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)

OPENING BRIEF ON THE MERITS

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STATEMENT OF ISSUES PRESENTED

This Court granted review on the following issues:

1. Did the Court of Appeal err in concluding that the parking area and walkway in front of the entrance to plaintiff's retail store, which is part of a larger shopping center, do not constitute a public forum under *Robins v. Pruneyard Shopping Ctr.* (1979) 23 Cal.3d 899 and its progeny?

2. Do the Moscone Act (Code Civ. Proc. § 527.3) and Labor Code section 1138.1, which limit the availability of injunctive relief in labor disputes, violate the First and Fourteenth Amendments of the United States Constitution because they afford preferential treatment to speech concerning labor disputes over speech about other issues?

INTRODUCTION

Petitioner United Food & Commercial Workers Local 8 (the "Union") peacefully protested at a grocery store in a South Sacramento shopping center. The Union publicized the store's failure to pay adequate health benefits and urged customers to support a boycott. It shared the sidewalks and parking lot in front of the store with missionaries, vendors, political signature-gatherers and others who recognized the public character of the space. Although the Union's activity was orderly and caused no

damage to store property, Ralphs Grocery Company sought an injunction to prevent the Union (and only the Union) from communicating its message.

California's Legislature has passed two laws limiting state courts' jurisdiction to issue injunctions in cases arising out of labor disputes. The Moscone Act (Code Civ. Proc. § 527.3) and Labor Code § 1138.1 are modeled *verbatim* after the federal Norris-LaGuardia Act and other states' "little" Norris-LaGuardia statutes. They 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 executive-branch officers and tribunals, rather than the state's judiciary. The Moscone Act and Labor Code § 1138.1 are no different from countless federal and state laws that provide procedural safeguards or selectively reform common-law rules to insulate particular forms of speech from infringement. Unsurprisingly, courts—including this Court and the United States Supreme Court—have upheld such laws over constitutional challenge.

Reviewing the denial of a preliminary injunction, however, the Third Appellate District held that the Moscone Act and Labor Code § 1138.1 violate the First and Fourteenth Amendments to the United States Constitution. Rewriting the doctrine of First Amendment content discrimination, the court concluded that the laws must be unconstitutional because they offer procedural protections in cases involving labor disputes

that do not apply in other types of cases. By making it more difficult to get an injunction against a union's speech, the court decided, the Moscone Act and Labor Code § 1138.1 violate Ralphs's First Amendment "right" not to be forced to accommodate speech with which it disagrees.

The errors in this reasoning are plain and their implications far-reaching. The Moscone Act and Labor Code § 1138.1 primarily limit state-court equity jurisdiction. The laws are fundamentally different from those at issue in *Police Department v. Mosley* (1972) 408 U.S. 92 and *Carey v. Brown* (1980) 447 U.S. 455, the cases on which the Third Appellate District relied. In those cases, the government flatly banned speech on public sidewalks. The Moscone Act and Labor Code § 1138.1 do no such thing; they limit state-court equity jurisdiction, not speech.

Ralphs's true complaint is not that it is being deprived of its right to free speech—it has never argued that its own speech rights were implicated—but that it is being denied access to the courts to enjoin *the Union* from speaking. Ralphs claims a constitutional right to a trespass cause of action and to the courts' equity jurisdiction.

But the Legislature may "create new rights or provide that rights which have previously existed shall no longer arise" and "it has been consistently held that the Legislature has power to determine what are grounds for equitable relief and when and under what circumstances injunctions may be granted." (*Modern Barber Colleges v. Cal. Employ.*

Com. (1948) 31 Cal.2d 720, 726, 727-28.) Litigants do not have a constitutional right to particular common-law causes of action or to specific equitable remedies. The Legislature may selectively revise state-law torts and create judicial procedures tailored to specific categories of cases, so long as it has a rational basis for doing so. (*Cory v. Shierloh* (1981) 29 Cal.3d 430, 439; *Werner v. So. Cal. Assoc. Newspapers* (1950) 35 Cal.2d 121, 130-31.)

To hold otherwise would preclude legislative revision of the common law on anything other than a universal basis and would threaten much federal and state law. Congress and California's Legislature regularly alter common-law rules that impede important societal goals, including the interest in protecting particular forms of speech. The fact that they do so selectively does not render the statutes unconstitutional.

For example, the National Labor Relations Act ("NLRA") and California's labor laws limit common-law trespass by requiring that employers grant employees worksite access to communicate about union matters, but not about politics or religion. (See *Beth Israel Hosp. v. NLRB* (1978) 437 U.S. 483, 491; *Agric. Labor Relations Bd. v. Super. Ct.* (1976) 16 Cal.3d 392, 400-411.) The Civil Code revises trespass rules by granting access to persons providing tenants with information about their rights, but not to those engaging in political door-knocking or commercial solicitation. (Civ. Code § 1942.6.) Whistleblower statutes prohibit employers from

firing employees—common-law employment-at-will notwithstanding—based upon the content of the employees' speech. (See, e.g., Lab. Code § 1102.5.) According to Ralphs and the Third Appellate District, these laws are unconstitutional because they do not apply to all speakers and all subjects.

Targeted procedural safeguards are equally common. Journalists and others enjoy statutory and judicial procedural protections in common-law defamation actions that are not extended to others. (See, e.g., Civ. Code § 48a.) Doctors, lawyers, and psychiatrists have content-based speech privileges under the Evidence Code. (See, e.g., Evid. Code § 950 *et seq.*) The Moscone Act and Labor Code § 1138.1 are no more discriminatory—and no less constitutional—than these and similar laws.

Nor are the Moscone Act and Labor Code § 1138.1 unconstitutional under the First Amendment's free-speech clause. Neither statute *abridges* anyone's speech, even indirectly. (See U.S. Const., amend. I ["Congress shall make no law . . . abridging the freedom of speech."].) A statute that does not abridge the right to engage in speech does not violate the First Amendment. (*Los Angeles Police Dept. v. United Reporting Publishing Corp.* (1999) 528 U.S. 32, 40.)

In order to bring a content-discrimination challenge to the statutes, Ralphs was required to "demonstrate a substantial risk that the application of the provision will lead to suppression of speech." (*Natl. Endowment for*

the Arts v. Finley (1998) 524 U.S. 569, 580.) It is "the government's ability to impose content-based *burdens* on speech that raises the specter that the government might 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].) But neither the Moscone Act nor Labor Code § 1138.1 burdens or suppresses anyone's speech.

The only actor seeking to suppress speech is Ralphs, not the government. Ralphs wants to enjoin the Union's protest under the same standards that govern activity that does not involve a labor dispute. But neither Ralphs's invocation of common-law trespass nor its resort to the equity jurisdiction of California's courts is state action under the First and Fourteenth Amendments. (*Lloyd Corp. v. Tanner* (1972) 407 U.S. 551, 567; *Hudgens v. NLRB* (1976) 424 U.S. 507, 519-20; *Golden Gateway Ctr. v. Golden Gateway Tenants' Assn.* (2001) 26 Cal.4th 1013, 1034.) By contrast, *Mosley*, *supra*, 408 U.S. 92 and *Carey*, *supra*, 447 U.S. 455, the cases on which the Third Appellate District relied, involved *governmental restrictions* on speech in a public forum—the government banned demonstrators from picketing on public sidewalks. This was critical to both decisions.

The Third Appellate District recognized these basic differences between the laws at issue in *Mosley* and *Carey* and the California statutes it

struck down. (*Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8* (2010) 186 Cal.App.4th 1078 [113 Cal.Rptr.3d 88], 101, review granted on Sept. 29, 2010, S185544.) Unable to locate a restriction on anyone else's speech, the court decided *sua sponte* that the Moscone Act and Labor Code § 1138.1 violate *Ralphs's* First Amendment right not to "accommodate" speech with which it disagrees. (*Ralphs*, *supra*, 113 Cal.Rptr.3d at p. 101.) But the United States Supreme Court rejects the idea that a commercial property owner like Ralphs has a "negative" First Amendment right to exclude speech from its property. (*Pruneyard Shopping Ctr. v. Robins* (1980) 447 U.S. 74, 87; *Rumsfeld v. Forum for Academic and Inst. Rights* (2006) 547 U.S. 47, 65 ["*FAIR*"].)

The Moscone Act and Labor Code § 1138.1 do not restrict speech; they limit common-law trespass and equity jurisdiction in cases arising from labor disputes. To the extent that they apply to speech concerning labor disputes, they are entirely speech-protective. Because they abridge no one's speech, they cannot violate the First Amendment.

Even if the Moscone Act and Labor Code § 1138.1 did not apply, the Union had a right under California's Constitution to criticize Ralphs's business practices on the sidewalks and parking lot in front of the grocery store.

The shopping center in which the store is located is a public forum under *Pruneyard*, *supra*, 23 Cal.3d 899. The shopping center's name—

College Square—evokes a town center, and its integrated sidewalks, open-air restaurants, courtyards, and landscaping invite the public to do more than simply shop. College and high-school students from nearby schools congregate in the mall's courtyards. On College Square's walkways and in its parking lot, missionaries spread the gospel, vendors hawk newspaper subscriptions, tamales, fireworks and other goods, and political advocates press their causes and solicit signatures for petitions. Like the Union, these citizens recognize the mall for what it is—a public meeting place in a suburban area where traditional public spaces are largely absent.

The Third Appellate District acknowledged that College Square is a *Pruneyard*-type shopping center, but ruled that sidewalks and parking lots fronting stores in such malls are categorically non-public under California's Constitution. According to the court, such sidewalks and parking lots are "not designed and presented to the public" as public spaces. (*Ralphs*, *supra*, 113 Cal.Rptr.3d at p. 98.)

This holding jettisons *Pruneyard*'s central rationale—that the "public areas of the shopping mall are replacing the streets and sidewalks of the central business district, which 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" (*Fashion Valley Mall, LLC v. NLRB* (2007) 42 Cal.4th 850, 858.) It ignores the evidence in this case that College Square's

walkways and parking lot are treated as places of public communication, and that the only way of traversing the mall is by use of these functional equivalents to the central business district's "streets and sidewalks." The Third Appellate District improperly expanded *Pruneyard's* exception for "modest retail establishments" to swallow the constitutional rule. (*Cf. Pruneyard, supra*, 23 Cal.3d at p. 910.)

The effect is particularly pernicious in this case. This Court recognizes 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; *Schwartz-Torrance Investment Corporation v. Bakery & Confectionary Workers' Union* (1964) 61 Cal.2d 766; *In re Lane* (1969) 71 Cal.2d 872.) But Ralphs urges an interpretation of California's Constitution under which it may hold the sidewalks fronting its store open to vendors, political groups, missionaries and others, but create a *cordon sanitaire* in which criticism of its business practices is prohibited. This inverts the constitutional values espoused by this Court for over four decades.

In short, the decision below struck down two statutes that the Legislature enacted to limit the power of the State's courts. It misapplied content-discrimination doctrine in a manner that conflicts with precedent and would call into question many California and federal laws. It created a

new "negative" First Amendment right to exclude speakers from commercial property that the United States Supreme Court has expressly rejected. And it placed the sidewalks and parking lots abutting retail stores in *Pruneyard*-type shopping centers categorically outside of California's free-speech clause, even when those sidewalks are used to criticize a store's business practices.

Petitioner respectfully requests that this Court reverse the Third Appellate District's profoundly destabilizing decision.

FACTUAL AND PROCEDURAL BACKGROUND

Factual Background

Ralphs operates a Foods Co grocery store in a mixed-use, outdoor shopping center in South Sacramento called College Square. College Square's name derives from its proximity to Consumnes River College. The shopping center includes restaurants, other retail establishments, a bank, nail and hair salons, and several storefronts that had not yet been leased at the time of trial. (RT 20, 21, 35-36, 70-71.)[1] Several of the mall's restaurants have outdoor seating areas. (2JA 0431; 3JA 0581-0582.)

There are three common courtyards in College Square, one of which is directly adjacent to Foods Co and connected to the store by a sidewalk that passes the store's entrance. (3JA 0486, 508-512.) College Square's

[1] The Record of Transcript below is referred to as "RT." The Joint Appendix is referred to by volume and page number, i.e., "3JA 000."

courtyards offer benches, eating tables, a mechanical hobbyhorse for children, vending machines, shade trees and other landscaping. (RT 34-35; 3JA 0486, 508-512.) The mall invites visitors, including students from Consumnes River College and a nearby high school, to congregate in these courtyards, as they often do. (2JA 0435; 3JA 0508-0511.)

The public accesses the courtyards and the center's stores by following a shared driveway to a shared parking lot containing several hundred parking spaces. (RT 26, 37.) The bordering public sidewalks along West Stockton Boulevard connect to the walkways within College Square. (3JA 0512.) These walkways wind through the center, allowing visitors to stroll 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 began protesting in front of Foods Co in July 2007, shortly after the store opened. (See RT 10.) The Union publicized Foods Co's non-union status and its failure to provide adequate family health benefits, which undermines the viability of benefits provided at Foods Co's union competitors. (See 3JA 0489.) Protestors held picket signs announcing the Union's dispute with Foods Co and offered leaflets to customers, asking them to boycott the store and suggesting alternative stores in the area. (RT 12, 28, 58; JA 0489.)

It is undisputed that the picketing and leafleting was entirely peaceful. (RT 57.) The Union required its picketers to act with courtesy and allow space for customer entry. (3JA 0494.) The demonstrators 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 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 the time that the Union protested at the store, 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 from College Square visitors, 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 used the sidewalk in front of Foods Co. (RT 31, 64, 66-67; 3JA 504-507.) A group was permitted to sell fireworks and distribute advertisements 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.)

Ralphs responded to the Union's protest by displaying a poster presenting its side of the dispute and asserting that it pays "competitive

wages and benefits." (3JA 0492.) Then, after six months of peaceful protest, Ralphs created onerous new rules to limit the Union's criticism. (RT 24; 3JA 487-488.) 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 487-488.) It banned all demonstrating in the weeks preceding Martin Luther King Day, Presidents Day, Easter, Memorial Day, Fourth of July, Labor Day and Halloween. (*Ibid.*) The rules also limited the number of demonstrators on the sidewalk to two people and banned all expressive activity in the parking lot. (*Ibid.*)

The Union continued its demonstration, 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 an injunction to force the Union—and only the Union—to comply with its restrictive rules.

Procedural Background

On April 17, 2008, the trial court issued an order to show cause on Ralphs's preliminary injunction motion. (1JA 0158-0161.) On May 28, 2008, it issued an order addressing its jurisdiction. It held that the Moscone Act "constitutes content-based discrimination that violates the 1st amendment and Equal Protection Clause." (2JA 0441.) The trial court erroneously stated that "[n]o California Court has addressed the equal

protection argument raised by Ralphs with regard to the Moscone Act." (*Ibid.*) When the Union pointed to *M Restaurants v. San Francisco Local Joint Executive Bd.* (1981) 124 Cal.App.3d 666, 674-78, which upheld the Moscone Act over an equal protection challenge, the trial court refused to reconsider. (3JA 0477, 0639.)

The trial court ordered an evidentiary hearing on whether Ralphs met Labor Code § 1138.1's requirements for injunctive relief and "to determine whether the location is a public forum, and if so whether the rules imposed by Ralphs constitute reasonable time, place and manner restrictions." (3JA 0442.)

After the evidentiary hearing, the trial court denied the preliminary injunction, finding that Ralphs had "failed to submit evidence sufficient to carry its burden on any of the factors enumerated in section 1138.1." (3JA 0640.) The court noted that "[t]he 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." (*Ibid.*) It also held that Ralphs's time, place and manner restrictions were unreasonable under *Fashion Valley*, *supra*, 42 Cal.4th 850, implicitly recognizing that College Square and the sidewalk in front of the store are public forums. (3JA 0640.)

The trial court issued an Order Denying Motion for Preliminary Injunction on October 3, 2008. (3JA 639-643.)

The Third Appellate District reversed. It held that the Moscone Act and Labor Code § 1138.1 violate the First and Fourteenth Amendments 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." (*Ralphs*, *supra*, 113 Cal.Rptr.3d at p. 92.) 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." (*Id.* at p. 93 [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"[2] of the Foods Co store is private under California law. (*Ralphs*, *supra*, 113 Cal.Rptr.3d at pp. 96-98.) 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

[2] Elsewhere, the court referred to the walkway fronting Foods Co as a "sidewalk or apron." (*Ralphs*, *supra*, 113 Cal.Rptr.3d at p. 95.)

conclusion by itself supports the trial court's decision to deny injunctive relief." (*Id.* at p. 97.)

The court acknowledged that College Square was a *Pruneyard*-type shopping center, with "common areas and restaurants where outdoor seating was available[.]" (*Id.* at p. 98.) But it held that "[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." (*Ralphs*, *supra*, 113 Cal.Rptr.3d at p. 97.) The court concluded, without citation to any evidence, that the sidewalk and parking lot in front of the store "were not designed and presented to the public as public meeting places." (*Id.* at p. 98.)

In response to extensive evidence that many groups besides the Union did view these areas as public meeting places, the court held that because it had already determined that the sidewalk was private, Ralphs could "selectively permit speech or prohibit speech in [such] a private forum without affecting the private nature of the forum." (*Ibid.*)

The court refused to be bound by *Lane* and *Schwartz-Torrance*, *supra*, which hold "that a privately owned shopping center must permit peaceful picketing of businesses in shopping centers, even though such picketing may harm the shopping center's business interests." (*Fashion Valley*, 42 Cal.4th at p. 864.) Although this Court reaffirmed *Lane* and

Schwartz-Torrance in *Fashion Valley*, the Third Appellate District held elliptically that these cases "are no 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*." (*Ralphs*, *supra*, 113 Cal.Rptr.3d at p. 98.)

The court next turned to the Moscone Act and Labor Code § 1138.1, holding both unconstitutional. It ruled that the Moscone Act "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." (*Id.* at p. 101.) Relying on *Mosley* and *Carey*, *supra*, the Third Appellate District held that this different treatment of labor disputes makes the Moscone Act unconstitutionally content-based under the First and Fourteenth Amendments.

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." (*Ralphs*, 113 Cal.Rptr.3d at p. 101 [emphasis added].) But the court found this distinction irrelevant because the Moscone Act "forces Ralphs to

provide a forum for speech based on its content." (*Ibid.* [citing *Pacific Gas & Elec. Co. v. Public Util. Com.* (1986) 475 U.S. 1].)

The Third Appellate District 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." (*Ralphs*, *supra*, 113 Cal.Rptr.3d at p. 104.) 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." (*Id.* at p. 106.)

The Third Appellate District concluded that the Moscone Act and Labor Code § 1138.1 violate Ralphs's First Amendment rights *sua sponte*. Neither party had argued that the laws violated Ralphs's free-speech rights.

Having ruled the Moscone Act and Labor Code § 1138.1 unconstitutional, the court held that Ralphs met the general requirements for a preliminary injunction. (*Ralphs*, *supra*, 113 Cal.Rptr.3d at p. 107.) It accordingly reversed and remanded with instructions to grant the preliminary injunction. (*Ibid.*)

ARGUMENT

I. The Moscone Act and Labor Code § 1138.1 Do Not Violate the First and Fourteenth Amendments.

Ralphs asks this Court to strike down statutes that California's Legislature passed to limit the courts' equity jurisdiction. The Legislature

enacted the Moscone Act in 1975, and this Court upheld it over constitutional challenge several years later. The Legislature passed Labor Code § 1138.1 in 1999 to fill gaps left in the law. It modeled both laws on the federal Norris-LaGuardia Act of 1932.

"Under our constitutional system of government, 'a statute, once duly enacted, is presumed to be constitutional.' Unconstitutionality must be clearly, positively, and certainly shown by the party attacking the statute, and we resolve doubts in favor of the statute's validity." (*Copley Press, Inc. v. Super. Ct.* (2006) 39 Cal.4th 1272, 1302 [quoting *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1086 (internal quotation omitted)].)

There are sound doctrinal reasons for rejecting Ralphs's contention that these laws violate the First and Fourteenth Amendments. But when a litigant asks the courts to void statutes that have been a basic part of federal and state law for many decades—and proposes novel constitutional grounds for doing so—its burden is a heavy one. (*Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 357 ["[A] court should avoid a constitutional interpretation that . . . would constrain the legitimate exercise of government authority in an area in which such regulation had long been acknowledged as appropriate."].)

The Union will demonstrate in several steps that Ralphs cannot meet this burden. First, the Union will briefly review the history of the Norris-

LaGuardia Act, the Moscone Act and Labor Code § 1138.1, and show that all three laws reflect a legislative determination that the judiciary has only a limited role to play in regulating labor disputes. Congress and California's Legislature concluded that injunctions are particularly inappropriate in labor disputes, and that such disputes should be regulated primarily by executive-branch officers and tribunals.

Second, the Union will show that Ralphs's core complaint is not that its free-speech rights are being restricted, but that it is being denied court access to enjoin the Union's speech. The Moscone Act and Labor Code § 1138.1 restrict state-court equity jurisdiction in cases arising from labor disputes. The Moscone Act also selectively modifies common-law trespass. But the First Amendment does not prohibit legislatures from limiting the circumstances under which injunctive relief is available; from creating targeted, speech-protective procedural safeguards; or from modifying common-law trespass rules on a non-universal basis. So holding would call into question numerous laws that do precisely this.

Finally, the Union will address Ralphs's contention that the Moscone Act and Labor Code § 1138.1 violate the First Amendment's free-speech clause. It will begin with the most obvious flaw in Ralphs's constitutional theory: the fact that neither law abridges anyone's speech. It will then address the Third Appellate District's "fix" to this problem—its conclusion that Ralphs has a "negative" free-speech right to exclude

speakers from its property. The Union will show that this notion is untenable.

It follows that the Moscone Act and Labor Code § 1138.1 are subject only to rational-basis review, which both clearly pass.

A. The Moscone Act and Labor Code § 1138.1—like the Norris-LaGuardia Act on which they are based—were enacted to limit judicial involvement in labor disputes.

1. The Norris-LaGuardia Act.

Congress passed the Norris-LaGuardia Act (the "Act") in 1932 "to withdraw federal courts from a type of controversy for which many believed they were ill-suited and from participation in which, it was feared, judicial prestige might suffer." (*Marine Cooks & Stewards v. Panama S. S. Co.* (1960) 362 U.S. 365, 369 7.) Its decision "drastically to curtail the equity jurisdiction of federal courts," was based on two concerns. (See *Milk Wagon Drivers' Union, Local 753 v. Lake Valley Farm Products, Inc.* (1940) 311 U.S. 91, 101.)

First, the federal courts were widely perceived as having abused their jurisdiction by siding with employers in labor disputes:

> The legislative history is replete with criticisms of the ability of powerful employers to use federal judges as "strike-breaking" agencies; by virtue of their almost unbridled "equitable discretion," federal judges could enter injunctions based on their disapproval of the employees' objectives, or on

> the theory that these objectives or actions, although lawful if pursued by a single employee, became unlawful when pursued through the "conspiracy" of concerted activity.

(*Jacksonville Bulk Terminals, Inc. v. Intern. Longshoremen's Assn.* (1982) 457 U.S. 702, 716.) "This intervention had caused the federal judiciary to fall into disrepute among large segments of this Nation's population." (*Id.* at p. 715.)

Congress had attempted to address the problem earlier through the Clayton Act, Section 20 of which provides "[t]hat no restraining order or injunction shall be granted by any court of the United States . . . in any case. . . involving or growing out of a dispute concerning the terms and conditions of employment." (38 Stat. 730 (1914); 29 U.S.C. § 52.) In 1921, however, the Supreme Court held that Section 20 merely codified the existing common law. (See *Duplex Co. v. Deering* (1921) 254 U.S. 443.) Another decade of broad injunctions followed. During the 1920s, courts "issued more than 2,100 anti-strike decrees, and the proportion of strikes met by injunctions to the total number of strikes reached an extraordinary 25 percent." (William Forbath, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 158 (1991).) Congress's response was the Norris-LaGuardia Act. (See *Burlington Northern R.R. v. Bhd. of Maintenance of Way Employees* (1987) 481 U.S. 429, 441-42.)

Second, Congress recognized that injunctions and the common law were ill-suited to regulating labor disputes. In their critique of the federal

courts' "government by injunction," Felix Frankfurter and Nathan Greene explained that courts often issued preliminary injunctions on the basis of formulaic allegations of violence or property damage, accompanied only by vague, *ex parte* affidavits. (Felix Frankfurter & Nathan Greene, THE LABOR INJUNCTION 47-81 (1930).) When unions pointed out that equity jurisdiction was traditionally limited to tangible property, courts expanded their jurisdiction to encompass threats to anything of exchangeable value—thus permitting injunctions against strikes and boycotts interfering with the "right to do business." (See, e.g., *Am. Steel Foundries v. Tri-City Cent. Trades Council* (1921) 257 U.S. 184, 193; *In re Debs* (1895) 158 U.S. 564, 566-67.)

Most importantly, the nature of labor disputes meant that rather than preserving the status quo pending trial, preliminary injunctions generally decided the dispute's outcome. (Frankfurter & Greene, *supra*, at pp. 17-18; Francis Sayre, *Labor and the Courts*, 39 YALE L.J. 682, 682 (1930) ["[In labor cases] the issue of a temporary injunction or restraining order commonly results not, as in ordinary cases, in maintaining the status quo and thus preventing irreparable injury until a more thorough examination of the issues can be made, but in virtually awarding victory in advance by tying the hands of the defendants during critical moments of the struggle."]; see also *Burlington N. Santa Fe Ry. Co. v. Intern. Broth. of Teamsters Local 174* (9th Cir. 2000) 203 F.3d 703, 707.)

As one of the Act's drafters noted, these criticisms were not intended to support some privileged position for labor unions. They rested,

> [n]ot upon the claim that a procedure is followed in labor cases different from that in other injunction suits, but rather upon the argument that a different procedure ought to be applied because the situation presented in industrial disputes differs radically from that of ordinary legal controversies. Rules and practices which are unobjectionable in other suits work badly and unjustly in labor cases. It is not that labor is discriminated against, but that industrial disputes present special problems requiring special treatment.

(Edwin Witte, THE GOVERNMENT IN LABOR DISPUTES 106-08 (1932).)

To address these concerns, Senator George Norris enlisted Felix Frankfurter and other legal reformers to draft the Act, which passed by wide margins in Congress before being signed into law by President Hoover. (See Forbath, *supra*, at p. 159.)

The Act begins by making clear that "[no] court in the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this chapter[.]" (29 U.S.C. § 101.) Nine categories of activity are insulated from any type of injunction, including refusals to work, membership in a union, peaceful assemblies to promote interests in labor disputes, and publicizing the existence of or facts involved in a labor dispute by non-violent, non-fraudulent means. (29 U.S.C. § 104.) For conduct still subject to the

courts' equity jurisdiction, the Act sets forth a series of requirements that must be met before an injunction may issue, including evidence that unlawful acts have been threatened and will be committed unless restrained, that substantial and irreparable injury to the complainant's property will follow absent an injunction, and that public officers are unable or unwilling to protect the complainant's property. (29 U.S.C. § 107.)

The Act's "central proposition was that law served no useful purpose in labor disputes, save possibly to protect tangible property and preserve public order. Its philosophical underpinning was the belief that government should not resolve labor disputes or substitute its wage or price determinations for private contracts in a free market." (Archibald Cox, LAW AND THE NATIONAL LABOR POLICY 5 (1960); see also *United Food & Commercial Workers Union, Local 324 v. Super. Ct.* (2000) 83 Cal.App.4th 566, 578 [Norris-LaGuardia "was based upon a recognition of the fact that the preservation of order and the protection of property in labor disputes is in the first instance a police problem, belonging to the executive rather than the judicial side of the government, and its whole intent and purpose was to remove the courts from that field, except in cases where the peace authorities failed or refused to act."] [internal quotation omitted].)

The Supreme Court upheld the Norris-LaGuardia Act six years later, stating that "[t]here can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States."

(*Lauf v. E.G. Shinner & Co.* (1938) 303 U.S. 323, 330.) The Court has applied the Act broadly, recognizing the important societal goals it embodies. (See, e.g., *New Negro Alliance v. Sanitary Grocery Co.* (1938) 303 U.S. 552, 561-63 [boycott and picketing of grocery store by African-American association protesting discriminatory hiring practices]; *Jacksonville Bulk Terminals, supra*, 457 U.S. at pp. 711-12 [politically motivated work stoppages].) Where the Court has limited Norris-LaGuardia's scope, it has done so to reconcile the Act with subsequent statutory enactments, not out of constitutional concern. (See *Boys Markets, Inc. v. Retail Clerks Union* (1970) 398 U.S. 235, 251.) In the Norris-LaGuardia Act's eighty-year history, no court has questioned its constitutionality.

2. The Moscone Act and Labor Code § 1138.1.

Many states have enacted laws to similarly limit their courts' equity jurisdiction—so-called "Little Norris-LaGuardia" Acts.[3] In 1937, the Supreme Court upheld Wisconsin's Little Norris-LaGuardia Act, which

[3] At least twenty-three states including California have laws modeled on the Norris-LaGuardia Act. (See Ariz. Rev. Stat. § 12-1808; Colo. Rev. Stat. § 8-3-118; Conn. Gen. Stat. § 31-112 *et seq.*; Haw. Rev. Stat. § 380-7; Idaho Code § 44-701 *et seq.*; Ill. Comp. Stat. ch. 820 § 5/1 *et seq.*; Ind. Code § 22-6-1-6; Kan. Stat. § 60-904; La. Rev. Stat. § 23:844; 26 Me. Rev. Stat. § 5; Md. Lab. & Empl. Code § 4-314; Mass. Gen. Laws 214 § 6; Minn. Stat. § 185.13; N.J. Stat. § 2A:15-51; N.M. Stat. § 50-3-1; N.Y. Lab. ch. 31, art. 22-a, § 807; N.D. Century Code § 34-08-01; Or. Rev. Stat. § 662.080; 43 Pa. Stat. § 206i; R.I. Gen. Laws § 28-10-2; Utah Code U.C.A. § 34-19-1; Wash. Rev. Code § 49.32.072; Wis. Stat. § 103.56; Wyo. Stat. § 27-7-101 *et seq.*)

was modeled on Section 4 of the federal statute, 29 U.S.C. § 104. Like the Moscone Act, Wisconsin's statute provided that "giving publicity to" a labor dispute and "peacefully picketing or patrolling" during a labor dispute "shall be legal." (*Senn v. Tile Layers Protective Union, Local 5* (1937) 301 U.S. 468, 472, 478.) The Court rejected an equal protection challenge similar to Ralphs's—that the state's denial of an injunctive remedy on an unequal basis violated the Constitution:

> Exercising its police power, Wisconsin has declared that in a labor dispute peaceful picketing and truthful publicity are means legal for unions. . . . [W]e hold that the provisions of the Wisconsin statute which authorized the conduct of the unions are constitutional. One has no constitutional right to a 'remedy' against the lawful conduct of another.

(*Id.* at 482-483.)

California did not immediately follow suit. As a result, many of the problems that led to passage of Norris-LaGuardia were repeated. This was the conclusion of UCLA Professor Benjamin Aaron's detailed study of labor injunctions issued by Los Angeles County courts between 1946 and 1951. (Benjamin Aaron & William Levin, *Labor Injunctions in Action: A Five-Year Survey in Los Angeles County*, 39 CAL. L.REV. 42 (1951).) These problems were largely due to procedural aspects of injunction practice that were unsuitable to labor disputes. As Professor Aaron concluded in a later, expanded study,

> many temporary restraining orders and preliminary injunctions are improperly issued, not because the judge is prejudiced, but because he is insufficiently informed . . . In a great many, if not the majority, of cases . . ., the restraining order or preliminary injunction spells defeat for the defendant's cause. Every objective study of injunctions in action since the publication of the pioneer work by Frankfurter and Greene has noted this result. Such a result is wrong, not because we can be sure that the defendant's cause is just and its objectives lawful—they frequently are not—but because the judicial power has been used prematurely and unfairly to aid one party to a private dispute.

(Benjamin Aaron, *Labor Injunctions in the State Courts—Part II: A Critique*, 50 VA. L.REV. 1147, 1157-58 (1965).)

Ten years later, this Court echoed Professor Aaron's findings. Striking down a temporary restraining order granted against a union protest, the Court noted that the affidavits on which the injunction was granted "consisted in large part of conclusionary declarations and statements which, if offered in testimony by a witness at trial, could be excluded as hearsay." (*United Farm Workers v. Super. Ct.* (1975) 14 Cal.3d 902, 908.) This Court also reiterated that "'[i]t has been demonstrated that the granting of temporary injunctions in labor disputes usually has the effect of determining and terminating the entire controversy.'" (*Id.* at p. 913 [internal citation omitted].)

In 1975, the Legislature passed the Moscone Act, which it modeled on § 4 of Norris-LaGuardia. Like that section, the Moscone Act lists activities that courts may not enjoin:

> The acts enumerated in this subdivision, whether performed singly or in concert, 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 doing any of the following:
>
> (1) Giving publicity to, and obtaining or communicating information regarding the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, or by any other method not involving fraud, violence or breach of the peace.
>
> (2) Peaceful picketing or patrolling involving any labor dispute, whether engaged in singly or in numbers.
>
> (3) Assembling peaceably to do any of the acts specified in paragraphs (1) and (2) or to promote lawful interests.

(Code Civ. Pro. § 527.3(b).) The Moscone Act does not, however, permit "breach of the peace, disorderly conduct, the unlawful blocking of access or egress to premises where a labor dispute exists, or other similar unlawful activity." (Code Civ. Pro. § 527.3(e).)

This Court interpreted the Moscone Act's scope and upheld it over constitutional challenge in *Sears, Roebuck & Co. v. San Diego County Council of Carpenters* (1979) 25 Cal.3d 317. The Court first recognized

subsection (a) of the Act to incorporate the Court's earlier holdings in *Schwartz-Torrance*, *supra*, 61 Cal.2d 766 and *Lane*, *supra*, 71 Cal.3d 872, that protestors have a right to peacefully picket and handbill on the private sidewalks fronting retail stores. (*Sears*, *supra*, 25 Cal.3d at pp. 325-329.)[4] Like the Wisconsin statute upheld by the Supreme Court in *Senn*, the Moscone Act declares that the enumerated activities "shall be legal" and shall not be subject to injunction. (Code Civ. Pro. § 527.3(b).) In *Sears*, the question of the conduct's legality and of the injunction's propriety coalesced:

> Although the reach of the Moscone Act may in some respects be unclear, its language leaves no doubt 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 conduct*."

(*Sears*, *supra*, 25 Cal.3d at p. 323.) *Schwartz-Torrance* and *Lane* "establish[] that peaceful picketing on privately owned walks outside the employer's store is not subject to injunction" and that "judicial intervention in such a case is 'unnecessary' to protect the substantial rights of the employer. " (*Id.* at p. 325.) This Court noted that *Schwartz-Torrance* and *Lane* had rested on both policy grounds and constitutional rights. (*Sears*, *supra*, 25 Cal.3d at p. 327.) The Legislature intended the Moscone Act to

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[4] Section 527.3(a) provides that the "the provisions of subdivision (b) . . . shall be strictly construed in accordance with existing law governing labor disputes with the purpose of avoiding any unnecessary judicial interference in labor disputes."

ratify these decisions statutorily: "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." (*Id.* at p. 332.)

Having so interpreted the Act, the Court upheld it under the Fourteenth Amendment's due process clause:

> The Moscone Act, although held to deny Sears the right to enjoin picketing on its premises under the facts of the instant case, is clearly valid under the [due process] standard: its purpose—the elimination of unnecessary judicial intervention into labor disputes—indisputably bears a reasonable relationship to legitimate state objectives.

(*Sears*, *supra*, 25 Cal.3d at p. 332.)[5]

Despite the Moscone Act's clear directive, some courts continued to impose injunctions under their traditional approach. (See, e.g., *Bertuccio v. Superior Court* (1981) 118 Cal.App.3d 363, 374 [holding that trial court had improperly issued *ex parte* injunction against picketing based upon vague, hearsay affidavits]; *International Molders Union Local 164 v. Superior Court* (1977) 70 Cal.App.3d 395, 403 [holding that Moscone Act

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[5] The Third Appellate District wrongly concluded that only a plurality adhered to this view. (See *Ralphs*, *supra*, 113 Cal.Rptr.3d at p. 102.) Justice Newman's concurrence agreed that the injunction should be reversed—clearly endorsing the lead opinion's conclusion that the Moscone Act is constitutional—but stressed that the Moscone Act *unambiguously* prohibited an injunction against the defendant's picketing. (*Sears*, *supra*, 25 Cal.3d at p. 333 [Newman, J., concurring].) The Court reaffirmed its interpretation of the Moscone Act two years later. (*In re Catalano* (1981) 29 Cal.3d 1, 13-14.)

did not alter common law of injunctions, but merely enacted it]; *see also Kaplan's Fruit & Produce Co. v. Superior Court* (1979) 26 Cal.3d 60, 84-85 [Newman, J., concurring].)

In 1999, the Legislature enacted Labor Code § 1138.1, which is modeled *verbatim* on § 7 of Norris-LaGuardia. Labor Code § 1138.1 states that no court may issue an injunction in a case "involving or growing out of a labor dispute" unless evidence produced in open court establishes:

> (1) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained . . . .
>
> (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(a); *cf.* 29 U.S.C. § 107.)

Prior to the decision below, no court had questioned the constitutionality of Labor Code § 1138.1. The Third Appellate District previously rejected a First Amendment challenge to the statute similar to

the one Ralphs raises here. (*Waremart Foods v. United Food & Commercial Workers Union, Local 588* (2001) 87 Cal.App.4th 145, 158.)

Together, the Moscone Act and Labor Code § 1138.1 impose the same restrictions on state-court equity jurisdiction that Congress imposed on the federal courts in 1932. Labor Code § 1138.1 is a purely procedural statute. It sets forth standards for issuing injunctions in cases growing out of labor disputes, regardless of whether the injunction is directed at speech and regardless of whether a union, an employer, an individual employee or some other party seeks it.[6] The Moscone Act also limits state-court equity jurisdiction and—by incorporating existing decisions recognizing the lawfulness of peaceful protest on a retail store's private sidewalks—statutorily modifies common-law trespass to immunize such conduct.

B. Neither the Moscone Act nor Labor Code § 1138.1 unconstitutionally denies Ralphs access to the courts.

The Third Appellate District treated Ralphs's challenge as one under the First Amendment's free-speech clause, but it was unable to identify any

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[6] See, e.g., *Amalg. Transit Union v. Greyhound Lines* (9th Cir. 1977) 550 F.2d 1237; *Aluminum Workers v. Consolidated Aluminum Corp.* (6th Cir. 1982) 696 F.2d 437, 441. While the Third Appellate District characterized Labor Code §1138.1's requirements as "virtually impossible" to meet (*Ralphs, supra*, 113 Cal.Rptr.3d at p. 92), federal courts issue injunctions against unions under similar requirements. (See, e.g., *San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters* (9th Cir. 1997) 125 F.3d 1230.)

free-speech right that the statutes infringe. The statutes do not abridge other protestors' right to speak,[7] and Ralphs does not have a First Amendment right to exclude speech from its property.

The lower court's confusion rested on the fact that Ralphs's complaint is not really that its free speech rights are being denied. Rather, Ralphs complains that it is being denied court access to restrain *the Union's* speech. The Third Appellate District recognized this, but it failed to acknowledge the constitutional implications. (*Cf. Ralphs*, *supra*, 113 Cal.Rptr.3d at p. 101 [Moscone Act unconstitutional because 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"].)

Ralphs does not have a constitutional right to uniform rules on state-court equity jurisdiction or common-law trespass. The Legislature may modify such jurisdiction and reform the common law on a less-than-universal basis in order to insulate particular forms of speech from infringement. A contrary constitutional rule would be untenable.

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[7] Even if they did, Ralphs would not have standing to enforce the rights of hypothetical speakers whom it wished to bar from its property. (*Rubio v. Super. Ct.* (1979) 24 Cal.3d 93, 103; *People v. Garcia* (1999) 21 Cal.4th 1, 11-12; *Los Angeles Police Dept.*, *supra*, 528 U.S. at p. 40.)

1. The Legislature may enact targeted reforms to court procedure and the common law.

The Legislature "may create new rights or provide that rights which have previously existed shall no longer arise, and it has full power to regulate and circumscribe the methods and means of enjoying those rights, so long as there is no interference with constitutional guaranties." (*Modern Barber*, *supra*, 31 Cal.2d at p. 726.)

In *Modern Barber*, this Court upheld a provision of the Unemployment Insurance Act that prohibited the courts from issuing injunctions and writs of mandate enjoining public officers from collecting contributions. This Court noted that "it has been consistently held that the Legislature has power to determine what are grounds for equitable relief and when and under what circumstances injunctions may be granted." (*Id.* at pp. 727.) The deprivation of this remedy in a particular category of cases did not violate the petitioner's due process rights, nor any other provision of the federal or state constitutions. (*Id.* at p. 726; see also, e.g., *Benjamin v. Ricks* (1976) 63 Cal.App.3d 593, 596 [exclusive remedy provision of Labor Code § 3601 did not violate equal protection by denying workers consequential damages in actions against employers].)

Similarly, the Legislature may revise common-law rules to insulate particular forms of speech from infringement. In *Werner*, *supra*, 35 Cal.2d 121, for example, this Court rejected an equal protection challenge to Civil

Code § 48a, which precludes recovery against media outlets for defamation unless the plaintiff has sought a retraction. The plaintiff argued that the Constitution prohibited "granting to newspapers and radio stations privileges denied to others, thus depriving plaintiffs defamed by newspapers or radio stations of rights enjoyed by plaintiffs defamed by others." (*Id.* at p. 130.). But selective legislative revision of common-law defamation to insulate particular forms of speech is unquestionably within the Legislature's power:

> Since 1872 the Legislature has consistently acted on the principle that it is free to change the law of defamation. Many of the amendments have limited or abolished remedies theretofore available to persons defamed. . . . As early as 1886 this court recognized the power of the Legislature to extend absolute privileges and thus abolish all remedies for defamation in certain situations.

(*Werner*, *supra*, 35 Cal.2d at pp. 124-25.) The Legislature's selective protection of journalists' speech from defamation actions was reasonable, given the public's interest in the free dissemination of ideas through the media. (*Id.* at p. 134; see also *Cory v. Shierloh*, *supra*, 29 Cal.3d at pp. 438-439.)

The federal courts also reject the notion that a legislature unconstitutionally denies court access by selectively limiting a prior cause of action:

> By its terms, the Act bars plaintiffs from courts for the adjudication of qualified civil liability actions, allowing access for only those actions that fall within the Act's

> exceptions. We conclude that these restrictions do not violate plaintiffs' right of access to the courts. . . . The PLCAA immunizes a specific type of defendant from a specific type of suit. It does not impede, let alone entirely foreclose, general use of the courts by would-be plaintiffs such as the City.

City of New York v. Beretta U.S.A. Corp. (2d Cir. 2008) 524 F.3d 384, 398; *Hammond v. United States* (1st Cir. 1986) 786 F.2d 8, 13 (noting that Congressional "alter[ation] ... [of] prior rights and remedies" does not provoke right-of-access concerns because "[t]here is no fundamental right to particular state-law tort claims"); see also *Christopher v. Harbury* (2002) 536 U.S. 403, 415 ["However unsettled the basis of the constitutional right of access to courts, our cases rest on the recognition that the right is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court."].)

Ralphs is asking that traditional standards governing injunctions and common-law trespass be enshrined in the Constitution, immune from legislative reform. But "the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." (*W. Indem. Co. v. Pillsbury* (1915) 170 Cal. 686, 696.) Accepting Ralphs's constitutional theory "would have a far-reaching and destructive effect on the administration of justice. It would mean that every right which now, formerly or in the future might be enforceable by [injunction] would be a constitutional right beyond the reach of the

Legislature and solely in the control of the courts." (*Modern Barber*, *supra*, 31 Cal.2d at p. 733; see also *id.* at p. 727 ("[T]o accept the argument advanced by those who seek to invalidate this legislation would result in leaving the only power to alter common law rights in the courts."]; *Pruneyard*, *supra*, 447 U.S. at p. 93 [Marshall, J., concurring] [the "suggestion that the common law of trespass is not subject to revision by the State" would "represent a return to the era of *Lochner v. New York* [(1905) 198 U.S. 45] . . . when common-law rights were also found immune from revision by State or Federal Government"].)

2. Ralphs's constitutional theory would invalidate a substantial amount of state and federal legislation.

Many state and federal laws provide procedural safeguards to particular categories of speech or selectively modify potentially speech-limiting common-law rules. All would be swept away by Ralphs's and the Third Appellate District's constitutional theory.

For example, in addition to the statutes discussed above, California's content-based evidentiary privileges protect certain speech by doctors, journalists, psychiatrists and other professions, but not others. (See Evid. Code § 950 *et seq.*) California's anti-SLAPP statute protects only speech about "issues of public interest" and not speech about purely private matters or commercial speech. (Code Civ. Pro. §425.16(b)(1); see, e.g.,

Rezec v. Sony Pictures Entertainment, Inc. (2004) 116 Cal.App.4th 135, 140; *cf. Bernardo v. Planned Parenthood Federation of Am.* (2004) 115 Cal.App.4th 322, 358-59.) Whistleblower statutes prohibit employers from firing employees—despite common-law employment-at-will—based upon the content of the employees' speech. (See, e.g., Lab. Code § 1102.5.) This Court has long held that special safeguards against defamation are available in actions growing out of labor disputes. (*Emde v. San Joaquin County Labor Council* (1943) 23 Cal.2d 146, 155-56; *Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 600; see also *Linn v. United Plant Guard Workers* (1966) 383 U.S. 53, 65 [requiring heightened, actual-malice standard in defamation suits arising out of labor disputes].) Such laws address society's legitimate interest in preventing interference with particular forms of speech, but would be constitutionally suspect under the Third Appellate District's view.

That view also contradicts the advice that this Court has given to other litigants facing speech restrictions imposed by private entities. In *Golden Gateway*, *supra*, 26 Cal.4th at p. 1034, the Court held that tenants do not have a free-speech right to distribute information in private apartment complexes. But the Court made clear that "tenants may always seek a legislative solution tailored to their particular concerns." (*Id.* at p. 1035.) Civil Code § 1942.6 does that, stating that a person entering onto private property for the "purpose of providing information regarding

tenants' rights"—but not for religious proselytizing or political door-knocking—is not liable for trespass.

Federal law is no different. Indeed, federal labor law may be viewed as a series of revisions to common-law regulation of industrial relations. That was the impetus for the Norris-LaGuardia Act, which corrected the federal court's application of equitable principles to labor disputes. Congress further reformed state common law through passage of the NLRA in 1935. That Act requires employers to grant their employees worksite access to discuss unionization, but not other topics. (*Republic Aviation Corp. v. NLRB* (1945) 324 U.S. 793; *Beth Israel Hosp. v. NLRB* (1978) 437 U.S. 483, 491.)[8]

The Supreme Court has further limited the application of common-law causes of action in labor disputes through its doctrine of labor preemption. State courts have no jurisdiction to enjoin conduct or award damages where the conduct is even arguably subject to the National Labor Relations Board's jurisdiction. (See *San Diego Building Trades v. Garmon* (1959) 359 U.S. 236, 244-48 [state courts may not enjoin or award damages for union's peaceful picketing, although such picketing was found to violate state law].) Many common-law actions that would normally be

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[8] California's Agricultural Labor Relations Act similarly requires that growers grant access to union representatives engaged in organizing, but not other forms of speech. (Lab. Code § 1152; Cal. Code Regs., tit. 8, § 20900; *Agric. Labor Relations Bd., supra*, 16 Cal.3d at pp. 400-11.)

available are thus placed outside of state-court jurisdiction when they arise in the context of a labor dispute. (See, e.g., *Amalgamated Assn. of Street, Electric Railway & Motor Coach Employees v. Lockridge* (1971) 403 U.S. 274, 291-93 [common-law contract breach]; *Local 926, Intern. Union of Operating Engineers v. Jones* (1983) 460 U.S. 669, 683 [tortious interference with contract].)

No court has suggested that these well-established limitations on common-law rules violate the First Amendment. Where the Supreme Court has limited the scope of labor preemption and permitted common-law actions to proceed, it has been because the actions "entailed little risk of interference with the regulatory jurisdiction of the Labor Board," not because the First Amendment precludes congressional modification of common-law rules in labor disputes. (See *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters* (1978) 436 U.S. 180, 196.)

The California Legislature, like Congress, has the authority to craft judicial procedure and revise the common law on a less-than-universal basis. The Moscone Act and Labor Code § 1138.1 are no different from the many state and federal laws that do just that. Ralphs does not have a constitutional right to a common-law trespass action or to an injunctive remedy.

C. Neither the Moscone Act nor Labor Code § 1138.1 violate the First Amendment's free speech clause.

Ralphs's position is even hollower when viewed as a challenge under the First Amendment's free-speech clause. Neither the Moscone Act nor Labor Code § 1138.1 abridges anyone's speech, and neither Ralphs nor the Third Appellate District could identify how the statutes violate any protected interest.

1. Neither statute abridges anyone's speech.

The First Amendment's free-speech clause states that "Congress shall make no law . . . abridging the freedom of speech." (U.S. Const., amend. I.) Without a governmental abridgement of speech, there can be no violation. (See *Los Angeles Police Dept.*, *supra*, 528 U.S. at 40 [private publishing company may not bring First Amendment challenge to statute that "is not an abridgement of anyone's right to engage in speech, be it commercial or otherwise"]; *Ysursa v. Pocatello Educ. Assn.* (2009) 555 U.S. ---, 129 S.Ct. 1093, 1098 [no First Amendment violation because State's decision not to aid labor unions' speech through payroll deductions "is not an abridgment of the unions' speech; they are free to engage in such speech as they see fit."]; see also *Finley*, *supra*, 524 U.S. at p. 595 [Scalia, J., concurring] ["To abridge is 'to contract, to diminish, to deprive of.' T. Sheridan, A Complete Dictionary of the English Language (6th ed. 1796). With the enactment of § 954(d)(1), Congress did not *abridge* the speech of

those who disdain the beliefs and values of the American public, nor did it *abridge* indecent speech.").

In order to bring a facial content-discrimination challenge, Ralphs was required to "demonstrate a substantial risk that the application of the provision will lead to suppression of speech." (*Finley, supra*, 524 U.S. at p. 580.) This reflects the fact that it is "the government's ability to impose content-based burdens on speech that raises the specter that the government might effectively drive certain ideas or viewpoints from the marketplace." (*Simon & Schuster, supra*, 502 U.S. at p. 116); see also *Hill v. Colorado* (2000) 530 U.S. 703, 735 (Souter, J., concurring) ["[C]ontent-based discriminations are subject to strict scrutiny because they place the weight of government behind the *disparagement or suppression* of some messages, whether or not with the effect of approving or promoting others."] [emphasis added].)[9]

Neither the Moscone Act nor Labor Code § 1138.1 do any such thing. Both are entirely speech-protective. The Moscone Act declares certain forms of conduct to be beyond the state courts' equity jurisdiction

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[9] Even in the context of content-based *restrictions* on speech, many forms of regulation are permissible because they do not raise the specter of government censorship. (*Davenport v. Washington Educ. Assn.* (2007) 551 U.S. 177, 188 ["We have recognized . . . 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."].)

and incorporates existing law limiting use of trespass against the peaceful protest of a store's business practices. In *Fashion Valley*, this Court reaffirmed that—far from abridging speech—*Schwartz-Torrance* and *Lane* further the constitutional values embodied in California's free-speech clause.[10] Labor Code § 1138.1 is not primarily directed at speech—it sets forth heightened standards that apply to any case involving a labor dispute.[11] Neither statute restricts or suppresses anyone's speech, even indirectly.

2. Ralphs's suppression of speech is not state action.

Nor can Ralphs identify any *governmental* restriction on speech legislated through the Moscone Act or Labor Code § 1138.1. Ralphs instead argues that *it* should be allowed to suppress speech related to a labor dispute on the same terms as it may suppress speech that is not related to a labor dispute. But neither Ralphs's invocation of common-law trespass nor its request for an injunction is state action under the First and Fourteenth Amendments. (*Lloyd Corp.*, *supra*, 407 U.S. at p. 567;

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[10] And, of course, free-speech " 'protection' is 'afforded' not only to one who speaks but also to those who listen." (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 485.) Ralphs's customers have a constitutional right to hear the Union's message.

[11] Labor Code § 1138.1's analogue in the Norris-LaGuardia Act is regularly applied in cases involving conduct other than speech. (See, e.g., *Camping Const. Co. v. Dist. Council of Iron Workers* (9th Cir. 1990) 915 F.2d 1333; *Dist. 29, United Mine Workers v. New Beckley Min. Corp.* (4th Cir. 1990) 895 F.2d 942.)

Hudgens, *supra*, 424 U.S. at pp. 519-20; *Intern. Olympic Comm. v. San Francisco Arts & Athletics* (9th Cir. 1986) 781 F.2d 733, 737 ["[I]n the absence of special benefit flowing to the state from the challenged action, state action will not be found unless there was a governmental decision to violate rights. Therefore, state enforcement of private rights generally will not itself meet the state action requirement."]; see also *Golden Gateway*, *supra*, 26 Cal.4th at p. 1034 ["[J]udicial enforcement of injunctive relief does not, by itself, constitute state action for purposes of California's free speech clause.].)

These fundamental differences distinguish the Moscone Act and Labor Code § 1138.1 from the laws at issue in *Mosley* and *Carey*, the cases to which the Third Appellate District analogized.

Those cases involved laws that prohibited speech on public sidewalks based on its content. In *Mosley*, the ordinance barred picketing and demonstrating on a public way within 150 feet of a school, except for 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 a place of employment subject to a labor dispute. (*Carey*, *supra*, 447 U.S. at pp. 457, 460.) In each case, the law was challenged by civil rights protestors who were prohibited from protesting on public sidewalks. It was this content-based *abridgement* of speech in a public forum that made each 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."]; see also *Perry Education Assn. v. Perry Local Education Assn.* (1983) 460 U.S. 37, 54.)

3. Ralphs has no "negative" First Amendment right to exclude speech.

The Third Appellate District recognized these crucial differences 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." (*Ralphs*, *supra*, 113 Cal.Rptr.3d at p. 101 [emphasis added].)

It sought to avoid this fundamental problem with its constitutional theory by holding that the statutes infringe on *Ralphs's* First Amendment rights. Citing *Hurley*, *supra*, 515 U.S. at p. 566 and *Pacific Gas & Elec. Co.*, *supra*, 475 U.S. 1 (plurality opinion), 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." (*Ralphs*, *supra*, 113 Cal.Rptr.3d at pp. 101, 105.)

This is clearly wrong. A commercial property owner like Ralphs has no First Amendment right to exclude speech with which it disagrees. The Supreme Court rejected an identical 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, a unanimous 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." (*Id.* at p. 63.) Thus, the law at issue in *Hurley* dictating that a particular group be included in a parade affected the parade's "expressive nature." (*Ibid.*) Similarly in *Pacific Gas & Electric*, when "the state agency ordered the utility to send a third-party newsletter four times a year, it interfered with the utility's ability to communicate its own message in its newsletter." (*Id.* at p. 64.)

The Solomon Amendment did not violate the law schools' First Amendment rights: "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].)

So too here. Neither the Moscone Act nor Labor Code § 1138.1 compels Ralphs to speak. As in *Pruneyard* and *FAIR*, there is no danger that the Union's message will be confused with Ralphs's or will otherwise interfere with Ralphs's expressive conduct. Ralphs was free to disassociate itself from the Union's message—as it did by displaying a poster outside of its store seeking to explain its side of the dispute. (3JA 0492.) Any right that Ralphs has to exclude speakers from its property derives from state trespass law, not the First Amendment. (See *Thunder Basin Coal Co. v. Reich* (1994) 510 U.S. 200, 217 fn. 21.)

The only other authority relied upon by the Third Appellate District was the federal court's opinion in *Waremart Foods v. NLRB* (D.C. Cir. 2004) 354 F.3d 870 (*Waremart II*). There, the court reviewed a decision of the National Labor Relations Board holding that a grocery store had unlawfully barred a union organizer from handbilling on a private sidewalk in front of the stand-alone store. (*Id.* at pp. 871-72.) Its review of this issue turned on whether California law gave organizers a right to do so, a question this Court declined to answer. (*Id.* at p. 870.) In a scant paragraph, the court predicted that this Court would hold the Moscone Act, as interpreted in *Sears II*, to violate the First Amendment. (*Id.* at pp. 874-75.) Three years later, however, this Court rejected this view, reaffirming *Schwartz-Torrance, Lane*, and—implicitly—*Sears II*'s interpretation of the

Moscone Act, under California's Constitution. (*Fashion Valley*, *supra*, 42 Cal.4th at p. 864 & fn.6.)

Waremart II did not address any of the fundamental differences between the Moscone Act and the laws at issue in *Mosley* and *Carey*. It did not explain how legislative revision of common-law trespass to insulate speech during a labor dispute abridges anyone's speech, or why similarly selective, speech-protective reforms to the common law created or upheld in cases like *Republic Aviation*, *supra*, 324 U.S. 793, *Linn v. United Plant Guard Workers*, *supra*, 383 U.S. 53, and *New York Times v. Sullivan* (1964) 376 U.S. 254, would not also be constitutionally suspect. *Waremart II* did not address the purely procedural, jurisdiction-limiting aspects of the Moscone Act and Labor Code § 1138.1. In its approach to the Moscone Act's substantive modification of common-law trespass, *Waremart II* was completely *sui generis*. This Court should not subscribe to its superficial and erroneous reasoning.

The Moscone Act and Labor Code § 1138.1 do not have any of the characteristics of laws that the Supreme Court has held to violate the First Amendment. The Supreme Court explained these essential characteristics in upholding a statute requiring agricultural growers to fund advertising:

> Three characteristics of the regulatory scheme at issue distinguish it from laws that we have found to abridge the freedom of speech guaranteed by the First Amendment. First, the marketing orders impose no restraint on the freedom of

> any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political or ideological views.

(*Glickman v. Wileman Bros. & Elliott, Inc.* (1997) 521 U.S. 457, 469.)

The Moscone Act and Labor Code § 1138.1 do not abridge anyone's freedom of speech, do not compel Ralphs to engage in any speech, and do not force Ralphs to endorse the Union's or anyone else's message. Neither statute violates the First Amendment.

II. The Sidewalks and Parking Lots Fronting the Foods Co Store Are Public Forums under *Pruneyard*.

Three years ago, this Court reaffirmed its long-standing view that "[a] shopping mall is a public forum in which persons may reasonably exercise their right to free speech guaranteed by article I, section 2 of the California Constitution." (*Fashion Valley*, *supra*, 42 Cal.4th at pp. 869-70; see also Snatchko v. Westfield LLC (2010) 187 Cal.App.4th 469, 479-80.) Labor Code § 1138.1 and the Moscone Act are dispositive of this case—Ralphs has not challenged the trial court's holding that it did not meet Labor Code § 1138.1's requirements. Even if this were not so, the Union had a constitutional right to criticize Ralphs's business practices from the sidewalks and parking lot fronting its store. Since it is undisputed that Ralphs's time, place and manner restrictions were unreasonable, Ralphs

was not entitled to an injunction enforcing them. (See *Ralphs*, *supra*, 113 Cal.Rptr.3d at p. 97.)

The Third Appellate District, however, held the sidewalk and parking lot to be private space. Two aspects of this ruling contradict *Fashion Valley* and threaten to undermine the speech rights established in *Pruneyard*. First, the Third Appellate District held that even within *Pruneyard*-type shopping centers like College Square, sidewalks and parking lots fronting individual stores are categorically non-public. This jettisons *Pruneyard's* central analogy to public streets and sidewalks and would lead to the absurd result that shopping centers' courtyards and restaurant seating areas are public forums, while the walkways and sidewalks used to reach such areas are not.

Second, the Third Appellate District held that the Union had no constitutional right to criticize Ralphs's business practices using College Square's sidewalks and parking lot. But "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.) There is no reason for this Court to break with this precedent.

A. College Square's sidewalks and parking lot—including those fronting the Foods Co store—are public forums.

The speech at issue in *Pruneyard* took place in a large, indoor shopping center containing several dozen shops and restaurants. (*Pruneyard*, *supra*, 23 Cal.3d at p. 902.) But this Court did not limit its holding to shopping centers of this size and configuration. Rather, the central inquiry under California's Constitution is the nature of the public invitation. Shopping centers "open to the public in a manner similar to that of public streets and sidewalks" are public forums (*Fashion Valley*, 42 Cal.4th at p. 858) and provide "an essential and invaluable forum for exercising [free speech] rights." (*Pruneyard*, 23 Cal.3d at p. 858). This Court therefore recognized only a limited exception to its holding, for what it termed "modest retail establishments." (*Id.* at p. 910.)

The Third Appellate District recognized that College Square itself is a *Pruneyard* forum. The Court noted that College Square contains "common areas and restaurants where outdoor seating was available[.]" (*Ralphs*, *supra*, 113 Cal.Rptr.3d at p. 98.) It characterized the Foods Co store as "indistinguishable" from the retail stores in larger, *Pruneyard*-type shopping centers involved in *Van*, *supra*, 155 Cal.App.4th 1375. (*Ralphs*, *supra*, 113 Cal.Rptr.3d at p. 97.)

College Square's very name evokes a small-town central business district. The public is invited to meet in its courtyards, stroll along its walkways, and dine in its restaurants, while also banking and shopping for groceries and other supplies. Shopping centers like College Square—and not the large, regional indoor mall—are the norm in most communities. (See Nancy E. Cohen, AMERICA'S MARKETPLACE: THE HISTORY OF SHOPPING CENTERS 10 (Intern. Council of Shopping Centers, 2002) [neighborhood and community shopping centers—generally anchored by a supermarket—constitute ninety-seven percent of shopping centers in the United States].) This proportion will continue to rise as large, regional malls become less profitable. (See, e.g., Michael D. Beyard, et al., SHOPPING CENTER DEVELOPMENT HANDBOOK 32-33 (Urban Land Institute, 1999); Richard E. Muhleback & Alan Alexander, SHOPPING CENTER MANAGEMENT & LEASING 9, 14 (Institute of Real Estate Management, 2005).)

While it recognized College Square as a public forum, the Third Appellate District held that the sidewalk and parking lot fronting the shopping center's anchor grocery store are non-public. Without citing to any evidence, it concluded that the sidewalk and parking lot were "not designed and presented to the public as public meeting places[.]" (*Ralphs*, *supra*, 113 Cal.Rptr.3d at p. 98.) Confronted by the fact that many other speakers besides the Union—missionaries, political groups, commercial

vendors—understood the sidewalk and parking lot to be public meeting places (apparently with Ralphs's blessing), the court reasoned backwards. It held that because the sidewalk was private, Ralphs could "selectively permit speech or prohibit speech . . . without affecting the private nature of the forum." (*Ibid.*)

But this Court has repeatedly recognized that the sidewalks surrounding large retail establishments like grocery stores are public forums. (*Schwartz-Torrance*, *supra*, 61 Cal.2d at p. 771; *Lane*, *supra*, 71 Cal.3d at p. 878; *Fashion Valley*, *supra*, 42 Cal.4th at p. 864.) As this Court held:

> [W]hen a business establishment invites the public generally to patronize its store and in doing so to traverse a sidewalk opened for access by the public the fact of private ownership of the sidewalk does not operate to strip the members of the public of their rights to exercise First Amendment privileges on the sidewalk at or near the place of entry to the establishment.

(*Lane*, *supra*, 71 Cal.3d at p. 878.) While it grounded its earlier cases in the First Amendment, the Court made clear in *Fashion Valley* that *Schwartz-Torrance* and *Lane* remain precedent under California's free-speech clause. (*Fashion Valley*, 42 Cal.4th at p. 864 & fn.6.)

The Third Appellate District based its contrary conclusion on two appellate opinions pre-dating *Fashion Valley*, both of which were wrongly decided. In *Albertson's v. Young* (2003) 107 Cal.App.4th 106, the court

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.) Unlike in this case, the shopping center contained "no enclosed walkways, plazas, courtyards, picnic areas, gardens, or other areas that might invite the public to congregate." (*Ibid.*) The court therefore 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." (*Id.* at p. 122.) The Court in *Albertson's* recognized this Court's contrary holding in *Lane*, but held—wrongly as it turned out—that the decision was "no longer viable" because it was based on the federal Constitution. (*Id.* at p. 123.)

The Third Appellate District also relied on *Van*, in which the court held that the "apron and perimeter area" of the respondents' big-box retail stores were not public forums, despite the fact that the stores were located "in larger, *Pruneyard*-type shopping centers." (*Van*, *supra*, 155 Cal.App.4th at pp. 1389-90.) The court acknowledged that, unlike the shopping center 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 court concluded that the "particular location" involved—the walkways fronting the stores—did not "act as the functional

equivalent of a traditional public forum." (*Id.* at p. 1388.) *Van* failed to mention, let alone distinguish, *Schwartz-Torrance* and *Lane*.[12]

Van, Albertson's and the Third Appellate District's decision below are not only inconsistent with this Court's rulings, but also with federal cases construing *Pruneyard*. (See *NLRB v. Calkins* (9th Cir. 1999) 187 F.3d 1080, 1092 [" '[w]hatever "modest retail establishment" means, it does not include ... a "large supermarket-type grocery store." '"] [quoting *Bank of Stockton v. Church of Soldiers of the Cross of Christ* (1996) 44 Cal.App.4th 1623, 1629]; *Cuviello v. City of Stockton* (E.D. Cal. 2008) 2008 WL 4283260; *Cuviello v. City of Oakland* (N.D. Cal. 2007) 2007 WL 2349325; see also *Kuba v. 1-A Agr. Assn.* (9th Cir. 2004) 387 F.3d 850, 856 [public walkways and parking lot surrounding San Francisco's Cow Palace public forums]; *Carreras v. City of Anaheim* (9th Cir. 1985) 768 F.2d 1039, 1045 [same, public walkways and parking lot surrounding Anaheim Stadium].)

The sidewalks and parking lots surrounding supermarkets in shopping centers like College Square are public forums. Ralphs may

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[12] *Albertson's* and *Van* can be distinguished from another line of appellate decisions holding that stand-alone retail stores that are not located in larger shopping centers are not governed by *Pruneyard*. (See *Trader Joe's Co. v. Progressive Campaigns, Inc.* (1999) 73 Cal.App.4th 425, 434; *Costco Companies v. Gallant* (2002) 96 Cal.App.4th 740, 755.) Whatever the merit of these decisions, they are obviously distinguishable from the instant case.

regulate use of these areas through reasonable time, place and manner restrictions. It may not prohibit speech in such areas altogether.

B. Speech criticizing a store's business practices is entitled to greater constitutional protection.

The Union seeks to use the sidewalk and parking lot in front of Foods Co to publicize its boycott of the store. This use is entitled to even greater constitutional protection than uses unrelated to the store's business practices. "It 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*, 42 Cal.4th at p. 864.) "[C]itizens 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." (*Ibid.*)

The Court explained the reasons for this distinction in *Diamond v. Bland* (1970) 3 Cal.3d 653, 662:

> When the activity to be protected is the right to picket an employer, the location of the employer's business is often the only effective locus; alternative locations do not call attention to the problem which is the subject of the picketing and may fail to apply the desired economic pressure.

(See also *Fashion Valley*, 42 Cal.4th at p. 860 ["'[B]usiness enterprises located in downtown areas would be subject to on-the-spot public criticism

for their practices, but businesses located in the suburbs could largely immunize themselves from similar criticism by creating a *cordon sanitaire* of parking lots around their stores. '"] [quoting *Food Employees v. Logan Valley* (1968) 391 U.S. 308, 324-25]; *Costco Co.*, *supra*, 96 Cal.App.4th at p. 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."].)

This doctrine is in keeping with the special place that retail boycotts hold in American political history. (See, e.g., T.H. Breen, THE MARKETPLACE OF REVOLUTION: HOW CONSUMER POLITICS SHAPED AMERICAN INDEPENDENCE xv-xvi, 267 (2004) [detailing the crucial role of non-importation associations—which boycotted British products like tea and individual retailers that sold them—in forming revolutionary consciousness and "transform[ing] the character of political life, encouraging people with little or no personal experience in formal elections to record their opinions on the most pressing issue of the day."]; *NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 911; *FTC v. Super. Ct. Trial Lawyers Assn.* (1990) 493 U.S. 411, 447 [Brennan, J., concurring] ["From the colonists' protest of the Stamp and Townsend Acts to the Montgomery bus boycott and the National Organization for Women's campaign to

encourage ratification of the Equal Rights Amendment, boycotts have played a central role in our Nation's political discourse."].)

Even if *Albertson's* and *Van* were correctly decided, neither case involved speech directing grievances at the store in question. (See *Albertson's*, *supra*, 107 Cal.App.4th at p. 123; *Van*, 155 Cal.App.4th at p. 1389.) The Third Appellate District erred in extending these precedents to the Union's protest against Ralphs's business practices.

CONCLUSION

For the foregoing reasons, United Food & Commercial Workers 8 respectfully requests that the Court reverse the Third Appellate District's decision. The Moscone Act and Labor Code § 1138.1 are constitutional and prohibit the injunction that the appellate court imposed. Even if they did not, the Union has a constitutional right to peacefully picket and handbill to publicize its boycott using College Square's sidewalks and parking lot.

Dated: December 7, 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 was produced using 13-point Times New Roman font for the main text, with 14-point Cambria font for the headings, and contains 13,885 words, including footnotes, and excluding the cover, the tables, the statement of issues presented, the signature block and this certificate [California Rules of Court, rule 8.520(c)]. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: December 7, 2010

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ATTACHMENT OF UNPUBLISHED CASES CITED HEREIN
[Cal. Rules of Court, rule 8.1115(c).]

EXHIBIT A

Review Granted
Previously published at: 186 Cal.App.4th 1078
(Cal.Const. art. 6, s 12; Cal. Rules of
Court, Rules 8.500, 8.1105 and 8.1110,
8.1115, 8.1120 and 8.1125)
113 Cal.Rptr.3d 88
Court of Appeal, Third District, California.

RALPHS GROCERY COMPANY,
Plaintiff and Appellant,
v.

UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 8, Defendant and Respondent.

No. C060413. July 19, 2010. Review Granted Sept. 29, 2010

Synopsis

Background: Employer brought action against labor union for trespass, seeking declaratory and injunctive relief. The Superior Court, Sacramento County, No. 34-2008-00008682-CU-OR-GDS, Loren E. McMaster, J., denied employer's motion for preliminary injunction. Employer appealed.

Holdings: The Court of Appeal, Nicholson, Acting P.J., held that:

1 entrance area and apron in front of grocery store was a private forum;

2 federal and state constitutions did not prevent employer from limiting speech in front of grocery store;

3 Moscone Act violated First and Fourteenth Amendments as applied to employer;

4 Moscone Act must be read to allow speech about labor disputes only to extent that speech related to other issues is allowed;

5 statute adding requirements for injunctions against labor protesters violated First and Fourteenth Amendments;

6 proper remedy was to invalidate statute adding requirements for injunctions against labor protesters; and

7 loss of business from picketing constituted irreparable harm requiring injunction.

Reversed with directions.

West Codenotes

Held Unconstitutional
West's Ann.Cal.Labor Code § 1138.1

Unconstitutional as Applied
West's Ann.Cal.C.C.P. § 527.3.

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Opinion

NICHOLSON, Acting P.J.

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

1 2 "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, 57 Cal.Rptr.3d 320, 156 P.3d 339.) "For corporations as for individuals, the choice to speak includes within it the choice of what not to say. [Citation.]" (*Pacific Gas* ***93** *& Electric Co. v. Public Utilities Com.* (1986) 475 U.S. 1, 16, 106 S.Ct. 903, 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, 115 S.Ct. 2338, 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.)

3 4 5 "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, 18 Cal.Rptr.2d 530 (*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.*)

6 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, 153 Cal.Rptr. 854, 592 P.2d 341 (*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, 69 Cal.Rptr.3d 288, 172 P.3d 742 (*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, 153 Cal.Rptr. 854, 592 P.2d 341.)

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., ***94** *Van v. Target Corp.* (2007) 155 Cal.App.4th 1375, 66 Cal.Rptr.3d 497 (*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, 131 Cal.Rptr.2d 721 (*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, 158 Cal.Rptr. 370, 599 P.2d 676 (*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 *95 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 ***96** 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, 104 Cal.Rptr.2d 359 (*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

7 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, ***97** 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.

8 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, 195 P.2d 1.)

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, 66 Cal.Rptr.3d 497, 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, 66 Cal.Rptr.3d 497.) 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, 66 Cal.Rptr.3d 497.) 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, 66 Cal.Rptr.3d 497.)

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, 66 Cal.Rptr.3d 497.)

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, 66 Cal.Rptr.3d 497; see also ***98** *Albertson's, supra*, 107 Cal.App.4th at pp. 109-110, 131 Cal.Rptr.2d 721 [holding that entrance area of grocery store not a public forum even though store located in shopping center].)

9 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.

10 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, 131 Cal.Rptr.2d 721.)

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, 69 Cal.Rptr.3d 288, 172 P.3d 742.) Those cases include

In re Lane (1969) 71 Cal.2d 872, 79 Cal.Rptr. 729, 457 P.2d 561 (*Lane*) and *Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union* (1964) 61 Cal.2d 766, 40 Cal.Rptr. 233, 394 P.2d 921 (*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, 69 Cal.Rptr.3d 288, 172 P.3d 742; *id.* at p. 880, 69 Cal.Rptr.3d 288, 172 P.3d 742, diss. opn. of Chin, J.; *Albertson's, supra,* 107 Cal.App.4th at p. 123, 131 Cal.Rptr.2d 721.)

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 ***99** 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, 92 S.Ct. 2286, 33 L.Ed.2d 212 (*Mosley*) and *Carey v. Brown* (1980) 447 U.S. 455, 100 S.Ct. 2286, 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, 158 Cal.Rptr. 370, 599

P.2d 676.) 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, 158 Cal.Rptr. 370, 599 P.2d 676.) Thus, the plurality concluded that "the sidewalk outside a retail store has become the traditional and accepted place where unions ***100** 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, 158 Cal.Rptr. 370, 599 P.2d 676.)

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, 158 Cal.Rptr. 370, 599 P.2d 676.) 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, 92 S.Ct. 2286.) 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, 92 S.Ct. 2286.) "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, 92 S.Ct. 2286.)

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, 92 S.Ct. 2286, fn. omitted.)

***101** 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, 100 S.Ct. 2286.) 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, 100 S.Ct. 2286.)

11 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, 106 S.Ct. 903.)

12 Governmental discrimination based on the content of speech is subject to strict scrutiny. (*Fashion Valley, supra,* 42 Cal.4th at p. 865, 69 Cal.Rptr.3d 288, 172 P.3d 742.) 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, 100 S.Ct. 2326, 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, 100 S.Ct. 2286.)

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, 177 Cal.Rptr. 690 (*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 ***102** 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, 158 Cal.Rptr. 370, 599 P.2d 676.) 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, 92 Cal.Rptr.3d 595, 205 P.3d 1047 [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, 158 Cal.Rptr. 370, 599 P.2d 676, original italics.) But these conclusions do not establish the constitutionality of the Moscone Act.

13 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, 13 Cal.Rptr.2d 245, 838 P.2d 1198.)

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: **103 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, 177 Cal.Rptr. 690.) 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, 177 Cal.Rptr. 690, quoting *Senn v. Tile Layers Union* (1937) 301 U.S. 468, 57 S.Ct. 857, 81 L.Ed. 1229.) The trial court granted injunctive relief to the restaurant. (*M Restaurants, supra*, at pp. 671-672, 177 Cal.Rptr. 690.)

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, 177 Cal.Rptr. 690), 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, 177 Cal.Rptr. 690.) 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, 71 Cal.Rptr.2d 830, 951 P.2d 399 [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, 51 Cal.Rptr.3d 55, 146 P.3d 510 [decisions of lower federal courts not binding but may be persuasive].)

14 15 Therefore, as did *Waremart II*, we conclude that the Moscone Act violates the First and Fourteenth Amendments **104 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*

16 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.

17 18 19 20 "An injunction is an appropriate remedy for a continuing trespass. [Citation.]" (*Allred, supra*, 14 Cal.App.4th at p. 1390, 18 Cal.Rptr.2d 530, 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, 52 Cal.Rptr.2d 429.) "[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, 1 Cal.Rptr.3d 32, 71 P.3d 296, italics omitted.)

21 22 23 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, 18 Cal.Rptr.2d 530 [injunction available against trespass]; but see *Waremart I, supra,* 87 Cal.App.4th at p. 158, 104 Cal.Rptr.2d 359 [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, 15 Cal.Rptr. 486 [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 ***105** 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, 69 Cal.Rptr.3d 288, 172 P.3d 742; *Consolidated Edison v. Public Serv. Comm'n, supra,* 447 U.S. at p. 541, 100 S.Ct. 2326.) 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, 100 S.Ct. 2286.) 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, 104 Cal.Rptr.2d 359. 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, 104 Cal.Rptr.2d 359.)

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, 104 Cal.Rptr.2d 359.) 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, 86 S.Ct. 1079, 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, 115 S.Ct. 2338; *Pacific Gas & Electric Co. v. Public Utilities Com., supra,* 475 U.S. at p. 16, 106 S.Ct. 903.)

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. ----, 129 S.Ct. 1093, 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 ***106** 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. ----, 129 S.Ct. at p. 1095, 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. ----, 129 S.Ct. at pp. 1098, 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.

24 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.

25 "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, 76 Cal.Rptr.3d 683, 183 P.3d 384.) 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

26 27 The Union contends that, even if we conclude that the Moscone Act and ***107** 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, 18 Cal.Rptr.2d 530 [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, 1 Cal.Rptr.3d 32, 71 P.3d 296.) "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, 15 Cal.Rptr. 486.) 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.

28 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, 52 Cal.Rptr.2d 429 [requirements for preliminary injunction against trespass].) Ralphs is ***108** 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).)

We concur: RAYE and ROBIE, JJ.

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EXHIBIT B

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United States District Court,
N.D. California.

Joseph P. CUVIELLO, et al., Plaintiffs,
v.

CITY OF OAKLAND, et al., Defendants.

No. C 06-05517 MHP (EMC). Aug. 15, 2007.

Attorneys and Law Firms

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Opinion

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

MARILYN HALL PATEL, United States District Court Judge.

*1 This action proceeded before Magistrate Judge Edward Chen. The Magistrate Judge held a hearing on a motion for preliminary injunction and filed a report and recommendation on August 14, 2007, recommending that a preliminary injunction be issued against defendants.

The report and recommendation was filed on August 14, 2007. The parties were given an abbreviated deadline for filing objections, consistent with the exigencies of the events giving rise to this motion. The designated time within which to file objections has expired and no objections have been filed. This court has reviewed the Report and Recommendation and finds that it is supported by the facts and record in this case and by the relevant case law relied upon by the Magistrate Judge. For the purposes of a preliminary injunction, plaintiffs have sufficiently established that the new ticketing policy does not serve a significant governmental interest. This court notes that it can revisit this conclusion at a later date and may consider imposing the cost of a ticket on plaintiffs at that time. If it is established that the policy was adopted for legitimate purposes unrelated to plaintiffs' actions and will be a long-standing policy for the area in question, the court may impose the costs of tickets upon plaintiffs.

Therefore, the report and recommendation is adopted in its entirety.

IT IS HEREBY ORDERED that the Magistrate Judge's Report and Recommendation is ADOPTED in its entirety and the motion for a preliminary injunction is GRANTED.

IT IS SO ORDERED.

REPORT AND RECOMMENDATION RE PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

EDWARD M. CHEN, United States Magistrate Judge.

Plaintiffs Joseph Cuviello and Deniz Bolbol have filed suit against Defendants the City of Oakland, Alameda County, Oakland-Alameda County Coliseum Authority, Oakland Coliseum Joint Venture L.L.C., SMG, Oakland Police Officer R. Villegas, Oakland Coliseum Assistant Security Manager "Skeet" Ellis, and Oakland Police Officer R. Valladon, alleging violation of their civil rights. Presently before the Court is Plaintiffs' motion for a preliminary injunction, which was referred to the undersigned for a report and recommendation.

Having considered the parties' briefs and accompanying submissions, as well as the oral argument of pro se Plaintiffs and defense counsel at the hearing on the motion on August 13, 2007, the Court hereby recommends that the motion for a preliminary injunction be GRANTED.

I. *FACTUAL & PROCEDURAL BACKGROUND*

Plaintiffs are members of Citizens for Cruelty-Free Entertainment, a San Francisco Bay Area group dedicated to the humane treatment of animals and educating the public about the abuse and mistreatment of animals in circuses. *See* Compl. ¶ 21. From August 16 to 19, 2007, the Ringling Brothers Circus will hold performances at the Oracle Arena portion of the Oakland Coliseum (hereinafter "Coliseum/Arena"). The Oakland Coliseum/Arena is publicly owned property.

*2 As clarified at the hearing herein, Plaintiffs seek a preliminary injunction of limited scope which would permit them to position themselves on the landing at the top of the ramp on the north side of the Coliseum/Arena ("north ramp

landing") to videotape activity related to the circus animals in the parking lot area below. At the hearing, Plaintiffs stated that they were not seeking to engage in other First Amendment-related activity such as distributing leaflets. Nor are they seeking to photograph or videotape from the north ramp itself, just from the landing. Plaintiffs also seek the right to ascend the north ramp to reach the landing without buying a ticket to the circus.

The north ramp is one walkway by which the public can enter the Coliseum/Arena. It is one of the four primary means of pedestrian ingress and egress. *See* Handley Decl. ¶ 9. The ramp is 158 feet long and 8.5 feet wide. *See id.* ¶¶ 4-5. The exact dimensions of the landing at the top of the north ramp have not been provided. However, Plaintiffs represented at the hearing that the landing is at least 20 feet wide, and Defendants did not dispute this statement. The north ramp landing appears to provide the best vantage point for Plaintiffs to do their videotaping because the circus animals travel through the north tunnel between the Coliseum/Arena and the circus's secure area in the north parking lot. *See* Little Decl. ¶ 8.

Mr. Cuviello and Ms. Bolbol use the videotapes that they have recorded "to educate the public about the Circus'[s] treatment of the animals through flyers, video screenings, posters and the Internet." Cuviello Decl. ¶ 8; Bolbol Decl. ¶ 8. They also provide the videotapes "to the news media and to law enforcement agencies as evidence for complaints that [they] file alleging that the Circus is in violation of the law." [1] Cuviello Decl. ¶ 9; Bolbol Decl. ¶ 9. On previous occasions, their videotape of alleged mistreatment of animals has been aired on television news programs. [2] *See* Cuviello Decl. ¶ 10; Bolbol Decl. ¶ 10.

II. *DISCUSSION*

A. *Legal Standard*

Under Ninth Circuit case law, a preliminary injunction should issue when a plaintiff shows " 'either: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in [the plaintiff's] favor.' " *Lands Council v. Martin*, 479 F.3d 636, 639 (9th Cir.2007). " 'These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases.' " *Diamontiney v. Borg*, 918 F.2d 793, 795 (9th Cir.1990). The advancement of the public interest is also considered in certain cases. *See Lands Council*, 479 F.3d at 639 (9th Cir.2007).

As noted above at the hearing, Plaintiffs clarified the exact nature of the injunctive relief they seek. Specifically, Plaintiffs explained that they seek an order: (1) enjoining Defendants from requiring Plaintiffs to have a ticket in order to enter the north ramp and position themselves at the landing at the top of the north ramp; (2) permitting Plaintiffs, and others acting in concert with them, to stand near the railing of the north ramp landing in order to videotape the circus animals; and (3) enjoining Defendants from harassing or otherwise preventing Plaintiffs from reaching the north ramp landing. Plaintiffs stated that they did not seek an order permitting them to position themselves and videotape on the north ramp itself (as opposed to the landing at the top), nor do they seek to leaflet.

B. *Plaintiffs' Likelihood of Success on the Merits*

*3 In the instant case, Plaintiffs argue that they are entitled to relief under both the First Amendment of the United States Constitution and Article I, section 2(a) of the California Constitution. *See* U.S. Const. amend. I ("Congress shall make no law ... abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble ...."); Cal. Const. art. I, § 2(a) ("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."). Although Plaintiffs do not intend to leaflet or openly protest, their attempt to film alleged animal abuse previously was shared with news media and has generated public interest. *See* Cuviello Decl., ¶¶ 8-10; Bolbol Decl., ¶¶ 8-10; Plaintiffs' Exhibit 1 ISO Reply (# 12). It constitutes free speech under the First Amendment and California Liberty of Speech Clause. *See, e.g., Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir.1995) (concluding that there was "a genuine issue of material fact does exist regarding whether [plaintiff] was assaulted and battered by a Seattle police officer in an attempt to prevent or dissuade him from exercising his First Amendment right to film matters of public interest"); *see also Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir.2000) (agreeing with plaintiffs that "they had a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct"; explaining that "[t]he First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters

of public interest"); *Robinson v. Fetterman,* 378 F.Supp.2d 534, 541 (E.D.Pa.2005) (concluding that plaintiff had a First Amendment right to videotape state troopers conducting truck inspections on a public highway because of his concern about the safety of the inspections); *Lambert v. Polk County,* 723 F.Supp. 128, 133 (S.D.Iowa 1989) (noting that "[i]t is not just news organizations ... who have First Amendment rights to make and display videotapes of events-all of us, including [plaintiff], have that right"). Defendants do not contend otherwise.

The Ninth Circuit has held that, "federal constitutional issues should be avoided if cases can be decided on state law grounds.... The Supreme Court has indicated that federal constitutional issues should be avoided even when the alternative ground is one of state constitutional law." *Carreras v. City of Anaheim,* 768 F.2d 1039, 1042 (9th Cir.1985). With respect to Plaintiffs' state constitutional claims, Plaintiffs have demonstrated a high likelihood of success on the merits. Because the Court concludes that the California Constitution is sufficient to support Plaintiffs' motion for a preliminary injunction, it does not reach Plaintiffs' First Amendment claims.

1. *Public Fora*

***4** In *Kuba v. 1-A Agricultural Association,* 387 F.3d 850 (9th Cir.2004), the Ninth Circuit explained that, under the California Constitution, " 'permissible restrictions on expression in public fora must be content-neutral, be narrowly tailored to serve an important government interest, and leave open ample alternative channels for the communication of the message.' " *Id.* at 856. "The standard under the California Constitution for whether a particular area is a 'public forum' ... varies from its federal cousin." *Id.* Under the California Constitution, the test is broader. *See id.* A public forum is not limited to traditional public fora such as streets, sidewalks, and parks. " 'Rather, the test under California law is whether the communicative activity is basically incompatible with the normal activity of a particular place at a particular time.' " *Id.* at 857.

> In *Carreras,* [768 F.2d at 1039, the Ninth Circuit] held that the parking areas and pedestrian walkways outside Anaheim Stadium and the exterior walkways of the nearby convention center were public fora [under state law]. In that case, the "communicative activity" that had been restricted was solicitation of donations by the International Society for Krishna Consciousness of Laguna Beach, Inc. (ISKCON). [The Ninth Circuit] held that the city had offered no evidence that ISKCON's solicitation interfered with the success of the stadium as a business enterprise, and that the "mere annoyance" to patrons of having to respond to ISKCON's attempts to solicit donations did not establish incompatability. The exterior of the Anaheim Stadium (including its parking lots and pedestrian walk-ways) and the convention center walkways were therefore "public fora" under the California Constitution.

Kuba, 387 F.3d at 857.

In *Kuba,* the Ninth Circuit relied heavily on *Carreras* in concluding that the parking lots and walkways around the Cow Palace[3] were public fora under the California Constitution. The plaintiff in *Kuba* was an animal rights activist who challenged the Cow Palace policy of prohibiting individuals from demonstrating outside the building, except in designated "free expression zones," none of which was near an entrance to the building. The Ninth Circuit explained that, "[a]s in the areas involved in *Carreras,* 'the public is free to come and go' in the parking lots and on the walkways around the Cow Palace, as people 'travel[ ] over the parking lot and walkways to attend ... events or exhibitions.' " *Id.* "Also, 'the purposes of the ... locations are very similar-the facilitation of parking and the free flow of pedestrian and vehicular traffic.' " *Id.* Finally, as in *Carreras,* the defendant did not provide any evidence that the plaintiff's "protest activity (or protest activity generally) is a threat to the financial success of the Palace, or is in any other respect more than a mere annoyance to Cow Palace patrons." *Id.* Because "protest activity is not inherently incompatible with the activity to which the parking lots and walkways outside the Cow Palace are dedicated, ... those areas are therefore public fora for purposes of California Liberty of Speech Clause analysis." *Id.*

***5** Defendants concede the parking lots and general pedestrian areas of the Coliseum/Arena are public fora. They contend, however, the ramps and upper landing of the Coliseum/Arena are not. In view of *Carreras* and *Kuba,* the Court finds the north ramp of the Oakland Coliseum/Arena and the landing at the top at issue here are public fora. The north ramp and landing are like the parking lots and walkways in *Carreras* and *Kuba*-these are areas where the public is free to come and go as they enter and exit the Coliseum/Arena. As

in *Kuba,* there is no evidence that Plaintiffs' activity is a threat to the financial success of the Coliseum/Arena. Nor is there any evidence in the record that Plaintiffs or others engaged in free speech activities have caused traffic flow problems, created congestion, or posed a significant security problem on the ramp or landing.

Defendants contend that the north ramp and landing are not public fora because the Coliseum/Arena has recently enacted a policy this month under which "at all upcoming events in the foreseeable future" only pedestrians with tickets for the events at the Coliseum/Arena are permitted on the north and south ramps. *See* Little Decl. ¶ 5. This alleged change in policy does not, however, change the fundamental nature of the north ramp and landing as thoroughfares for the flow of pedestrians. The newly established restrictions constitute a time, place, and manner restriction, not a change in the fundamental character of the ramp and landing. Moreover, the north ramp and landing have historically been open to nonticketed pedestrians, demonstrating that communicative activity is not basically incompatible with normal pedestrian activity. Defendants cannot, by taking unilateral action, convert an historically public forum into nonpublic forum, particularly where, as here, there is no record evidence justifying the new restriction. [4]

Defendants also contend that communicative activity is not compatible with the normal activity and usage of the ramps because of various security concerns. But as discussed below, Defendants' asserted security concerns are based on speculation, not experience or evidence. In any event, these assertions are not dispositive to the public forum analysis but rather informs the issue of whether there is a significant government interest justifying Defendants' time, place, and manner restrictions.

Accordingly, the free expression activities of Plaintiffs (or others) are not inherently incompatible with the activity to which the north ramp and landing are dedicated, and therefore the ramp and the landing are public fora for purposes of the California Liberty of Speech Clause.

2. *Time, Place, and Manner*

As noted above, " 'permissible restrictions on expression in public fora must be content-neutral, be narrowly tailored to serve an important government interest, and leave open ample alternative channels for the communication of the message.' " *Id.* at 856. At this juncture, the aspects of Defendants' restrictions that are challenged by Plaintiffs are as follows: (1) the ban of pedestrians without a ticket from the north ramp and landing and (2) the ban on Plaintiffs and their associates from videotaping from the railing at the north ramp landing. [5]

a. *Significant Government Interest*

*6 With respect to the importance of the government interest, the Court finds the assertion of the need to prevent traffic congestion is baseless given the current record. *See* Little Decl. ¶ 6 (stating that the north ramp is "a required handicapped-access ramp" and that allowing persons to loiter "potentially interferes with access to the arena for both handicapped and non-handicapped patrons"). Plaintiffs do not seek to videotape from the north ramp itself-rather, only the landing of the north ramp. Defendants did not challenge Plaintiffs' representation that the landing is at least 20 feet wide. There is nothing in the record indicating that there has been a problem with pedestrian congestion in this wide landing area. There is no evidence that Plaintiffs' presence at the railing of the landing has caused or would cause a congestion problem or block an accessible path of travel. The video clip of Exhibit 1 showing security personnel asking Plaintiff Bolbol to leave the landing in 2005 reveals there were few, if any, pedestrians in the area at the time.

At the hearing, Defendants also contended that limiting access to the ramp and landing to ticketed customers serves the purpose of preventing a log queue and the potential for "gate crashers" at the upper entrance (located at the top of the ramp on the landing) by creating a buffer zone. But Defendants presented no evidence that such a huge buffer zone-which includes a 158 foot-long, 8.5-foot wide ramp, *see* Hadley Decl., ¶¶ 4-5, and a large 20-foot wide landing area-is needed. There is no evidence of any historical problem with long queues in this area. Nor is there any evidence of a problem with gate crashers at the Oracle Arena (as distinct from the Coliseum Stadium) particularly at family-oriented events such as a circus. In fact, as Plaintiffs pointed out at the hearing, there are no such buffer zones around the main entrance at the lower level of the Arena, and Defendants propose none there. Furthermore, until recently, no such ticket requirement has been imposed on a consistent basis; indeed, the only record of any restriction on ramp access was closure of the ramp when Plaintiffs previously attempted to videotape from the north ramp landing.

Defendants also claim a significant government interest in barring off the north ramp and landing area in order to protect the security and safety of people and animals. They point out that there are large air intake vents located at the top of

the north ramp and claim that "[a]llowing persons to loiter in this vicinity creates a potential biological, chemical and/or radiological hazard for tens of thousands of patrons inside the arena." Little Decl. ¶ 7. Defendants also claim that allowing persons to loiter "creates a hazard insofar as animals are occasionally antagonized or disturbed by persons who toss objects down, shout, spit, etc." *Id.* ¶ 8.

The Court is not persuaded that the evidence submitted by Defendants-*i.e.*, the Little declaration-is sufficient under *Kuba*. "[M]erely invoking interests ... is insufficient." *Kuba*, 387 F.3d at 859. There must be some concrete evidence supporting the asserted interests. *See id.* at 860 (rejecting "mere speculation"). The Little declaration largely engages in speculation, baldly asserting for example, "potential biological, chemical and/or radiological hazard." Little Decl. ¶ 7. Moreover, as Plaintiffs point out, simply requiring a person to buy a $15 ticket is unlikely to deter a terrorist. In addition, based on the pictures submitted by Defendant, the vents appear to be high enough above the ground so that they are not within easy reach of pedestrians.

*7 As to the risk to animals, the Court acknowledges that the Little declaration mentions occasions on which animals have been antagonized or distributed by persons who toss objects down, shout, and spit. *See id.* ¶ 8. However, it does not provide information as to how many such occasions there have been. More important, it is not clear that this problem would be substantially exacerbated by the addition of individuals such as Plaintiffs who seek to engage in speech-related activity on the landing. In *Kuba*, the Ninth Circuit acknowledged that the defendant had submitted a declaration which "supports a conclusion that congestion is already a problem in some outdoor areas surrounding the arena"; however, the court noted that the declaration failed to "prove that the addition of a handful of individuals in any of the outdoor areas other than the designated zones would substantially exacerbate the problem." *Kuba*, 387 F.3d at 860. The same is true in the case at bar.

In sum, Defendants have failed to establish facts sufficient to prove that a significant governmental interest is served by the challenged restrictions.

b. *Narrowly Tailored Restriction*

Even if Defendants did provide sufficient support for their asserted interests, Defendants' restrictions on expressive activity are not narrowly tailored. *Cf. Kuba*, 387 F.3d at 862 ("Such measures as prohibiting protestors within a certain distance from the entrance to the building, or limiting the overall number of demonstrators in certain areas closer to the entrance, or requiring that protestors stand a certain distance from each other, are all measures that directly respond to the nature of congestion and traffic safety issues in parking lots"). The "buffer zone" created for ticketed pedestrians is needlessly vast, extending down a 158-foot long ramp and encompassing a large landing area. It is more massive than *e.g.*, an apron in front of the ticket entrance (*Cf. Kuba, id.* at 861-62 (12# x 100# apron prone to extreme congestion)) and not justified by experience or evidence. Moreover, *all* nonticketed pedestrians are barred from the buffer zone even if they do not engage in First Amendment activity. Defendants have also barred all pedestrians from videotaping at the landing, rather than *e.g.*, restricting them to the railing in order to insure a clear path of travel. While the prohibitions are not as broad as those at the Cow Palace struck down in *Kuba*, they are still overly broad.

Thus, Plaintiffs have demonstrated a high likelihood of success on the merits with respect to their free speech claim under the California Constitution. The ramp and landing are public fora and the challenged restrictions do not constitute reasonable time, place, and manner restrictions.

C. *Possibility of Irreparable Injury*

When a plaintiff demonstrates a high likelihood of success on the merits, the plaintiff need only show a possibility of irreparable harm. *See Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 972-73 (9th Cir.2002). "The Supreme Court has made clear that 'the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury' for purposes of the issuance of a preliminary injunction." *Id.* at 973. The same reasoning applies to Plaintiffs' loss of freedoms under the California Liberty of Speech Clause.

*8 Though not necessary given Plaintiffs' robust showing on the merits, the Court also notes that the balance of hardships tips sharply in Plaintiffs' favor given their free speech rights at stake and Defendants' failure to provide evidence showing any real harm likely to occur were the injunction granted.

Moreover, the public interest also weighs in favor of Plaintiffs' position since the free speech interests at issue (enhanced by the newsworthiness of the subject of Plaintiffs' speech-related activity) support a finding of public interest. *See id.* at 974.

III. *RECOMMENDATION*

For the foregoing reasons, the Court recommends that a preliminary injunction be issued enjoining Defendants from: (1) requiring Plaintiffs to have a ticket in order to enter the north ramp and videotape at the north ramp landing; (2) refusing to permit Plaintiffs, and up to four additional persons acting in concert with Plaintiffs, [6] to stand at or near the railway of the north ramp landing in order to photograph or videotape circus animals; and (3) harassing or preventing Plaintiffs from reaching the north ramp landing, absent a law violation. The preliminary injunction need only apply to circus events scheduled at the Coliseum/Arena, such as the Ringling Brothers Circus which will hold performances at the Coliseum/Arena from August 16 to 19, 2007, and should continue in efffect until final judgment. [7]

The Court further recommends that no bond be required under Federal Rule of Civil Procedure 65(c). The Court has discretion to dispense with security when requiring a bond would effectively deny access to judicial review. *See People ex rel. Van de Kamp v. TRPA*, 766 F.2d 1319, 1325-26 (9th Cir.1985). At the hearing herein, Defendants asked for a substantial amount sufficient (potentially millions of dollars) to indemnify them in the event that, as a result of the preliminary injunction, they are not able to *e.g.*, prevent a terrorist attack, which they contend would cause millions, if not billions, in damages. Moreover, the Court has discretion to dispense with the bond where, as here, there is no proof of likelihood of harm to the party enjoined. *See Doctor's Associates, Inc. v. Distajo*, 107 F.3d 126, 136 (2d Cir.1997); *see also Americans United for Separation of Church & State v. City of Grand Rapids*, 784 F.Supp. 403, 412 (W.D.Mich.1990) (finding no possibility of material damages resulting from grant of injunction preventing erection of Menorah in public plaza).

Any party may file objections to this report and recommendation with the district judge by noon, August 15, 2007. *See* 28 U.S.C. § 636(b)(1)(B); Fed.R.Civ.P. 72; Civil L.R. 72-3. The Court shortens the normally applicable 10-day period to file an objection given the exigent circumstances. *See Tripati v. Drake*, No. 89-55330, 1990 WL 100242, at *1 (9th Cir. July 19, 1990) (unpublished memorandum); *United States v. Barney*, 568 F.2d 134, 136 (9th Cir.1978); *Hispanic Counseling Center, Inc., v. Incorporated Village of Hempstead*, 237 F.Supp.2d 284, 289-90 (E.D.N.Y.2002). Because the circus starts August 16 and ends on August 19, exigent circumstances require expedited adjudication of the preliminary injunction.

Footnotes

1 Defendants have objected to paragraphs 8 and 9 of the Cuviello and Bolbol declarations on the grounds of relevance and prejudice. The objections are overruled. The reason why Plaintiffs seek access to the north ramp landing is relevant to this case. Also, there is no prejudice that the Court can discern from admission of the evidence. As to the other objection to the declarations, they are overruled, except for the objections to ¶ 7 of the Cuviello declaration and ¶ 7 of the Bolbol declaration which are sustained. The other paragraphs qualify as nonhearsay or exceptions to hearsay and are relevant.

2 In their reply, Plaintiffs filed a document denominated Exhibit 1, which was accompanied by a DVD containing, *inter alia,* various video clips of the arena ramps and Plaintiffs' interaction with security guards on prior occasions. Although not authenticated by a declaration, Ms. Bolbol did authenticate the contents of the exhibit and DVD under oath in open court. Defendants did not have any issue with the authentication but objected on grounds of relevance and prejudice. Those objections were overruled, and Exhibit 1 was admitted into evidence.

3 The Cow Palace is a performance facility located south of San Francisco. It is owned by the State of California. *See Kuba*, 387 F.3d at 852.

4 The timing and circumstances of Defendants' action raises the specter that the new policy is designed to suppress Plaintiffs' free speech activity in particular. The Court need not and does not, however, decide whether Defendants' action is content neutral.

5 At the hearing, Plaintiffs explained that they seek to videotape from only the north ramp landing itself, and not the north ramp, and that they use the north ramp merely to reach the landing. Because of the limited scope of relief sought at this juncture, the Court need not address at this stage the constitutionality of the broader prohibitions and their application to other members of the public. The Court notes, however, that the finding of public forum herein places a heavy burden on Defendants to demonstrate that any

restrictions within the public forum (which includes the parking lots and pedestrian thoroughfares) constitute reasonable time, place, and manner restrictions consistent with the California Liberty of Speech Clause.

6 At the hearing, Plaintiffs stated they did not envision ever having more than four other persons with them.

7 Plaintiffs stated at the hearing they only seek to videotape at the circus and not at any other events.

End of Document

EXHIBIT C

2008 WL 4283260
Only the Westlaw citation is currently available.
United States District Court,
E.D. California.

Joseph P. CUVIELLO and Deniz Bolbol, individually, Plaintiffs,
v.

CITY OF STOCKTON, a public entity, International Facilities Group (IFG), a corporation dba IFG-Stockton, Inc., Stockton Police Officer Lt. Trulson, Stockton Assistant City Attorney Michael Rishwain, and Does 1-40 in their individual and official capacities, jointly and severally, Defendants.

No. CIV. S-07-1625 LKK/KJM. Sept. 16, 2008.

Attorneys and Law Firms

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Opinion

ORDER

LAWRENCE K. KARLTON, Senior District Judge.

*1 Plaintiffs are individuals who have brought suit against the City of Stockton, various city officials, and the International Facilities Group ("IFG"), alleging violations of their rights of free speech under the United States and California Constitutions in conjunction with their attempts to videotape and speak to the public outside of performances of the Ringling Bros.-Barnum & Bailey Circus ("Ringling Bros."). They seek damages, declaratory relief, and injunctive relief.

Pending before the court is the plaintiff's motion for a preliminary injunction to enjoin defendants from infringing on plaintiffs' rights during the September 2008 circus performance in Stockton and a motion for declaratory relief. For the reasons discussed herein, the court grants the motion for a preliminary injunction but defers declaratory relief to a full trial.

I. BACKGROUND AND FACTS [1]

Plaintiffs are individuals who assert they have an interest in the welfare of animals and, to that end, have engaged in certain activities when the Ringling Bros. Circus has performed at the Stockton Arena in 2006 and 2007. Complaint ¶ 24; Declaration of Deniz Bolbol in Support of Plaintiff's Motion for Preliminary Injunction and Declaratory Relief ("Bolbol Decl.") ¶ 3; Declaration of Joseph Cuviello in Support of Plaintiff's Motion for Preliminary Injunction and Declaratory Relief ("Cuviello Decl.") ¶ 3. Specifically, they have passed out leaflets to patrons and videotaped animals outside of the arena. Bolbol Decl. ¶ 3; Cuviello Decl. ¶ 3.

The plaintiffs have presented evidence regarding their attempts at communicating with circus patrons and videotaping near the Stockton Arena at the time of the 2006 circus. On August 28, 2006, Bolbol and Cuviello observed that part of West Washington Street was closed, near the Arena. Bolbol Decl. ¶¶ 4-5; Cuviello Decl. ¶¶ 4-5. Bolbol was prohibited by Stockton Police officers from accessing the blocked portion of the street. [2] Bolbol Decl. ¶ 5. She videotaped this interaction. *See* Cuviello Decl., Ex. A.

On August 31, 2006, Bolbol and Cuviello approached the Arena for the purpose of holding signs and banners and distributing information to circus patrons. Bolbol Decl. ¶ 6; Cuviello Decl. ¶ 6. Once on the Arena property, [3] plaintiffs were approached by Stockton Police Lieutenant Trulsson, who informed plaintiffs that the area was private property and if the Arena staff believed plaintiffs to be trespassing, it is Stockton Police policy to honor this as a citizens' arrest. Bolbol Decl. ¶¶ 7-8; Cuviello Decl. ¶¶ 8-9. The plaintiffs videotaped this encounter. *See* Cuviello Decl., Ex. A.

After being turned away, Bolbol went to the Arena's back parking lot. Bolbol Decl. ¶ 10. There, an IFG representative informed Bolbol that she could not be on Arena property without a ticket. *Id.* Bolbol left the property. *Id.* She videotaped this encounter. *See* Cuviello Decl., Ex. A.

*2 On September 2, 2006, Bolbol returned to the Arena property to hand out leaflets to patrons. Bolbol Decl. ¶ 11. She was approached by an IFG representative, who informed her

that she would be held for trespass if she was on the property without a ticket. *Id.* She left the property. *Id.* This encounter was also videotaped. *See* Cuviello Decl., Ex. A.

In September 2007, the Ringling Bros. circus returned to the Stockton Arena. Prior to the circus' arrival, the Stockton Assistant City Attorney requested a phone conference in which plaintiffs participated. Cuviello Decl. ¶ 12. Other employees of the City of Stockton and of IFG also participated. Declaration of Kimberly Drake In Support of Defendants City of Stockton, Michael Rishwain and Lt. Chris Trulsson's Opposition to Plaintiff's Motion for Preliminary Injunction ("Drake Decl.") ¶ 7, Ex. E (deposition of Deniz Bolbol at 98:8-98:25). Plaintiffs informed the Assistant City Attorney that they had received a preliminary injunction from the Northern District of California in a case they believed was similar and provided a copy of the injunction to her. *Id.; see also* Declaration of Jonathan Rizzardi in Support of Defendant International Facilities Group's Opposition to Plaintiffs' Motion for Preliminary Injunction ("Rizzardi Decl.") ¶ 10. Later, they met with Stockton Police Lieutenant Paoletti, who agreed to allow plaintiffs the access they sought around the Arena. Cuviello Decl. ¶ 12; *see also* Rizzardi Decl. ¶ 10.

Once Ringling Bros. had arrived, Cuviello again sought to engage in the leafletting and videotaping around the Arena, which he had endeavored to do the previous year. Cuviello Decl. ¶ 13. At one street, he was initially not permitted access to a portion that had been blocked off. *Id.* However, Lieutenant Paoletti arrived and permitted plaintiff's access. *Id.* A few days later, Cuviello again accessed the street, although a police officer and Ringling Bros. representative attempted to stop him. *Id.* He also accessed the area around the Arena where patrons were waiting in line, from which he had been restricted the previous year. Drake Decl. ¶ 8, Ex. F (deposition of Joseph Cuviello at 168:14-168:25).

Plaintiff Bolbol acknowledged in her deposition that plaintiffs "were able to exercise their rights in 2007 on the [Arena] property ." Rizzardi Decl. ¶ 9. She also acknowledged that City officials were no longer acting with deliberate indifference to protect the constitutional rights of people within the City, as plaintiffs had alleged in their complain. Drake Decl. ¶ 7, Ex. E (deposition of Deniz Bolbol at 187:11-187:22).

II. STANDARDS

A. Standard for a Preliminary Injunction

A preliminary injunction may issue if the movant shows either "a combination of probable success and the possibility of irreparable harm, or that serious questions are raised and the balance of hardship tips in its favor." *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 874 (9th Cir.2000). At a minimum, the movant must show "a fair chance of success on the merits, or questions serious enough to require litigation" and a significant threat of irreparable injury. *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935, 937 (9th Cir.1987). The Ninth Circuit conceives this standard as "two interrelated legal tests" operating along a continuum. *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir.1983). At one end of the continuum, the moving party may succeed if it shows that there is a probability of success on the merits as well as a possibility of irreparable injury. *Golden Gate Restaurant Ass'n. v. City and County of San Francisco*, 512 F.3d 1112, 1115-16 (9th Cir.2008). At the other end, the moving party may succeed if it shows that it has raised "serious legal questions" and that "the balance of hardships tips sharply in its favor." *Id.* at 1116 (quoting *Lopez*, 713 F.2d at 1435). Finally, in certain cases, the court should consider whether the issuance of the injunction would advance the public interest. *Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1200 (9th Cir.1980).

B. Standard for Declaratory Relief

*3 Declaratory judgment is proper when it "will clarify and settle the legal relations at issue and whether it will afford relief from the uncertainty and controversy giving rise to the proceedings." *McGraw-Edison Co. v. Preformed Line Products Co.*, 362 F.2d 339, 342 (9th Cir.) (citing Borchard, *Declaratory Judgments* 299 (2d ed.1941)), *cert. denied*, 385 U.S. 919, 87 S.Ct. 229, 17 L.Ed.2d 143 (1966). A court declaration delineates important rights and responsibilities and can be "a message not only to the parties but also to the public and has significant educational and lasting importance." *Bilbrey by Bilbrey v. Brown*, 738 F.2d 1462, 1471 (9th Cir.1984). It is warranted where the controversy at issue is compellingly immediate and non-speculative. *Id.*

III. ANALYSIS

Plaintiffs seek both a preliminary injunction and a declaratory judgment addressing their right to engage in communicative activities near the Stockton Arena during the Ringling Bros. engagement here. As discussed below, the court concludes that, under the circumstances, a preliminary injunction should issue but that any declaratory relief must await trial on the

merits or summary judgment, if appropriate. A declaration of rights is a final judgment on the merits and thus must await disposition on the merits. A preliminary injunction, on the other hand, being preliminary, need not await final disposition.

A. Notice of the Scope of the Preliminary Injunction

All defendants observe that plaintiffs did not file a proposed order with a provision for a bond with their motion, as required by Local Rule 65-231(d)(2)(iii).[4] Defendants contend that plaintiffs' motion should be denied for failing to comply with the local rules and because, absent the draft order, plaintiffs' motion is too vague to provide notice of to what areas plaintiffs seek access.

A court may not issue a preliminary injunction without notice to the opposing party. Fed.R.Civ.P. 65(a)(1); see also *Gray Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Divers Local No. 70*, 415 U.S. 423, 433 n. 7, 94 S.Ct. 1113, 39 L.Ed.2d 435 (1974) (explaining that Rule 65(a)'s requirement allows the opposing party "a fair opportunity to oppose the application and prepare for such opposition"). The court does not agree that the failure to include a proposed order, while inconsistent with good practice, constitutes a lack of notice to defendants as to what plaintiffs seek, so as to prevent defendants from framing an effective response to the motion. It appears from plaintiffs' motion and supporting documents that they seek access to the areas outside the Stockton Arena, including the queuing areas, and to the public streets around the Arena. The proposed order that was filed on September 2 confirms that this is the scope of the injunction sought by plaintiffs, and therefore it appears that defendants were not prejudiced by the omission.

Plaintiffs are cautioned, however, that failure to adhere to the local rules are grounds for sanctions, including, when warranted, the dismissal of the action. See Local Rule 11-110. Future instances of non-compliance will not be treated with similar generosity.

B. Preliminary Injunction Against City of Stockton and Its Employees

1. Likelihood of Success On the Merits

*4 As described above, a preliminary injunction may issue only upon plaintiffs' showing that both the likelihood of success on the merits and the possibility of irreparable injury favor the injunction's issuance, although those factors need not be present to the same degree. *Golden Gate Restaurant Ass'n*, 512 F.3d at 1115-16. Plaintiffs contend that the City of Stockton, Chris Trulsson, and Michael Rishawn ("City defendants") infringed on plaintiffs' free speech rights under the United States and California Constitutions. That assertion is considered first.

Under both the California and United States Constitutions, "permissible restrictions on expression in public fora must be content-neutral, be narrowly tailored to serve an important government interest, and leave open ample alternative channels for the communication of the message." *Kuba v. 1-A Agr. Ass'n.*, 387 F.3d 850, 856 (9th Cir.2004). It appears from plaintiffs' motion that their complaint against the City defendants concerns the latter's blocking of certain public streets around the Arena.[5] Public streets are quintessential public fora. *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 802, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985).

The dispositive issue, then, is whether the City defendants' restrictions on plaintiffs' speech was content-neutral, narrowly tailored to serve an important government interest, and left ample alternative channels for communication. *See Kuba*, 387 F.3d at 856. Here, the evidence tendered by plaintiffs of the City defendants' restrictions on speech was the blocking of part of West Washington Street on August 28, 2006 and officers' attempts to block the plaintiffs from accessing a portion of the same street on September 12 and 16, 2007. Bolbol Decl. ¶¶ 6-10; Cuviello Decl. ¶¶ 6-10, 13.

The evidence tendered reveals that, in 2006, a portion of the street and sidewalk was blocked by posted officers and by a "No Pedestrians" sign. Drake Decl. Ex. E (deposition of Deniz Bolbol at 119:14-119:19). There is no direct evidence that the City defendants' blocked plaintiffs' access to a portion of the street based on the content of their speech, rather, it appears that access by all pedestrians was restricted. According to plaintiffs' declarations, however, they were there to videotape the animals during the animals' walk to the Arena. *See* Cuviello Decl. ¶¶ 4-5; Bolbol Decl. ¶¶ 4-5. *See Fordyce v. City of Seattle*, 55 F.3d at 436, 439 (9th Cir.1995) (recognizing a First Amendment right under the United States Constitution to "film matters of public interest").

The Stockton Police's Operations Order regarding the event, however, refers to an expectation of the presence of animal rights groups and activists. The Order directs officers that "protesters must remain on public sidewalks or other public areas without obstructing vehicular or pedestrian traffic" and does not otherwise advise officers to restrict activists'

activities. Drake Decl., Ex. C. It may, however, be reasonable to infer that individual police officers, after having been alerted to the possibility of animal rights activists, would have presumed plaintiffs to be videotaping them. *See* Drake Decl., Ex. C (2006 Operations Order advising officers that animal rights activists "have gone so far as to videotape Officers confronting protesters"). Thus, it is possible, though not necessarily a finding, the City's street closure was directed, at least in part, at plaintiffs based on the content of plaintiffs' first amendment activities.

*5 Even if the City's street closure was content-neutral, the plaintiffs contend that the defendants' restrictions on speech were not narrowly tailored to serve an important government interest. Defendants assert that the relevant portion of West Washington Street was closed "to reduce traffic congestion" and "to ensure the safety of the animals, walk participants, officers and the public." Defendants City of Stockton, Michael Rishwain, and Lt. Cris Trulsson's Opposition to Plaintiffs' Motion for Preliminary Injunction and Declaratory Relief, at 8-9. Prevention of traffic congestion and "ensuring the safety of pedestrians and drivers" are legitimate governmental interests. *Kuba,* 387 F.3d at 858; *see also Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.,* 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981); *Foti v. City of Menlo Park,* 146 F.3d 629 (9th Cir.1998).

Nevertheless, mere invocation of legitimate interests is not sufficient; the City "must also show that the proposed communicative activity endangers those interests." *Kuba,* 387 F.3d at 859. In *Kuba,* for example, the Ninth Circuit held that the mere assertion of traffic flow and pedestrian safety was inadequate to justify the denial of pedestrian access to the parking lots and walkways immediately outside of an arena. *Id.* at 859-60. There, the government had blocked off those areas when a circus or rodeo was performing in the arena, based on the speculation that if demonstrators were allowed in those areas, they would cause "congestion and danger to safety." *Id.* at 860. Without some type of showing, such as a history of past protestors causing such dangerous congestion, the court concluded that the government had not shown that public safety would be endangered by the "addition of a handful of individuals" protesting immediately outside of the arena. *Id.*

Here the City defendants contend that the portion of West Washington Street at issue was closed during the time that Ringling Bros. employees were walking the circus animals down the street, from the Port of Stockton to the Arena. Drake Decl. Ex. B-D. Plaintiffs describe that plaintiff Bolbol was barred from accessing the portion of West Washington Street for fifteen to sixteen minutes. Bolbol Decl. ¶ 5.

From all that appears, the City's restriction operated to deny plaintiffs the very access that they desired so that they could tape the animal walk. Just as the *Kuba* plaintiffs sought access to the public for the purpose of distributing information, in the present case the plaintiffs sought access to the "animal walk" in order to videotape the condition and treatment of the animals. For this reason, a factfinder could reasonably conclude that the City's actions were not "narrowly tailored," as they circumscribed precisely the type of speech activities the plaintiffs desired to engage in, without sufficient justification. *See Kuba,* 387 F.3d at 863 (defendants' restrictions were not narrowly tailored because, *inter alia,* they almost entirely prevented plaintiffs from accessing the crowd). Moreover, like *Kuba,* the defendants have not offered evidence that plaintiff's access to the blocked portion of West Washington Street would create traffic congestion and endanger public safety. Thus the defendants have not shown there was an important government interest was threatened by plaintiffs' actions. *See id.* at 860-61.

*6 Given these circumstances, it appears, for purposes of the preliminary injunction, that the City's safety concerns were only speculative and their actions were not narrowly tailored to those concerns. It may be that ultimately the City's safety concerns were legitimate and well-founded, and that the denial of access to the portion of West Washington Street was narrowly tailored to those interests. Overall, however, on the present record, the court concludes that the plaintiffs have a likelihood of success on the merits of their claims against the City defendants.

2. Possibility of Irreparable Injury

The loss of First Amendment freedoms, even briefly, constitute an irreparable injury. *Elrod v. Burns,* 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). In order to obtain an injunction, the plaintiff must show that this irreparable injury is likely to recur. *City of Los Angeles v. Lyons,* 461 U.S. 95, 102, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). Evidence of past incidents alone is not enough, unless plaintiffs show that those incidents were part of a policy or on-going pattern that continues to threaten their rights. *Id.; see also Allee v. Medrano,* 416 U.S. 802, 815-16, 94 S.Ct. 2191, 40 L.Ed.2d 566 (1974) (only a prevailing pattern of police misconduct, not simply evidence of a few incidents, would merit an injunction against state law enforcement); *Thomas v. County of Los Angeles,* 978 F.2d 504 (9th Cir.1989)

(reversing issuance of injunction against the City, where there was insufficient evidence of a City policy linked to officers' illegal conduct, although an extensive record of individual incidents).

Here, the court agrees with plaintiffs that the activities which they sought to engage in were speech, within the meaning of the United States and California Constitutions, the impairment of which would constitute an irreparable injury. *See Fordyce,* 55 F.3d at 439.

The plaintiffs have also presented evidence from which the court can conclude that there is some likelihood of the injury recurring.[6] Plaintiffs have acknowledged that they were able to exercise their free speech rights without constraint during the 2007 circus performances at the Stockton Arena. Rizzardi Decl. ¶ 9, Ex. D (deposition of Deniz Bolbol at 159:18-160:1); Drake Decl. ¶ 7, Ex. E (deposition of Deniz Bolbol at 187:11-187:22). The evidence before the court indicates that in 2007 the city initiated a meeting with the plaintiffs and relevant City personnel to discuss plaintiffs' ability to exercise their rights to free speech during the 2007 circus and a commitment from Lt. Paoletti to allow plaintiffs the access they sought. Cuviello Decl. ¶ 12; *see also* Rizzardi Decl. ¶ 10.

Despite this, it is well-settled " 'that an action for an injunction does not become moot merely because the conduct complained of was terminated, if there is a possibility of recurrence, since otherwise the defendant's would be free to return to [their] old ways.' " *FTC v. Affordable Media,* 179 F.3d 1228, 1237 (9th Cir.1999) (quoting *FTC v. Am. Standard Credit Sys. ., Inc.,* 874 F.Supp. 1080, 1087 (C.D.Cal.1994)). In fact, although the City in 2007 told the plaintiffs that they could have the access that they were denied in 2006, this policy appears not to have been uniformly implemented by all officers. *See* Cuviello Decl. ¶¶ 12-14. This calls into question the efficacy of the City's efforts at voluntary cessation and makes it appear not unlikely that the deprivations that occurred in 2006 may recur in 2008.

3. Public Interest

*7 Finally, the court considers whether the interest of the public generally is served by the issuance of the injunction. *Los Angeles Memorial Coliseum Comm'n,* 634 F.2d at 1200. The Ninth Circuit has recognized a significant public interest in the preservation of First Amendment freedoms. *Sammartano v. First Judicial D.C.,* 303 F.3d 959, 974 (9th Cir.2002).[7] This interest can be overcome by a particularly compelling state interest. *Id.* at 974-75.

Here, the public interest favors the issuance of a preliminary injunction. The plaintiffs seek to engage in speech protected under the First Amendment and if the City's actions in restricting that speech were unlawful, this represents a serious infringement on the interests of others, including persons who have been or may be deterred from lawfully exercising their First Amendment rights. *See id.* at 974. *See id.* Accordingly, the public interest would be served by granting the injunction.

Considering all the factors as a whole, the court is persuaded that plaintiffs have shown that the facts locate on a point in the continuum analysis at which an injunction is merited. *See Lopez,* 713 F.2d at 1435. They have a fair or better chance of success on the merits. Although the evidence of the likelihood of the injury's recurrence is equivocal, the possible injury is a loss of one of a core freedom guaranteed by the Constitution. *See Elrod,* 427 U.S. at 373. As such, the balance of hardships tips sharply in the plaintiffs favor. *See Lopez,* 713 F.2d at 1435. All the above favors the injunction's issuance against the City defendants.

C. Preliminary Injunction Against IFG

1. Likelihood of Success on the Merits

Plaintiffs allege that IFG, through its employees, infringed on plaintiffs' rights to free speech under the California Constitution. *See* Plaintiffs' Motion for Preliminary Injunction and Declaratory Relief at 12. California's Liberty of Speech provision is more expansive than rights under the First Amendment of the United States Constitution. *Vernon v. City of Los Angeles,* 27 F.3d 1385, 1391-92 (9th Cir.1994), *cert. denied* 513 U.S. 1000, 115 S.Ct. 510, 130 L.Ed.2d 417. Unlike its federal counterpart, the California constitution prohibits private actors, not only the state, from infringing on the right to free speech. *Golden Gateway Center v. Golden Gateway Tenants Ass'n.,* 26 Cal.4th 1013, 1023, 111 Cal.Rptr.2d 336, 29 P.3d 797 (2001). This prohibition extends to those private actors who open their land to the public and, in so doing, resemble state actors. *Id.* at 1031-32, 111 Cal.Rptr.2d 336, 29 P.3d 797. Specifically, the Liberty of Speech provision applies to private property that has been made "freely and openly accessible to the public." *Id.* at 1034, 111 Cal.Rptr.2d 336, 29 P.3d 797 (construing *Robins v. Pruneyard Shopping Center,* 23 Cal.3d 899, 153 Cal.Rptr. 854, 592 P.2d 341 (9th Cir.1979)). This includes, for example, a shopping mall; it does not include, for example, a secured

apartment complex. *Id.* at 1032-34, 111 Cal.Rptr.2d 336, 29 P.3d 797.

Here, it seems apparent that the areas surrounding the Stockton Arena at issue are encompassed by the state Liberty of Speech provision. The areas around the Arena appear to be open to the public generally and, unlike an apartment complex, are not restricted to a certain few or for a certain purpose. *See Golden Gateway Center,* 26 Cal.4th at 1034, 111 Cal.Rptr.2d 336, 29 P.3d 797. The normal activities that would occur in these areas seems basically compatible with the plaintiffs' communicative activity. *Kuba,* 387 F.3d at 857. As such, the state Liberty of Speech provision applies to IFG vis-a-vis plaintiffs' use of the areas surrounding the Stockton Arena.

*8 Although the California Constitution applies to private property as well as state property, the limitations on restrictions of speech that can occur there borrow from federal jurisprudence. Thus, as when state action is at issue, a private party may only restrict speech where the restriction is "content-neutral, [is] narrowly tailored to serve an important government interest, and leave[s] open ample alternative channels for the communication of the message ." *Kuba,* 387 F.3d at 856.

Here, the plaintiffs have presented evidence that on two occasions they were barred from accessing the pedestrian areas near the Arena by IFG personnel. Cuviello Decl. ¶¶ 6-9; Bolbol Decl. ¶¶ 6-11. *See* Drake Decl. Ex. F (deposition of Joseph Cuviello at 167:10-168:2) (describing the areas as "queuing areas"). Both times, Bolbol was told that she could not access these areas without a ticket. Bolbol Decl. ¶¶ 6-11. Both times, the plaintiffs had signs, banners, and leaflets with them, from which one may infer that IFG staff were aware of the content of plaintiffs' message. Cuviello Decl. ¶¶ 6-9; Bolbol Decl. ¶¶ 6-11. It also appears that IFG staff were categorical in their refusal to allow plaintiffs onto the areas in question. *See generally* Cuviello Decl. ¶¶ 6-9; Bolbol Decl. ¶¶ 6-11. Finally, there is no evidence tendered to the court of the reason for IFG's restriction on plaintiffs' access to these areas, let alone a showing that the restrictions served an important state interest and were narrowly tailored to that interest. *See Kuba,* 387 F.3d at 856.

Consequently, the plaintiffs have shown that there is a fair chance of success on the merits. *See Arcamuzi,* 819 F.2d at 937.

2. Possibility of Irreparable Injury

As described above, the loss or restriction of First Amendment freedoms is an irreparable injury. *Elrod,* 427 U.S. at 373. As is the case with the City defendants, however, the evidence regarding the likelihood of recurrence is mixed. Plaintiffs have acknowledged that in 2007 they were able to access all areas around the Arena from which they had been blocked in 2006. Rizzardi Decl Ex. D. IFG and the City took affirmative steps to ensure plaintiffs rights were respected in 2007 and, by plaintiffs' own descriptions, no infringement occurred that year. Rizzardi Decl. ¶¶ 9, 10; Drake Decl. Ex. F (deposition of Joseph Cuviello at 167:21-168:21). Nevertheless, as explained above, defendants' voluntary cessation of the allegedly illegal actions is not a compelling reason to refrain from issuing an injunction. *FTC,* 179 F.3d at 1237. Based on the evidence tendered, the court concludes that plaintiffs have shown at least a possibility of irreparable injury by IFG.

Taking this possibility together with the fair likelihood of success on the merits, as well as the strong public interest described in section III.B.3, *supra,* the court concludes that there is an sufficient showing that a preliminary injunction should issue here. The considerations for issuance of an injunction are, as described above, a sliding scale. *Lopez,* 713 F.2d at 1435. Although it is a closer question, the importance of the plaintiffs' and the public interest at issue here tips the case onto that side of the scale at which an injunction is warranted.

IV. CONCLUSION

*9 For the reasons stated herein, plaintiffs' motion for a preliminary injunction (Docket No. 46) is GRANTED.

The court orders as follows:

1. From September 18 through 21, 2008, plaintiffs shall be permitted full access to the public fora surrounding the Stockton Arena, including parking lots and public walkways, without interference from International Facilities Group or its agents or the City of Stockton or its agents.

2. From September 18 through 21, 2008, plaintiffs shall be permitted full access to the public streets, including W. Washington Street, of the City of Stockton, without interference from International Facilities Group or its agents or the City of Stockton or its agents.

3. From September 18 through 21, 2008, plaintiffs shall be permitted to distribute leaflets and to videotape in any public streets and any public fora areas surrounding the Stockton Arena.

4. Plaintiffs shall POST BOND in the amount of one hundred dollars ($100) within ten (10) days.

IT IS SO ORDERED.

Footnotes

1 Defendant IFG objects to plaintiffs' submission of a DVD containing video clips, offered as Exhibit A to the Declaration of Joseph Cuviello in support of plaintiffs' motion. IFG contends that these video clips were not disclosed as part of plaintiffs' initial disclosures, the deadline for which was March 7, 2008. *See* Order, Feb. 6, 2008, at 1. For this reason, the court disregards this exhibit in resolving the instant motion.
Defendants also objected to several items of evidence offered by plaintiffs in support of the motions. Some of the evidence to which defendants object is irrelevant to the court's analysis of the motions. To the extent that the evidence is relevant, defendants' objections are OVERRULED.

2 The plaintiffs have admitted that IFG did not prevent them from accessing this area. Rizzardi Decl. ¶ 2, Ex. B-C.

3 The City of Stockton owns the Arena and area surrounding it, but leases it to IFG, who manages it. Drake Decl. ¶ 3, Ex. A. The plaintiffs do not precisely describe which areas around the Arena they tried to enter, but describe them as the queuing areas at the front and back entrances of the Arena and near the "animal open house." *See* Drake Decl. Ex. F (deposition of Joseph Cuviello at 167:10-168:2).

4 The proposed order was filed on September 2, 2008, several days after defendants' oppositions were filed.

5 In their reply brief and at oral argument, plaintiffs raise for the first time the argument that by the City's acceptance of IFG's citizens' arrests, an agency relationship existed between the City and IFG. Thus, they contend that the City is responsible for any Constitutional violations perpetrated by IFG. It is improper for the court to rely on arguments raised in the first instance in a reply brief. *See Von Brimer v. Whirlpool Corp.*, 536 F.2d 838, 846 (9th Cir.1976). Nevertheless, the court cannot ignore the implications of the facts asserted. If plaintiffs' contention is true and the City officers have a blanket policy of honoring citizens arrests made by IFG for trespass, this presents additional concerns. Although this appears to lie outside the purview of the complaint, a government entity may not delegate its police power to a private party. *See generally Stephens v. City of Vista*, 994 F.2d 650 (9th Cir.1993), *as amended on denial of reh'g* (Aug. 4.1993). Additionally, it is unlawful for an officer to arrest without probable cause or an arrest warrant, *Knox v. Southwest*, 124 F.3d 1103, 1107 (9th Cir.1997), which may render the City's policy of accepting IFG's citizens arrests unconstitutional. *See, e.g., Corcoran v. Fletcher*, 160 F.Supp.2d 1085, 1092 (C.D.Cal.2001).

6 Although defendants represent in their opposition that defendant Michael Rishwain is no longer Assistant City Attorney and Lieutenant Cris Trulsson is no longer Event Commander, they present no evidence of this fact and the court does not rely on it. Moreover, there is no evidence that the conduct was the result of rogue decisions by these two defendants rather than that they were expressing the city's policy.

7 Indeed, it is somewhat dispiriting that the defendants seem to regard the First Amendment as an impediment to doing their "real" job, rather than as a duty they should gladly assume.

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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 December 8, 2010, I served the attached document described as an **OPENING BRIEF ON THE MERITS** 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, Joyce Archain, declare under penalty of perjury under the State of California and the United States of America that the foregoing is true and correct.

Executed on December 8, 2010, at San Francisco, California.

Joyce Archain