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)

REPLY BRIEF ON THE MERITS

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INTRODUCTION

Ralphs asserts that the First Amendment bars California's Legislature from enacting purely speech-protective statutes on anything other than a universal basis. In its challenge to Labor Code § 1138.1, Ralphs goes even further. It argues that California's Legislature may not enact laws regulating court procedure in a particular class of cases if that procedure might impact a private party's ability to *restrict* speech in some instance. No First Amendment doctrine supports these propositions.

Ralphs asks this Court to strike down two important statutes as facially unconstitutional, using reasoning that would invalidate many other state and federal laws, but refuses to explain whose First Amendment rights are violated or how. With good reason, Ralphs disavows the Third Appellate District's conclusion that Labor Code § 1138.1 and the Moscone Act infringe on *Ralphs's* First Amendment rights by compelling the company to accommodate speech. Nor does Ralphs assert that the statutes somehow burden other, hypothetical speakers' First Amendment rights. That position would also be untenable, since neither statute abridges speech.

Instead, Ralphs claims that Labor Code § 1138.1 and the Moscone Act violate the First Amendment because they interfere with its private property rights. At times, Ralphs suggests that the statutes constitute a taking under the Fifth Amendment. (Appellant's Answering Brief

("AAB"), at pp. 1-2, 13-14.) Elsewhere, Ralphs contends that the statutes violate the First Amendment because they interfere with its common-law property rights—"forcing us to allow labor-related expressive activities on our private property when we have the right to exclude all other expressive activities." (AAB, at 24-25 n. 21.)

This is creating new, far-reaching constitutional theories out of whole cloth. Ralphs has not challenged the statutes under the Takings Clause and would be unsuccessful if it did. (See *Pruneyard Shopping Center v. Robins* (1980) 447 U.S. 74, 84; *Snatchko v. Westfield LLC* (2010) 187 Cal.App.4th 469, 490.) It cannot graft this baseless theory onto a First Amendment claim. Nor does Ralphs have a First Amendment right to a common-law trespass cause of action.

The First Amendment and its California equivalent apply only to statutes that "abridge speech." Neither Labor Code § 1138.1 nor the Moscone Act restricts or compels anyone's speech. Nor does the First Amendment invalidate a purely procedural statute like Labor Code § 1138.1 merely because the statute might be invoked to limit a private party's remedy against speech. Ralphs argues that *Police Department of Chicago v. Mosley* (1972) 408 U.S. 92 and *Carey v. Brown* (1980) 447 U.S. 455 support its claim. But those two cases involved statutes that *prohibited* speech based on its content, a fact that was essential to the government's constitutional violation.

When confronted with the many state and federal laws that its constitutional theory would implicate, Ralphs protests that the "sky is not falling" (AAB, at p. 27), yet is unable to explain why its reasoning would not invalidate the Norris-LaGuardia Act, key aspects of the National Labor Relations Act ("NLRA"), statutory and judicial protections for journalists, evidentiary privileges, and many other statutes and judicial doctrines.

Because Labor Code § 1138.1 and the Moscone Act do not abridge speech in violation of the First Amendment, their classifications are not subject to strict scrutiny. Ralphs's request that the Court rewrite the statutes to apply only when a defendant has no other means to communicate with the public is therefore irrelevant. (See AAB, at pp. 30-38.) The statutes clearly meet the rational basis standard.

This Court also granted review on a second, analytically distinct question—the Union's right under California's Liberty of Speech Clause to engage in peaceful picketing on the sidewalk and parking lot fronting Ralphs's store. The Court correctly framed this second issue as whether the court below erred in concluding that walkways and parking lots fronting retail businesses in larger, *Pruneyard*-type shopping centers are categorically non-public.

In arguing that these spaces are not public forums, Ralphs plays fast and loose with semantics. It claims that it is a "stand-alone" store and "modest retail establishment," when in fact it is a "large warehouse grocery

store" that is physically connected to other retail stores and anchors a shopping center containing courtyards, outdoor seating areas, and an integrated scheme of walkways. (See *Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8* (2010) 186 Cal.App.4th 1078, 113 Cal.Rptr.3d 88, 94-95.) Ralphs cites to cases addressing fundamentally different situations—individual retail stores unconnected to any larger shopping center, medical facilities not open to the public, and speech not presenting a grievance against the targeted business.

The walkway and parking lot fronting Ralphs's store are the functional equivalent of the public streets and sidewalks that have traditionally been held open for peaceful speech and debate. Moreover, the Union used the walkway to protest Ralphs's business practices, and "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 Mall, LLC v. NLRB* (2007) 42 Cal.4th 850, 864.) Ralphs provides no basis for upending this settled precedent.

In the closing section of its brief, Ralphs states that it was just trying to hold the Union to reasonable time, place and manner restrictions that other organizations followed. This is both disingenuous and beside the point. Neither the Moscone Act nor Labor Code § 1138.1 prevents a storeowner from promulgating reasonable time, place and manner

restrictions. But the trial court found that Ralphs did not prove its restrictions were reasonable or evenhandedly enforced. Ralphs failed to introduce any evidence to justify prohibiting all expressive activity on at least 49 days of the year (including, for example, the entire week before Martin Luther King Jr. Day), for barring all expressive activity during intermittent times of the day, or for limiting organizations to two representatives. As the trial court found, none of the other individuals and organizations that used the store's walkways to communicate with the public followed Ralphs's unreasonable restrictions. Yet Ralphs sought to enforce its rules against the Union alone.

Like the decision below and the Fifth Appellate District's recent divided opinion,[1] Ralphs's brief fails to identify any First Amendment violation that could justify striking down Labor Code § 1138.1 or the Moscone Act. Ralphs believes that these laws are unfair and trench on its property interests, but this Court is not the proper audience for such claims. The Legislature—like Congress and many other states—has properly concluded that limiting the judicial role in labor disputes is a worthy goal. If Ralphs is dissatisfied, it must bring its complaint to the representative branch of government.

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[1] *Ralphs Grocery Company v. United Food & Commercial Workers Union Local 8* (2011) __ Cal.App.4th __, 120 Cal.Rptr.3d 878 ["*Fresno Ralphs*"]. Respondents have filed a petition for review of that case, in Supreme Court case No. S191251.

ARGUMENT

I. Neither Labor Code § 1138.1 Nor the Moscone Act Violates the First and Fourteenth Amendments.

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

Ralphs's challenge to Labor Code § 1138.1 is particularly ill-conceived. That statute does not regulate speech or make any content-based distinction between types of speech. It regulates court equity procedure in *any case* "arising or growing out of a labor dispute"—an extremely large category of cases. (Lab. Code § 1138.1(a).)[2]

Ralphs brings a facial challenge to Labor Code § 1138.1. (AAB, at p. 1.) But the Supreme Court has made clear "that a facial freedom of speech attack must fail unless, at a minimum, the challenged statute 'is directed narrowly and specifically at expression or conduct commonly associated with expression.' " (*Roulette v. City of Seattle* (9th Cir. 1996) 97 F.3d 300, 305 [quoting *City of Lakewood v. Plain Dealer Pub. Co.* (1988) 486 U.S. 750, 760].) Thus, "the Supreme Court has entertained facial freedom-of-expression challenges only against statutes that, 'by their terms,' sought to regulate 'spoken words,' or patently 'expressive or communicative conduct' such as picketing or handbilling." (*Roulette*,

[2] The term "labor dispute" is defined broadly. (Lab. Code § 1138.4; Code Civ. Proc. § 527.3(b)(4).)

supra, 97 F.3d at p. 303 [citing *Broadrick v. Oklahoma* (1973) 413 U.S. 601, 612-13]; see also *Arcadia Unified School Dist. v. State Dept. of Educ.* (1992) 2 Cal.4th 251, 267.)

For example, a statute prohibiting sitting on sidewalks is not subject to a facial First Amendment challenge merely because sitting is sometimes expressive. (*Roulette*, *supra*, 97 F.3d at p. 303.) Although gun possession can be expressive and some guns sold at gun shows are decorated with political messages, a facial challenge to a statute regulating gun sales will fail. (*Nordyke v. King* (9th Cir. 2003) 319 F.3d 1185, 1190.) For the same reason, a plaintiff may not bring a facial challenge to California statutes barring attorneys from disobeying court orders. (*Canatella v. Stovitz* (N.D. Cal. 2005) 365 F.Supp.2d 1064, 1072 ["While acts that would fall within the reach of these statutes might come in the form of speech or other expressive conduct, that is not enough to support a facial challenge."].)

Labor Code § 1138.1 is not directed "narrowly and specifically" at speech or expressive conduct—it sets forth rules of equity procedure that govern in any case arising from a labor dispute. Labor Code § 1138.1 contains identical language to that in the Norris-LaGuardia Act, 29 U.S.C. § 107. So like the federal law, it applies in situations that do not involve speech, such as when a union seeks an injunction to stop an employer from encumbering its capital assets (*Drivers, Chauffeurs Local 71 v. Akers Motor Lines, Inc.* (4th Cir. 1978) 582 F.2d 1336, 1341), when a party to a

collective bargaining agreement seeks to enjoin a pending arbitration (*Camping Const. Co. v. Dist. Council of Iron Workers* (9th Cir. 1990) 915 F.2d 1333, 1342-43; *AT&T Broadband, LLC v. IBEW* (7th Cir. 2003) 317 F.3d 758, 759-760), or when a union seeks an injunction requiring the employer to hire workers by seniority. (*District 29, United Mine Workers v. New Beckley Mining Corp.* (4th Cir. 1990) 895 F.2d 942, 945-47. See also *Waremart Foods v. United Food & Commercial Workers Union, Local 588* (2001) 87 Cal.App.4th 145, 158 [Labor Code § 1138.1 "places no limitations on the location or content of speech. It is, rather, a rule of procedure applicable to the obtaining of injunctive relief in state court and does not address speech[.]"].) Labor Code § 1138.1 is a restriction on court jurisdiction, not a regulation of private conduct.

Nor does the fact that Labor Code § 1138.1 might have some effect on expressive activity in particular cases make out a First Amendment challenge. The courts "have not traditionally subjected every criminal and civil sanction imposed through legal process to 'least restrictive means' scrutiny simply because each particular remedy will have some effect on the First Amendment activities of those subject to sanction." (*Arcara v. Cloud Books, Inc.* (1986) 478 U.S. 697, 706; *Bailey v. City of National City* (1991) 226 Cal.App.3d 1319, 1332; see also *Norton v. Ashcroft* (2d Cir. 2002) 298 F.3d 547, 553 ["[T]here is no disparate impact theory of the First Amendment."].)

Permitting Ralphs's facial challenge to Labor Code § 1138.1 would dramatically expand the scope of First Amendment review. Legislatures regularly prescribe court procedures and remedies in particular classes of cases and for particular litigants. (See, e.g., Code Civ. Proc. § 527.6 [procedures for restraining orders in cases involving harassment]; Code Civ. Proc. § 527.8 [procedures for injunctions in cases involving workplace violence]; Civ. Code § 1942.5, Code Civ. Proc. § 1159 *et seq.* [procedures for landlord-tenant disputes]; Family Code § 240 *et seq.* [procedures for restraining orders in divorce, child support, and domestic violence cases]; 42 U.S.C. § 1997e [procedures for prisoners seeking redress for prison circumstances].) Under Ralphs's view, such statutes are content discriminatory merely because they might make it easier or more difficult for a litigant to proceed in a case involving expressive activity.

Ralphs contends that Labor Code § 1138.1 substantively regulates speech because it "gives the Union a right to trespass onto private property to speak when no one else has a similar right." (AAB, at p. 30.) But Labor Code § 1138.1 confers no such right. It requires that the applicant demonstrate that "unlawful acts have been threatened and will be committed unless restrained," but does not substantively define what acts are considered "unlawful." (Lab. Code § 1138.1(a)(1).) If a defendant's entry onto private property is trespass under the law, then the applicant can meet this requirement and is entitled to an injunction if it meets the statute's

other requirements. The Third Appellate District's unsupported assertion that Labor Code § 1138.1 makes it "virtually impossible for a property owner to obtain injunctive relief" is baseless. (See, e.g., *San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters* (9th Cir. 1997) 125 F.3d 1230, 1236-39 [Norris-LaGuardia did not prevent injunction against union displaying banner near hospital entrance]; *Mott's LLP v. United Food & Commercial Workers* (N.D. Tex. August 5, 2010) No. 3:10-cv-01315, 188 L.R.R.M. 3352 [Norris-LaGuardia did not prevent injunction against union placing strike-related labels on products in grocery stores].)

Ralphs's theory is also inconsistent with the purpose of content-discrimination analysis. "The 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.' " (*R.A.V. v. St. Paul* (1992) 505 U.S. 377, 387 [internal citation omitted].) A statute regulating court procedure in a large class of cases that includes many wholly unrelated to speech does not threaten to "drive ideas from the marketplace." Labor Code § 1138.1—like the Norris-LaGuardia Act—was enacted to limit the judicial role in regulating labor disputes, not to censor particular ideas or viewpoints. (Respondent's Opening Brief ("ROB"), at pp. 21-33.)

B. Neither Labor Code § 1138.1 nor the Moscone Act abridges speech.

Ralphs's constitutional challenge is perverse. It claims that Labor Code § 1138.1 and the Moscone Act violate the First Amendment because they *limit* the ability that Ralphs—a private actor—would otherwise have to *restrict speech* through court action. No First Amendment doctrine supports this theory.[3]

The First Amendment's free-speech clause states that "Congress shall make no law . . . abridging the freedom of speech." (U.S. Const., amend. I.) "To abridge is 'to contract, to diminish, to deprive of.' T. Sheridan, A Complete Dictionary of the English Language (6th ed. 1796)." *National Endowment for the Arts v. Finley* (1998) 524 U.S. 569, 595 [Scalia, J., concurring].)

In certain circumstances, *government-compelled* speech can abridge the right *not* to speak. (*Wooley v. Maynard* (1977) 430 U.S. 705, 714.) But in the absence of government-compelled speech or a government restriction

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[3] The Fifth Appellate District, *sua sponte*, analyzed the statutes under California's Liberty of Speech Clause. (*Fresno Ralphs*, *supra*, 120 Cal.Rptr.3d at p. 885; see *Fresno Ralphs*, Petition for Review, Case No. S191251, at pp. 13-14.) That issue is not presented here. In any case, analysis under the First Amendment and under California's Liberty of Speech Clause is the same. Like the First Amendment, California's Constitution only bars acts that *restrain or abridge* speech. (Cal. Const., Art. I, sec. 2(a).) California's approach to content discrimination mirrors that under the federal Constitution. (*Los Angeles Alliance For Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 367-78; *Fashion Valley*, *supra*, 42 Cal.4th at pp. 865-69.)

on speech, a statute cannot violate the First Amendment. (*Los Angeles Police Dept. v. United Reporting Publishing Corp.* (1999) 528 U.S. 32, 40; *Ysursa v. Pocatello Educ. Assn.* (2009) 555 U.S. ___, 129 S.Ct. 1093, 1098; *Glickman v. Wileman Bros. & Elliott, Inc.* (1997) 521 U.S. 457, 469 [regulatory scheme that "imposes no restraint on the freedom . . . to communicate any message to any audience," that "do[es] not compel any person to engage in any actual or symbolic speech," and that does not compel the plaintiff "to endorse or to finance any political or ideological view" does not violate the First Amendment]; *U.S. West, Inc. v. FCC* (10th Cir. 1999) 182 F.3d 1224, 1232 ["As a threshold requirement for the application of the First Amendment, the government action must abridge or restrict protected speech."].)

Neither statute abridges speech. Neither restricts speech—the Moscone Act and Labor Code § 1138.1 (to the extent it is invoked in a case involving expressive activity) are speech-protective.

Nor do the statutes unconstitutionally compel speech. The Third Appellate District decided that the statutes violate Ralphs's First Amendment right to exclude speech from its property, citing compelled-speech cases. (*Ralphs*, *supra*, 113 Cal.Rptr.3d at pp. 92-93.) But commercial property owners like Ralphs have no such right. (*Pruneyard*, *supra*, 447 U.S. at p. 87; *Rumsfeld v. Forum for Academic & Inst. Rights* (2006) 547 U.S. 47, 65; *Snatchko*, *supra*, 187 Cal.App.4th at p. 490 [merely

hosting speech on commercial property "is not being compelled to espouse or respond to any particular message"].)

Ralphs rightly disavows the Third Appellate District's reasoning. (AAB, at pp. 24-25 fn.21; see *Fresno Ralphs*, *supra*, 120 Cal.Rptr.3d at p. 889 [Wiseman, P.J., dissenting] ["Despite multiple opportunities during briefing and oral argument, appellant has pointedly (and with good reason) *not* argued that its rights against compelled speech and association are implicated."].) But it is unable to explain how the statutes violate anyone else's First Amendment rights.

Other than the federal court's cursory and misguided discussion in *Waremart Foods v. NLRB* (D.C. Cir. 2004) 354 F.3d 870 (*D.C. Waremart*), Ralphs cannot cite any case in which a court has ruled a statute to be content-discriminatory—or to otherwise violate the First Amendment—where, as here, that statute did not compel or restrict speech. The random assortment of cases Ralphs cites confirm this—they all involved regulations that either burdened or compelled the plaintiff's speech.[4]

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[4] AAB, at p. 21 fn.17; *ARP Pharmacy Svcs. v. Gallagher Bassett Svcs.* (2006) 138 Cal.App.4th 1307, 1322 [regulatory requirement that drug claims processors publish statistical reports "burden[ed] the rights of drug claims processors not to speak on the subject"]; *Sund v. City of Wichita Falls* (N.D. Tex. 2000) 121 F.Supp.2d 530, 547 [regulation restricted First Amendment right to receive information]; *Vermont Soc. of Assn. Executives v. Milne* (2001) 172 Vt. 375, 385 ["distinct, independent tax singling out" lobbyists burdened their political speech]; *Natl. Advertising Co. v. City of Orange* (9th Cir. 1988) 861 F.2d 246, 249 ["Because the exceptions to the

Ralphs, like the court below, relies on *Mosley* and *Carey*, *supra*. (AAB, at pp. 16-18.) But those cases do not hold that a purely speech-protective statute is unconstitutional merely because its protection is not extended universally. *Mosley* and *Carey* both involved laws that *restricted* the plaintiff's speech through broad, content-based prohibitions. (ROB, at pp. 45-46; *Mosley*, *supra*, 408 U.S. at p. 99; *Carey*, *supra*, 447 U.S. at p. 462.) This fact was essential to the outcome of each case. In *Hill v. Colorado*, for example, the Court distinguished *Carey*, noting that in that case it had:

> explain[ed] that it was the fact that the statute placed a *prohibition* on discussion of particular topics, while others were allowed, that was constitutionally repugnant. . . . The Colorado statute's regulation of the location of protests, education, and counseling is easily distinguishable from *Carey*. It places no *restrictions* on—and clearly does not *prohibit*—either a particular viewpoint or any subject matter that may be discussed by a speaker.

(*Hill v. Colorado* (2000) 530 U.S. 703, 722-23 [emphasis added].)

Ralphs cannot dance around this fundamental problem with its theory by selectively quoting *Mosley*. Ralphs contends that *Mosley* struck down the challenged ordinance because it " 'describe[d] permissible

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[ordinance's] restriction on noncommercial speech are based on content, the restriction itself is based on content."].)

picketing in terms of its subject matter.' " (AAB, at p. 17 [quoting *Mosley*, *supra*, 408 U.S. at p. 95].) But what the Court in fact said was this:

> 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.

(*Mosley*, *supra*, 408 U.S. at p. 95 [emphasis added].)

The recent decision in *Best Friends Animal Society v. Macerich Westside Pavilion Property LLC* (2011) __ Cal.App.4th __, , 2011 WL 711584, applies *Mosley* and *Carey* under California's Constitution and further illustrates this difference. In *Best Friends*, an animal-rights organization challenged a mall's time, place and manner restrictions. (*Id.*, 2011 WL 711584 at pp. *1-2.) Under the mall's rules, noncommercial speech faced onerous restrictions—it could only take place in out-of-the-way areas, was banned altogether during blackout dates, and was required to cease when the store closest to the designated area was closed. (*Ibid.*) "Qualified" labor speech, by contrast, was not subject to these restrictions. (*Id.* at p. *1.) As in *Mosley* and *Carey*, the challenged rules *restricted* the plaintiff's speech, and these restrictions applied because of the content of that speech. (See *id.* at p. *9.) The court accordingly upheld an injunction

prohibiting the mall from enforcing its rules against non-commercial, non-labor speakers like the plaintiff. (*Id.* at p. *11.)

D.C. Waremart, *supra*, 354 F.3d 870, adds nothing to the analysis. There, the federal court predicted—in a single, conclusory paragraph—that this Court would interpret *Mosley* and *Carey* to invalidate the Moscone Act. (*Id.* at p. 875.) The court did not address any of the fundamental problems with this prediction described herein, such as the absence of any abridgement of speech. The decision has no bearing on Labor Code § 1138.1, which the court did not discuss. What little discussion the decision did contain focused on this Court's holding that the Moscone Act incorporates case law making picketing on private property affirmatively lawful. (*Id.* at pp. 875-76 [citing *Sears, Roebuck & Co. v. San Diego County Dist. Council* (1979) 25 Cal.3d 317].) The federal court concluded that the cases so holding—*Schwartz-Torrance Inv. Corp. v. Bakery & Confectionery Workers' Union* (1964) 61 Cal.2d 766 and *In re Lane* (1969) 71 Cal.2d 872—were no longer good law. But this Court re-affirmed those decisions three years later in *Fashion Valley*, *supra*, 42 Cal.4th at p. 864 & fn.6. *D.C. Waremart* was wrongly decided.

Ralphs argues, alternatively, that it does not matter that neither statute restricts speech because the "effect" of the statutes is that speech not involving a labor dispute may be more easily restricted on its property than speech involving a labor dispute. (AAB, at p. 18.) But it is *Ralphs*—not

the government—that seeks to exclude speech from its property, and *Ralphs* would do so by invoking common-law trespass and the courts' equity jurisdiction, not by invoking the statutes it challenges. (*Fresno Ralphs*, *supra*, 120 Cal.Rptr.3d. at p. 891 [Wiseman, P.J., dissenting] ["The state and federal Constitutions condemn the *suppression* of speech, not the *protection* of it. The hypothetical trespassing nonlabor speakers whose rights appellant is asserting would be silenced by laws relating to trespass and laws allowing the issuance of injunctions, not by the Moscone Act or Labor Code section 1138.1."].)[5] Neither Ralphs's invocation of common-law trespass nor its request for an injunction is state action under the First and Fourteenth Amendments. (ROB, at pp. 44-46.) The government is not restricting anyone's speech through Labor Code § 1138.1 or the Moscone Act.

C. The First Amendment does not protect Ralphs's property rights.

Ralphs refuses to say whose First Amendment rights the statutes violate. It rightly disavows the Third Appellate District's conclusion that Labor Code § 1138.1 and the Moscone Act compel it to speak. Ralphs suggests that the statutes might violate the rights of hypothetical speakers

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[5] Tellingly, when Ralphs discusses *who* seeks to restrict speech, it lapses into the passive voice. (AAB, at p. 21 [Moscone Act allows "Union representatives to enter onto Foods Co's private property . . . when entry *may* be forbidden to all other demonstrators . . ."], p. 26 ["entry *is forbidden* to all other demonstrators . . ."].)

who wish to demonstrate about non-labor matters. (AAB, at p. 30 fn.23.) But this theory is also baseless, since the statutes do not restrict such speakers from doing so and, in any case, Ralphs lacks standing to raise their constitutional claims. Ultimately, Ralphs settles on the untenable argument that the statutes are unconstitutional under the First Amendment because they interfere with its *property rights*.

The statutes do not restrict non-labor speakers from demonstrating on Ralphs's property. *Ralphs*, not the government, seeks to prohibit speech on its property, and it seeks to use trespass law and the courts' equity jurisdiction—not the challenged statutes—to do so. Furthermore, Ralphs does not have standing to raise hypothetical third parties' constitutional claims. "[A] charge of unconstitutional discrimination can only be raised in a case where this issue is involved in the determination of the action, and then only by the person or a member of the class of persons discriminated against." (*People v. Globe Grain & Mill Co.* (1930) 211 Cal. 121, 127-128; accord *People v. Garcia* (1999) 21 Cal.4th 1, 11 ["Defendant, in short, lacks standing to assert the equal protection claims of hypothetical felons who may be treated more harshly because their prior offenses were committed as juveniles."]; *Rubio v. Super. Ct.* (1979) 24 Cal.3d 93, 103; see also *Los Angeles Police Dept., supra*, 528 U.S. at pp. 40-41 ["To the extent that respondent's 'facial challenge' seeks to rely on the effect of the

statute on parties not before the Court . . . its claim does not fit within the case law allowing courts to entertain facial challenges."].)[6]

Unable to formulate a viable First Amendment theory, Ralphs presents a series of incoherent arguments about its property rights. According to Ralphs, Labor Code § 1138.1 and the Moscone Act violate the *First Amendment* because they interfere with its property rights under the *Fifth Amendment* and *common law*. Ralphs claims that the statutes are unconstitutional because they mean that "labor activity as a societal goal outweighs every property owner's Fifth Amendment rights." (AAB, at p. 14.) It asserts a "constitutional right" to a trespass cause of action because the statutes allegedly "interfere[] with the property owner's reasonable investment-backed expectations" and "constitute a taking of property prohibited by the Fifth Amendment." (*Id.* at p. 13.) Ralphs claims that the statutes are "constitutionally infirm" because they "forc[e] us to allow labor-related expressive activities on our private property when we have the right to exclude all other expressive activities." (*Id.* at 24-25 fn. 21.)

These arguments make no sense. Ralphs has not challenged the statutes under the Takings Clause and would be unsuccessful if it did.

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[6] On the issue of standing, Ralphs again cites irrelevant cases. (See AAB, at p. 30 n.23.) In *Sears*, *supra*, 25 Cal.3d 317, the property owner challenged the Moscone Act by asserting its *own* due process rights. In the other cited cases, the property owner had standing to assert a common-law trespass cause of action. (E.g., *Trader Joe's Co. v. Progressive Campaigns* (1999) 73 Cal.App.4th 425.) None of these cases supports Ralphs's standing to invoke the First Amendment rights of hypothetical third parties.

(*Pruneyard*, *supra*, 447 U.S. at p. 84 ["[T]he requirement that appellants permit appellees to exercise state-protected rights of free expression and petition on shopping center property clearly does not amount to an unconstitutional infringement of appellants' property rights under the Takings Clause.'"]; *Snatchko*, *supra*, 187 Cal.App.4th at p. 490.) It cannot graft this meritless claim onto a First Amendment challenge.

This Court is not being asked to weigh how "constitutionally mandated" First and Fifth Amendment rights might best "coexist." (AAB, at pp. 1-2.) The issue before the Court is whether Labor Code § 1138.1 and the Moscone Act abridge speech in facial violation of the First Amendment. The Fifth Amendment is irrelevant.

Nor does Ralphs have a First Amendment right to a uniform standard on injunctions in all cases or to a trespass cause of action against picketing. (ROB, at pp. 33-42.) This argument is indistinguishable from the First Amendment "right-to-exclude" challenge rejected by the Court in *Pruneyard*, *supra*, 447 U.S. at pp. 85-88. There is no constitutional right against targeted, speech-protective modifications to the common law. (*Werner v. So. Cal. Assoc. Newspapers* (1950) 35 Cal.2d 121, 130.)

No court has ever held that the First Amendment protects a private property owner's "right to exclude" under the common law or Takings Clause. Ralphs has invented this theory to obscure the fact that no First Amendment right is abridged in this case. (*Fresno Ralphs*, *supra*, 120

Cal.Rptr.3d at p. 889 [Wiseman, P.J., dissenting] ["Counsel's reference to the Fifth Amendment appears to be only an effort to mask the fact that appellant's constitutional rights are not implicated in this case."].)

D. Ralphs refuses to confront its constitutional theory's implications.

Ralphs claims that the Legislature is barred from enacting speech-protective statutes on anything other than a universal basis. The Union explained in its opening brief that accepting this theory would invalidate many long-standing state and federal laws. (ROB, at pp. 38-42.) Ralphs responds with empty rhetoric, claiming that "the sky is not falling" but refusing to confront its argument's implications. (AAB, at p. 27.)

There is no free-floating First Amendment principle that bars legislatures and courts from protecting particular forms of speech—they do so all the time. Judicially created free-speech protections are inherently content-based. "[S]peech on 'matters of public concern' . . . is "at the heart of the First Amendment's protection.'" (*Snyder v. Phelps* (2011) __ U.S. __, 131 S.Ct. 1207, 1215 [internal citations and quotations omitted].) "Accordingly, 'speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to *special protection.*'" (*Ibid.* [emphasis added, citing *Connick v. Myers* (1983) 461 U.S. 138, 145].) Courts dissect the content of speech to determine whether it is entitled to heightened protection from common-law torts such as

defamation (*New York Times Co. v. Sullivan* (1964) 376 U. S. 254) and intentional infliction of emotional distress (*Snyder, supra*, 131 S.Ct. at p. 1215; *Hustler Magazine, Inc. v. Falwell* (1988) 485 U.S. 46). Special protections apply to labor speech as well. (*Linn v. United Plant Guard Workers* (1966) 383 U.S. 53, 65; *Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 600.)

It is absurd to argue that these bedrock First Amendment cases in fact violate content-discrimination norms because they do not also extend special protection to speech about private matters or to non-labor speech. But Ralphs is contending that California's Legislature may not do what the judiciary regularly does—provide targeted protection against common-law torts to a class of speech based on its content.

Ralphs admits that state and federal Norris-LaGuardia Acts would be subject to strict scrutiny under its First Amendment theory, even though the U.S. Supreme Court has invoked the laws for decades and upheld them over an equal protection challenge nearly identical to Ralphs's First Amendment claim. (AAB, at p. 28; cf. *Senn v. Tile Layers Protective Union, Local 5* (1937) 301 U.S. 468, 482-83.)

But Ralphs then argues that its First Amendment theory has "no bearing on federal law where it is settled that there is no automatic exception to criminal trespass laws for labor speech." (AAB, at p. 28.) This argument is confused, for several reasons. First, Ralphs's theory does

not depend on whether the labor-related activity takes place on public or private property. According to Ralphs, the Legislature is prohibited from enacting *any* law that treats one form of speech differently from another. Ralphs bases this theory on *Mosley* and *Carey*, which both involved public sidewalks.

Second, Ralphs misunderstands federal labor law, which *does* create an exception to criminal trespass laws for labor speech. Ralphs contends that "[u]nder federal law, it is only where some unique circumstance prevents nontrespassory methods of communication with employees . . . that a labor dispute may legally spill over onto private property." (AAB, at p. 28.) But this is wrong. Ralphs cites to two cases—*Lechmere, Inc. v. NLRB* (1992) 502 U.S. 527, 531-535 and *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112—that interpreted the NLRA to limit access rights of *non-employee union organizers*.[7] But these cases do not apply to *employees* when they access their employer's property to organize a union. Federal labor law abrogates common-law trespass and requires employers to grant employees worksite access to discuss unionization, but not other topics. (*Republic Aviation Corp. v. NLRB* (1945) 324 U.S. 793; *Beth Israel*

[7] A third cited case, *Thornhill v. Alabama* (1940) 310 U.S. 88, stands for the opposite of Ralphs's proposition. There, the Supreme Court struck down a state law that effectively criminalized picketing an employer's "premises or place of business." (*Id.* at p. 91.) The Supreme Court held the statute facially unconstitutional in a case in which the picketing took place on private property. (*Id.* at p. 106.)

Hosp. v. NLRB (1978) 437 U.S. 483, 491; see also *Lechmere*, *supra*, 502 U.S. at p. 537 [distinguishing employee from non-employee organizers].)[8] Under Ralphs's novel theory, this central feature of the NLRA—invoked by the Supreme Court and National Labor Relations Board for more than a half-century—is in fact unconstitutional.

Ralphs avoids discussing the many other targeted state and federal speech protections that would be caught up in its constitutional dragnet—evidentiary privileges that protect speech by doctors, journalists, and other professionals; whistleblower statutes; the anti-SLAPP statute; tenant protections; and much else. (See ROB, at pp. 38-44.) Its position, apparently, is that these laws should also face strict scrutiny.

Ralphs's constitutional theory is unreasonable and destabilizing. It does not comport with the First Amendment's plain language or with any existing First Amendment doctrine. This Court should reject it.

E. Ralphs's exegesis on non-employee union organizers' NLRA access rights is irrelevant.

Ralphs asks this Court to rewrite the Moscone Act and Labor Code § 1138.1, applying a "least restrictive means" test to limit the statutes' scope.

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[8] The Union has previously explained that Ralphs's characterization of federal labor law is mistaken. (Petition for Review, Reply Brief, at p. 8.) Ralphs has neither corrected its presentation—which it repeats *verbatim*—nor explained how its characterization can be squared with *Republic Aviation* and its progeny.

(AAB, at pp. 30-38.) This discussion is irrelevant because the statutes are not subject to strict scrutiny.

Ralphs is confused about the process of constitutional review. It requests that "even if this Court declines Foods Co's invitation to adopt *D.C. Waremart's* conclusions, it should at a minimum find that the survival of the Moscone Act and section 1138.1 depend on a narrow reading that would apply those statutes only when there is no other reasonable, practical or feasible means for a union to express its views to an employer's customers." (AAB, at p. 32.) But neither statute is content discriminatory under the First Amendment and so neither is subject to strict scrutiny. Both statutes pass rational basis review—the Legislature rationally concluded that limiting judicial involvement in labor disputes is a worthy goal. (*Sears*, *supra*, 25 Cal.3d at p. 332; ROB, at pp. 21-33.) Ralphs does not argue otherwise.

Ralphs confounds judicial review of popularly enacted statutes under the First Amendment with this Court's interpretation of California's Liberty of Speech Clause. It asks this Court to adopt federal law interpreting the NLRA and limit the Moscone Act and Labor Code § 1138.1 to situations in which a union has no other feasible means of communicating. But California's Legislature—through the Moscone Act—has established a different substantive rule governing speech on private property. There is no basis in the Moscone Act's text for limiting it to situations in which a union

lacks alternative means of communication. Ralphs's request makes even less sense when applied to Labor Code § 1138.1, which governs equity procedure and contains no substantive rules on property access or expression.

This Court does not sit as a super-legislator. As Justice Wiseman, dissenting from the Fifth Appellate District's decision, stated: "Unlike in *Robins v. Pruneyard and Fashion Valley Mall*, in which the outcome depended only upon the Supreme Court's interpretation of the state Constitution, here there is a legislative judgment which requires deference unless binding authority compels its invalidation. There is simply no binding authority compelling invalidation of the statutes challenged here." (*Fresno Ralphs*, *supra*, 120 Cal.Rptr.3d at p. 892 [Wiseman, P.J., dissenting].) The proper audience for Ralphs's complaint is the Legislature, not this Court.

II. The Walkways And Parking Lot Fronting The Store Are *Pruneyard* Forums.

The Court should resolve this case solely under the Moscone Act and Labor Code § 1138.1, which the trial courts in the Third and Fifth Appellate Districts correctly applied to deny Ralphs a preliminary injunction. (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 230 [" '[T]his Court will not decide constitutional questions where other grounds are available and dispositive

of the issues of the case.' "] [quoting *Palermo v. Stockton Theaters, Inc.* (1948) 32 Cal.2d 53, 66].)

If the Court does address Ralphs's argument under California's Liberty of Speech Clause, it should confirm that Californians have a right to protest against the business practices of large retail stores in shopping centers like College Square. While Ralphs characterizes such a holding as a "leap of logic," it is not. (See AAB, at p. 11.) It is a position that this Court has consistently maintained for nearly 50 years. (See *Fashion Valley*, *supra*, 42 Cal.4th at p. 864.) Ralphs is asking this Court to break with settled precedent, not to extend it.

A. Foods Co is neither a "stand-alone store" nor a "modest retail establishment."

The court below recognized College Square as a *Pruneyard*-type shopping center, with "common areas and restaurants where outdoor seating was available[.]" (*Ralphs*, *supra*, 113 Cal.Rptr.3d at p. 98.) But it held that even a large retail store within such a shopping center can prohibit all speech on the sidewalks fronting its store because sidewalks are "not designed and presented to the public as public meeting places." (*Ibid.*) Under the Third Appellate District's view, large retailers may go beyond *limiting* speech on their sidewalks through reasonable time, place and manner restrictions, and may declare speech to be categorically off-limits.

Ralphs takes a different tack. It claims that it is a "modest retail establishment" and a "stand-alone store," and so falls within the exception set forth in *Robins v. Pruneyard Shopping Ctr.* (1979) 23 Cal.3d 899, 910-11. (AAB, at pp. 6, 13.) It also disputes that College Square is a *Pruneyard*-type shopping center, claiming that this Court's characterization of the issue presented is "mistaken insofar as it appears to assume that Foods Co's College Square store is located in a *Pruneyard*-type shopping center." (AAB, at p. 13.)

But the Third Appellate District recognized that Ralphs is a "large warehouse grocery store," physically connected to other retail stores and anchoring a shopping center containing courtyards, outdoor seating areas, and an integrated scheme of walkways. (See *Ralphs*, *supra*, 113 Cal.Rptr.3d at pp. 94-95.) Foods Co is neither a "modest retail establishment" nor a stand-alone store. (*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].) College Square, like the Pruneyard Shopping Center, invites the public not just to shop but to dine in its restaurants and congregate in its common areas. Outdoor, community shopping centers

like College Square—rather than indoor regional malls—are increasingly the norm in California's communities. (ROB, at p. 54.)[9]

In support of its claim that its store is simply a "modest retail establishment," Ralphs cites inapposite cases. Many of these cases involved banks and medical centers, which are not *Pruneyard* forums because they are not generally open to the public. (AAB, at p. 6. fn.4.) Other cases involved true stand-alone stores that were unconnected to any larger shopping center. (*Ibid.* [citing *Trader Joe's*, *supra*, 73 Cal.App.4th at pp. 438-39; *Costco Co. v. Gallant* (2002) 96 Cal.App.4th 740, 755].)

Two decisions bear a superficial resemblance to this case—*Albertson's, Inc. v. Young* (2003) 107 Cal.App.4th 106 and *Van v. Target Corp.* (2007) 155 Cal.App.4th 1375.[10] But those cases do not support Ralphs's position. In *Albertson's*, the court held that a supermarket's location in a larger shopping center did not make it a *Pruneyard* forum because, unlike College Square, the shopping center had "no enclosed walkways, plazas, courtyards, picnic areas, gardens, or other areas that might invite the public to congregate[.]" (*Albertson's*, *supra*, 107

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[9] Although College Square is smaller than the Pruneyard Center, there is no evidence that it is a marginal shopping center. Ralphs claims that College Square "doesn't have 25,000 visitors a week, let alone in a day," but there is no evidence in the record to support this claim. (See AAB, at p. 5.)

[10] Federal courts interpreting California law have concluded that grocery stores in shopping centers like College Square are *Pruneyard* forums. (ROB, at p. 57.)

Cal.App.4th at p. 733.) Furthermore, neither *Albertson's* nor *Van* involved speech that directed a grievance against the business targeted, as both courts stressed. (*Id.* at pp. 734-35 [distinguishing *In re Lane* (1969) 71 Cal.2d 872 because it "involved expressive activity specifically related to the business use of the property. . . a matter of distinctive significance"]; *Van*, *supra*, 155 Cal.App.4th at p. 1389 ["[W]e see no relationship between the ideas sought to be presented and the purpose of the property's occupants."].)

There is no reason for speech rights to be treated worse under *Pruneyard* when exercised in community shopping centers like College Square than when exercised in indoor malls. There is no basis for categorically excluding a shopping center's sidewalks and parking lots from California's Liberty of Speech Clause. The Union—like the vendors, missionaries, and political organizations who also communicated with the public in front of the Foods Co store—rightly saw these spaces as public forums.

B. The Union seeks to protest against Ralphs.

This might be a more difficult case if the Union were not demonstrating against Ralphs's business practices. 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.) Accordingly, demonstrators criticizing a large retailer like Ralphs have a right to do so from the sidewalk fronting the store. (*In re Lane*, *supra*, 71 Cal.2d at p. 878; *Schwartz-Torrance*, *supra*, 61 Cal.2d at pp. 769-71; *Fashion Valley*, *supra*, 42 Cal.4th at p. 864 ["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."].)

The reason is simple: "on-the-spot public criticism" of business practices is a fundamental form of speech that depends largely on physical proximity to the targeted business to be effective. (*Id.* at p. 860; *Diamond v. Bland* (1970) 3 Cal.3d 653, 662; see also *Best Friends*, *supra*, 2011 WL 711584 at p. *8 ("[I]t is a general proposition that a shopping mall must allow protests within aural and visual range of a targeted business whenever the mall is open to the public."].)[11]

This does not mean that Ralphs could not promulgate time, place and manner rules limiting the Union's and other speakers' location within College Square. But in order for such rules to be valid, Ralphs would have to present compelling evidence that they were necessary for some purpose

[11] Speech advocating a boycott is also at the heart of our national experience. (ROB, at pp. 59-60; *Fashion Valley*, *supra*, 42 Cal.4th at p. 869.)

other than preventing the Union's boycott from interfering with its sales—such as problems with ingress and egress in front of its store. (*Fashion Valley*, *supra*, 42 Cal.4th at p. 869.) As explained below, no such evidence exists.

The Third Appellate District's rule that the sidewalks and parking lots fronting large retailers like Foods Co are categorically non-public under California's Constitution—even when used to criticize the targeted retailer—is contrary to this Court's precedent. It would effectively end on-the-spot criticism of businesses located outside of California's central business districts.

III. Ralphs's Time, Place and Manner Restrictions Are Unreasonable and Were Discriminatorily Enforced.

In a final gambit, Ralphs claims that this is merely a dispute over whether it may enjoin the Union from violating reasonable time, place and manner restrictions. (AAB, at pp. 38-47.) This is disingenuous. Nothing in the Moscone Act or Labor Code § 1138.1 prevents Ralphs from enforcing such rules. But Ralphs's restrictions are unreasonable and discriminatorily enforced.

The Moscone Act does not prevent Ralphs from enforcing reasonable time, place and manner restrictions to "prevent activities that obstruct or unreasonably interfere with free ingress and egress, and which will interfere with the normal use of the property by others with an equal

right of access." (Cf. AAB, at p. 41-42 fn.29; Code Civ. Proc. § 527.3(e) ["It is not the intent of this section to permit . . . the unlawful blocking of access or egress to premises where a labor dispute exists, or other similar unlawful activity."]; *M Restaurants v. San Francisco Local Joint Exec. Bd.* (1981) 124 Cal.App.3d 666, 681-686 [upholding under Moscone Act an injunction against picketing that blocked ingress and egress to restaurant].) Nor does Labor Code § 1138.1 prevent Ralphs from enforcing such rules—a violation of reasonable time, place and manner restrictions would satisfy the "unlawful acts" prong of that statute. (Lab. Code § 1138.1(a)(1).)

The trial court held as an evidentiary matter that Ralphs applied its restrictions discriminatorily and had "failed to carry its burden of proof that its rules are reasonable time, place and manner restrictions within the guidelines of *Fashion Valley Mall LLC v. NLRB*[.]" (3 JA 0640.) The Third Appellate District agreed, finding it necessary to address the store's status as a public forum because "if the front entrance and apron of the Foods Co store are 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." (*Ralphs*, *supra*, 113 Cal.Rptr.3d at p. 97 [emphasis added].) Ralphs's claim that neither the trial nor appellate court addressed the restrictions is bizarre. (Cf. AAB, at p. 42.)

If the Court is inclined to address this issue, it should affirm the lower courts' determinations. Because Ralphs discriminatorily applied its restrictions to the Union's speech, the restrictions are subject to strict scrutiny. (*Fashion Valley*, *supra*, 42 Cal.4th at pp. 865-66.) Even if Ralphs had applied the restrictions even-handedly, it was required to demonstrate that they are "narrowly tailored" and "leave[] open ample alternative avenues of communication." (*Id.* at p. 865; *Snatchko*, *supra*, 187 Cal.App.4th at p. 491.) Ralphs did not submit any competent evidence to the trial court demonstrating that restrictions barring all expressive activity during the entire weeks before Labor Day and six other holidays; limiting organizations to two representatives; and proscribing speech intermittently for over five hours each day were necessary to "avoid congestion and traffic problems" at the store. (AAB, at p. 45.)

Ralphs relies on a declaration from one of its corporate officers reciting the general purpose of the restrictions. (AAB, at p. 46 [citing 2 JA 259].) The Union objected to this declaration, and the trial court did not admit it. (2 JA 0316) In any case, this conclusory statement—which was not specific to the Sacramento store—is not competent evidence to demonstrate that the restrictions are narrowly tailored. (*Best Friends*, *supra*, 2011 WL 711584 at p. *8 [defendant may not justify blackout dates as a " 'common sense' measure to decrease crowding during peak times" without providing evidence that "less restrictive alternatives would not

promote the same interest"]; *Kuba v. Marine World Joint Powers Auth.* (E.D. Cal. 2006) 2006 WL 1376837, at *5 [although defendants' "interest in orderly crowd control may be significant," court may not uphold time, place and manner restrictions where "defendants have not presented any evidence to establish the strength of this interest"].)

Ralphs's desire to "ensure that [the Union] do[es] not interfere with the store's raison d'être—selling wares to its customers" is not a legitimate interest justifying peak-time restrictions on a boycott. (AAB, at p. 42; cf. *Fashion Valley*, *supra*, 42 Cal.4th at p. 869; *Snatchko*, *supra*, 187 Cal.App.4th at p. 489 ["shopping mall's business interest in ensuring its shopping customer's convenience and undisturbed comfort in order to prevent loss of customers and maximize profit" is not a compelling interest]; *United Bhd. of Carpenters Local 586 v. NLRB* (9th Cir. 2008) 540 F.3d 957, 973 ["Limiting expressive activity to non-peak times eliminates the opportunity to comment upon or criticize—directly and in-person—tenants' actions . . . and forecloses any chance of effectively reaching a large percentage of the target audience."].

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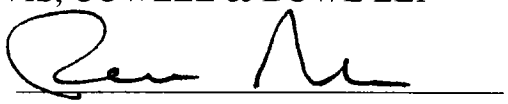
CONCLUSION

The Legislature enacted the Moscone Act and Labor Code § 1138.1 to limit California courts' role in regulating labor disputes. The Third Appellate District warped content-discrimination doctrine and arrogated to itself the legislative function. It unnecessarily addressed the application of the Liberty of Speech Clause to College Square's sidewalks, and then ignored this Court's consistent holding that California's citizens have a right to protest a large retailer's business practices from a shopping center's sidewalks. This Court should reverse.

Dated: March 22, 2011

Respectfully submitted,

DAVIS, COWELL & BOWE LLP

By: 

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, counsel hereby certifies that the above brief is produced using 13 point Times New Roman font, with 13-point and 14-point Cambria font for the headers, and contains 8,304 words, including footnotes, and excluding the cover, the signature block and this certificate. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: March 22, 2011

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PROOF OF SERVICE

Re: Case Number: S185544
Third Appellate No. C060413
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 March 22, 2011, I served the attached document described as **REPLY 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 declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and was executed on this 22nd day of March, 2011 at San Francisco, California.

Miriam I. Tom