Company v. United Food Commercial Workers Union Local 8*

I hereby declare that I am a citizen of the United States, I am over 18 years of age, and I am not a party in the above-entitled action. I am employed in the County of San Francisco and my business address is 595 Market Street, Suite 1400, San Francisco, California 94105.

On August 27, 2010, I served the attached document described as a **PETITION FOR REVIEW** on the parties in the above-named case. I did this by enclosing true copies of the document in sealed envelopes with postage fully prepaid thereon. I then placed the envelopes in a U.S. Postal Service mailbox in San Francisco, California addressed as follows:

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I, Miriam I. Tom, declare under penalty of perjury that the foregoing is true and correct.

Executed on August 27, 2010, at San Francisco, California.

Miriam I. Tom