No. 12-1162

In The
Supreme Court of the United States

RALPHS GROCERY COMPANY,

Petitioner,

v.

UNITED FOOD AND COMMERCIAL
WORKERS UNION LOCAL 8,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether California Labor Code § 1138.1 – which is modeled *verbatim* on the federal Norris-LaGuardia Act, 29 U.S.C. § 107 – violates the First and Fourteenth Amendments to the U.S. Constitution because it places restrictions on the authority of state courts to issue injunctions in cases "involving or growing out of a labor dispute."

2. Whether the Moscone Act (California Code of Civil Procedure § 527.3) "abridges" speech in violation of the First and Fourteenth Amendments because it prohibits state courts from issuing injunctions against peacefully "communicating information regarding the existence of, or the facts involved in, any labor dispute" on the sidewalks in front of retail stores.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties are as stated in the caption. United Food and Commercial Workers Union Local 8 ("UFCW") has no parent corporation, and there is no publicly held corporation holding 10% or more of its stock.

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JURISDICTION

Petitioner Ralphs Grocery Company ("Ralphs") invokes this Court's jurisdiction under 28 U.S.C. § 1257(a). But the questions presented in the petition are not justiciable. Ralphs lacks third-party standing to claim that the Moscone Act and California Labor Code § 1138.1 violate the First and Fourteenth Amendment rights of speakers who are not before the Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment and Section 1 of the Fourteenth Amendment to the U.S. Constitution; California Civil Procedure Code § 527.3 (the "Moscone Act"); and Section 1138.1 of the California Labor Code ("Section 1138.1").

Ralphs incorrectly states that the Fifth Amendment to the U.S. Constitution is involved in this petition. The petition lacks the required "specification of the stage in the proceedings, both in the court of first instance and in the appellate courts" when Ralphs alleges it raised a Fifth Amendment challenge to the statutes. Sup. Ct. R. 14.1(g)(i). In fact, Ralphs did not argue below that Section 1138.1 or the Moscone Act violates the Fifth Amendment's Takings Clause, and the California Supreme Court did not rule on such a claim.

STATEMENT OF THE CASE

1. Legal Background.

Congress passed the Norris-LaGuardia 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.*, 362 U.S. 365, 369 n.7 (1960). The Act insulates nine categories of activity from any type of federal-court injunction, including peacefully publicizing a labor dispute. 29 U.S.C. § 104. For conduct still subject to the courts' jurisdiction, Norris-LaGuardia sets forth requirements that litigants must meet before a court issues an injunction. 29 U.S.C. § 107. Shortly after its passage, this Court upheld the Norris-LaGuardia Act, 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.*, 303 U.S. 323, 330 (1938).

Subsequently, many states passed so-called "Little Norris-LaGuardia Acts," withdrawing or limiting their state courts' equity jurisdiction in labor disputes.[1] In 1937, this Court upheld Wisconsin's

[1] *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.

(Continued on following page)

Little Norris-LaGuardia Act. *Senn v. Tile Layers Protective Union, Local No. 5*, 301 U.S. 468 (1937). Like the Moscone Act, Wisconsin's statute stated that "giving publicity to" a labor dispute and "peacefully picketing or patrolling" during a labor dispute "shall be legal." *Id*. at 472. The Court rejected an equal-protection challenge similar to Ralphs' – that the state's denial of an injunctive remedy on an unequal basis violated the Constitution. *Id*. at 482-83 ("One has no constitutional right to a 'remedy' against the lawful conduct of another.").

California did not immediately adopt its own Little Norris-LaGuardia Act. Its state courts continued to issue injunctions against peaceful conduct during labor disputes, often *ex parte* and on the basis of hearsay. *United Farm Workers of Am. AFL-CIO v. Sup. Ct.*, 14 Cal.3d 902, 908, 913 (Cal. 1975); Benjamin Aaron, *Labor Injunctions in the State Courts – Part II: A Critique*, 50 Va. L. Rev. 1147, 1157-58 (1965).

California's Legislature responded in 1975 by passing the Moscone Act. The statute is modeled on section 4 of Norris-LaGuardia, 29 U.S.C. § 104. Like that section, the Moscone Act lists activities that courts may not enjoin, including "[g]iving publicity to,

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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*.

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[.]" Cal. Civ. P. Code § 527.3(b)(1). The Act does not protect "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." Cal. Civ. P. Code § 527.3(e).

Four years later, the California Supreme Court interpreted the Moscone Act's scope and upheld it over constitutional challenge in *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 25 Cal.3d 317, 599 P.2d 676 (Cal. 1979). The Court interpreted the Act to incorporate statutorily the Court's holdings in *Schwartz-Torrance Inv. Corp. v. Bakery & Confectionery Workers' Union, Local No. 31*, 61 Cal.2d 766, 394 P.2d 921 (Cal. 1964) and *In re Lane*, 71 Cal.2d 872, 457 P.2d 561 (Cal. 1969) that protestors during labor disputes have a right to peacefully picket and handbill on private property open to the public, including on retailers' sidewalks. *Sears*, 25 Cal.3d at 325-29; *id*. at 332 ("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."). The Moscone Act thus both limits state-court equity jurisdiction and creates a limited, substantive exception to state trespass law.

In 1999, the California Legislature adopted Section 1138.1, which tracks nearly word-for-word section 7 of Norris-LaGuardia, 29 U.S.C. § 107. Like Norris-LaGuardia, Section 1138.1 states that no court may issue an injunction in a case "involving or growing out of a labor dispute" unless evidence 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.

Cal. Lab. Code § 1138.1(a); *cf.* 29 U.S.C. § 107. Section 1138.1 is a purely procedural statute; it does not alter state substantive law.

2. Factual Background and Decisions Below.

Shortly after Ralphs' Foods Co store in Sacramento opened, members of UFCW began picketing and handbilling on the store's sidewalk. They publicized the fact that the store is non-union and does not provide its employees family health-care benefits. Pet., at 3a; C.A. J.A. 0489. Union demonstrators shared the sidewalk with many other speakers – vendors, religious proselytizers, political petition signature gatherers. Pet., at 78a-79a, 116a; C.A. J.A. 0498-0507. The picketers did not impede customer access to the store. Pet., at 3a.

There is no evidence that union picketers harassed any customer. Ralphs cites the trial-court testimony of its managers, who claimed that some customers said they were uncomfortable with the picketers' presence. Pet., at 8-9. But the trial court excluded this evidence as hearsay. J.A. C.A. 0559-0560 ("[UNION COUNSEL]: Objection, Your Honor. This is all hearsay. THE COURT: Sustained."). Ralphs did not challenge this evidentiary ruling, and should not have cited excluded evidence as fact in its petition.[2]

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[2] *Amici* California Grocers Association, *et al.*, claim in their brief that in California "handbillers and organizers" erect "human barriers" in front of store entrances, "stand in front of large trucks to . . . back up traffic in the streets," and roam around unchecked through "the interior premises of healthcare facilities." Amicus Br. of the California Grocers Association, *et al.*, at 5. *Amici* provide no support for these wild claims. Nothing

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More than six months after the union picketing began, Ralphs adopted restrictive rules governing speech on its sidewalks, including a ban on speech anywhere near the store's entrance. Pet., at 3a. Ralphs sought to enforce these rules against UFCW alone. Pet., at 116a. In 2008, it filed a complaint against the Union and moved for a preliminary injunction. Pet., at 4a, 116a.

Before the trial court, Ralphs argued that Section 1138.1 and the Moscone Act facially violated the First and Fourteenth Amendments because they were content-discriminatory. None of Ralphs' trial-court briefs made any claim that the Moscone Act or Section 1138.1 violated the Takings Clause, or mentioned the Fifth Amendment at all. C.A. J.A. 0029-0030, 0180-0183, 0249-0251, 0410-0415, 0529-0533.

The trial court held an evidentiary hearing on Ralphs' motion for a preliminary injunction, as required by Section 1138.1(a). Pet., at 114a. The court ruled that Ralphs "failed to introduce evidence sufficient to carry its burden on any of the factors enumerated in section 1138.1" and therefore denied the motion. Pet., at 115a. It also held that the speech regulations that Ralphs adopted were unreasonable and had been discriminatorily applied to the Union. Pet., at 116a.

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remotely similar is involved in this case. The conduct that *amici* describe, if it were to occur, would be unprotected by the Moscone Act. *See* Cal. Civ. P. Code § 527.3(e).

Ralphs appealed from the denial of the preliminary injunction. Before the intermediate appellate court, Ralphs did not dispute that it had failed to meet Section 1138.1's requirements. Instead, it argued that Section 1138.1 and the Moscone Act "constitute[ ] content-based discrimination in violation of the First Amendment." Ralphs also challenged the trial court's conclusion that the sidewalks in front of its entrance were a public forum under the California Constitution's Liberty of Speech Clause. Ralphs made no mention of the Fifth Amendment in its briefing.

The appellate court reversed the trial court's grant of a preliminary injunction, concluding that both statutes "violate[ ] the First and Fourteenth Amendments to the United States Constitution." Pet., at 71a. It based this conclusion on an analogy to *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972) and *Carey v. Brown*, 447 U.S. 455 (1980). Although Ralphs had not argued such a theory, the appellate court cited this Court's compelled-speech cases and decided that the statutes violated the First Amendment because they forced Ralphs to "host or accommodate another speaker's message[.]" Pet., at 72a, 92a, 103a. The appellate court failed to cite or distinguish *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 85 (1980), which rejected the argument that a shopping center 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."

UFCW petitioned for review in the California Supreme Court. The federal constitutional question

presented was whether Section 1138.1 and the Moscone Act "violate the free speech guarantee of the federal Constitution's First Amendment and the equal protection guarantee of the federal Constitution's Fourteenth Amendment." Pet., at 2a.

In its answering brief before the California Supreme Court, Ralphs mentioned the Takings Clause for the first time. In a half-page passage, Ralphs argued that it had a Fifth Amendment "right to prohibit all expressive activity on its premises," and cited *Pruneyard*, 447 U.S. at 82-84, although that case held the opposite. Ralphs' Answer Br. on Merits, at 13. Ralphs cited the Fifth Amendment as part of its claim that its store was not a public forum under California's Constitution, not as part of its challenge to the Moscone Act or Section 1138.1. Ralphs' sole basis for challenging the statutes was that they violated the First and Fourteenth Amendments. Ralphs did not present any argument that the statutes violated its right against compelled speech and expressly waived this claim. Ralphs' Answer Br. on Merits, at 24 n.21.

The California Supreme Court reversed the intermediate appellate court. It agreed that the sidewalks immediately in front of the grocery store's entrance were not a public forum under California's Constitution. Pet., at 11a. But it rejected Ralphs' argument that Section 1138.1 and the Moscone Act violated the First and Fourteenth Amendments. Pet., at 31a. The California Supreme Court recognized that "neither the Moscone Act nor section 1138.1 restricts

speech, and the speech at issue here occurred on private property that is not a public forum for purposes of the federal Constitution's free speech guarantee[.]" Pet., at 23a.

The Court did not understand Ralphs to have challenged the statutes under the Takings Clause, because it did not mention the Fifth Amendment in its decision. Having held the statutes constitutional, it remanded the case to the Court of Appeal for further proceedings.

Two Justices filed concurring opinions, putting their glosses on the majority decision. Pet., at 32a-39a, 39a-64a. A lone Justice dissented, but even he admitted that "[t]hese statutory provisions are probably constitutional on their face." Pet., at 66a. The dissenting Justice would have remanded to determine whether Ralphs might be able to raise an as-applied challenge. *Ibid.*

REASONS FOR DENYING THE PETITION

I. The Constitutionality of Section 1138.1 and the Moscone Act Do Not Present Questions Worthy of Certiorari.

Although Ralphs seeks to lump them together, Section 1138.1 and the Moscone Act are distinct statutes. Neither statute presents any significant First or Fourteenth Amendment issue. But they should be analyzed separately.

A. Ralphs Does Not Claim Any Conflict Between Courts Involving Section 1138.1.

There is no conflict between the California Supreme Court's ruling that Section 1138.1 is constitutional and any decision of this Court, another state supreme court, or any federal circuit court.

Ralphs stakes its petition on an alleged conflict between the California Supreme Court's decision and *Waremart Foods v. NLRB*, 354 F.3d 870 (D.C. Cir. 2004). Pet., at 21-23. But Section 1138.1 was not addressed or discussed in *Waremart Foods*, only the Moscone Act was. The only courts to have held Section 1138.1 unconstitutional are the intermediate appellate courts that the California Supreme Court reversed.

Nor does Section 1138.1 even remotely conflict with *Mosley*, 408 U.S. 92 or *Carey,* 447 U.S. 455. Those cases involved statutes and ordinances that expressly prohibited speech in a traditional public forum – a public sidewalk – based on the speech's content. *Mosley*, 408 U.S. at 92-93, 99; *Carey*, 447 U.S. at 462. In *Mosley*, the Chicago ordinance prohibited all picketing that was not labor-related on the sidewalks in the vicinity of a school. In *Carey*, the state statute barred all picketing that was not labor-related on public sidewalks in residential areas. Section 1138.1, by contrast, is a procedural statute that makes no reference to speech at all and does not abridge anyone's speech. Instead, it establishes

requirements that state courts must follow in any case "arising or growing out of a labor dispute." Cal. Lab. Code § 1138.1(a).

B. Section 1138.1 Is Modeled *Verbatim* on the Norris-LaGuardia Act and Does Not Violate the First and Fourteenth Amendments.

Section 1138.1's factors for obtaining an injunction in California's courts during a labor dispute are indistinguishable from the Norris-LaGuardia Act's requirements for obtaining an injunction in the federal courts, 29 U.S.C. § 107. Both the state and federal statutory provisions are content-neutral on their face. They make no reference to speech or to the content of speech. They apply to any "*case* involving or growing out of a labor dispute," Cal. Lab. Code § 1138.1(a); 29 U.S.C. § 101 (emphasis added), and thus distinguish between categories of cases, not categories of speech. Ralphs misrepresents the statute when it argues that Section 1138.1 "single[s] out labor speech for favored status." Pet., at 17.

Section 1138.1, like the Norris-LaGuardia Act, applies by its terms to many types of cases that do not involve expressive activity. *See, e.g., Drivers, Chauffeurs, Warehousemen, and Helpers Teamsters Local Union No. 71 v. Akers Motor Lines, Inc.*, 582 F.2d 1336, 1340-41 (4th Cir. 1978) (Norris-LaGuardia Act applied where union sought injunction to stop employer from encumbering its capital assets);

Camping Const. Co. v. Dist. Council of Iron Workers, 915 F.2d 1333, 1342-43 (9th Cir. 1990)), *cert. denied*, 500 U.S. 905 & 500 U.S. 953 (Norris-LaGuardia applied where party to a collective-bargaining agreement sought to enjoin a pending arbitration); *AT&T Broadband, LLC v. Int'l Bhd. of Elec. Workers*, 317 F.3d 758, 759-60 (7th Cir. 2003) (same); *District 29, United Mine Workers of Am. v. New Beckley Mining Corp.*, 895 F.2d 942, 945-47 (4th Cir. 1990) (Norris-LaGuardia barred union from seeking injunction requiring the employer to hire workers by seniority); *Amalgamated Local 813, Int'l Union v. Diebold, Inc.*, 605 F.Supp. 32, 34-35, 38 (N.D. Ohio 1984) (Norris-LaGuardia barred court from granting union an injunction to prevent layoffs).

Even when expressive activity is involved, Section 1138.1's requirements for injunctive relief apply regardless of the speech's content – regardless, for example, of whether the speech relates directly to employees' terms of employment – so long as the case itself grows out of a "labor dispute." *See, e.g., Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457 U.S. 702, 709-15 (1982) (Norris-LaGuardia applied to employer's effort to enjoin protest motivated by union's "political objections to the conduct of the Soviet Union"); *Sutter Health v. Unite Here*, 186 Cal.App.4th 1193, 1200-01, 1205-06, 113 Cal.Rptr.3d 132, 137-38, 141-42 (Ct. App. 2010) (postcard to prospective hospital patients concerning cleanliness of hospital's linens arose from labor dispute between union and laundry company); *Bertsch v. Comm.*

Workers of Am., Local 4302, 655 N.E.2d 243, 245, 247 (Ohio Ct. App. 1995) (union criticism of management employee's "extreme sensitivity and paranoia regarding the size of her hind end" was made "in the broad context of a labor dispute").

When it applies, Section 1138.1 does not "give labor related speech . . . a free pass to trespass on private property by closing the court-house doors to the property owner[.]" Pet., at 14. Ralphs does not present any support for its claim that Section 1138.1 poses "virtually insurmountable burdens" or "an impossibly high hurdle" to obtaining an injunction. Pet., at 6, 16. Federal courts have enjoined expressive and other conduct under the Norris-LaGuardia's standards. *See, e.g.*, *San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters*, 125 F.3d 1230, 1236-39 (9th Cir. 1997); *Mott's LLP v. United Food & Commercial Workers*, No. 3:10-cv-01315, 188 L.R.R.M. 3352 (N.D. Tex. August 5, 2010); *Nat'l Football League Players Ass'n v. Nat'l Football League*, 598 F.Supp.2d 971, 977-78, 984 (D. Minn. 2008). Section 1138.1 affects only one potential remedy – "a temporary or permanent injunction." Cal. Lab. Code § 1138.1(a). Parties to labor disputes who cannot meet Section 1138.1's requirements may continue to seek damages and may press the police to arrest those who commit illegal acts.

No precedent supports Ralphs' theory that a facially content-neutral procedural statute like Section 1138.1 or the Norris-LaGuardia Act violates the First and Fourteenth Amendments merely because its

general requirements also apply in cases involving speech and might make it easier or more difficult to obtain relief in those cases. *See Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706 (1986) (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."); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 760-61 (1988) (statutes are subject to facial First Amendment challenge only where "directed narrowly and specifically at expression or conduct commonly associated with expression"; "laws of general application that are not aimed at conduct commonly associated with expression . . . carry with them little danger of censorship"); *Norton v. Ashcroft*, 298 F.3d 547, 553 (2d Cir. 2002) ("[T]here is no disparate impact theory of the First Amendment."), *cert. denied*, 537 U.S. 1172 (2003).

Accepting Ralphs' theory would have radical implications. The Norris-LaGuardia Act and many other state and federal procedural statutes would suddenly be subject to strict-scrutiny review. Legislatures regularly prescribe court procedures and remedies for categories of cases that include some involving speech, such as prisoners' speech and speech between landlord and tenant. *See, e.g.*, Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e, 18 U.S.C. § 3626 (procedures for prisoners seeking redress for prison conditions, including limitations on injunctive relief); *Woodford v. Ngo*, 548 U.S. 81, 83

(2006) (requiring state prisoner to follow PLRA's exacting administrative exhaustion requirements prior to filing § 1983 action alleging denial of First Amendment rights); Cal. Civ. P. Code § 527.6 (procedures for restraining orders in cases involving harassment); Cal. Civ. P. Code § 527.8 (procedures for injunctions in cases involving workplace violence); Cal. Civ. P. Code § 1942.5 & Cal. Civ. P. Code §§ 1161-1180 (procedures for landlord-tenant disputes); Cal. Family Code § 240 *et seq.* (procedures for restraining orders in divorce, child support, and domestic violence cases). If Ralphs is right, these procedural statutes can be successfully challenged as content-discriminatory merely by arguing that they make it more difficult to obtain some form of relief in a subcategory of cases involving speech.

The California Supreme Court was right to reject Ralphs' theory as 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. City of St. Paul*, 505 U.S. 377, 387 (1992) (internal citation omitted). A statute regulating court procedure in a large class of cases that includes many unrelated to speech does not threaten to "drive ideas from the marketplace." Section 1138.1 – like the Norris-LaGuardia Act – was enacted to limit the judicial role in regulating labor disputes, not to censor ideas or viewpoints. Pet., at 26a-27a, 40a (Liu, J., concurring) ("[T]he Legislature

enacted these statutes in order to restrain the role of the courts in labor disputes and to promote dispute resolution through collective bargaining, not to burden non-labor speech or to express favoritism for labor speech over other speech.").

The trial court held that Ralphs failed to submit evidence sufficient to meet any of Section 1138.1's requirements. Ralphs has never challenged this evidentiary conclusion, and Section 1138.1 is dispositive of Ralphs' claim to injunctive relief. There is no federal question in the California Supreme Court's decision upholding Section 1138.1 that is worthy of certiorari, so there is no need to go any further. Section 1138.1 presents a sufficient basis for the California Supreme Court's conclusion that Ralphs was not entitled to an injunction.

C. The Moscone Act Does Not Abridge Any First or Fourteenth Amendment Rights.

Ralphs' First and Fourteenth Amendment challenge to the Moscone Act was as misplaced as its challenge to Section 1138.1, for distinct but related reasons.

Like Section 1138.1, the Moscone Act does not "abridge" anyone's speech, so it cannot violate the First Amendment. U.S. Const., amend. I ("Congress shall make no law . . . abridging the freedom of speech."); *National Endowment for the Arts v. Finley*, 524 U.S. 569, 595 (1998) (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)."); *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 355 (2009) ("The First Amendment prohibits government from 'abridging the freedom of speech'. . . . Idaho's law does not restrict political speech, but rather declines to promote that speech by allowing public employee checkoffs for political activities."); *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528 U.S. 32, 40 (1999); *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 469 (1997). The Moscone Act protects peaceful communication about a labor dispute taking place on certain private property from a common-law trespass action. But it does not restrict anyone else's ability to speak. Because no speech right is abridged by the Moscone Act's statutory protection, the Act is subject to rational-basis review under the Fourteenth Amendment, which Ralphs does not dispute it passes.

According to Ralphs, a purely speech-protective statute is unconstitutionally content-discriminatory if its protection does not extend universally. No precedent supports this all-or-nothing theory of the First Amendment, and this Court has previously rejected it. *See Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 189 (2007) ("The restriction on the state-bestowed entitlement was thus limited to the state-created harm that the voters sought to remedy. The voters did not have to enact an across-the-board limitation on the use of nonmembers' agency fees by

public-sector unions in order to vindicate their more narrow concern[.]").

As the California Supreme Court recognized, accepting the theory would call into question a large number of statutes. Pet., at 28a-29a, 51a-55a. Take the National Labor Relations Act, which abrogates common-law trespass and requires employers to grant employees, and in some cases non-employees, worksite access to discuss unionization, but not other topics. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-05 (1945); *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978); *Roundy's, Inc. v. NLRB*, 674 F.3d 638, 654-55 (7th Cir. 2012) (grocery store violated NLRA where it sought to exclude non-employee union organizers from shopping-center areas to which it had non-exclusive easement); *New York-New York, LLC v. NLRB*, 676 F.3d 193, 196 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 1580 (2013) (onsite contractor's employees had NLRA right to distribute handbills on property not owned by their employer). Under Ralphs' theory, this central feature of the NLRA – invoked by this Court and National Labor Relations Board for more than a half-century – is in fact unconstitutional.[3]

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[3] Ralphs' notion that it has some unqualified property right "to exclude all other speakers from [its] private property" is plainly wrong. Pet., at 4. In addition to the access rights granted under the NLRA, all Californians have the right to access shopping centers' common areas in order to communicate with the public under California's Constitution. *Robins v. Pruneyard*

(Continued on following page)

If Ralphs were correct that a government may not protect speech from private encroachment on anything less than a universal basis, then what is one to make of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which establishes special protections from defamation actions for speech involving a public figure, or *Linn v. United Plant Guard Workers*, 383 U.S. 53, 65 (1966), which interpreted the NLRA to extend the same protection to defamation actions arising in labor disputes? If the courts and Congress can create targeted modifications to common-law defamation in order to protect particular categories of speech, then how can it be unconstitutional for the California Legislature to modify the common law of trespass to do the same? Under Ralphs' theory, state and federal whistleblower laws, evidentiary privileges, and other laws that selectively protect particular forms of speech would be subject to strict scrutiny merely because they do not extend the same protection to every other form or subject of speech.

Ralphs tries to analogize this case to *Mosley*, 408 U.S. 92 and *Carey,* 447 U.S. 455, using incomplete quotations to argue that any law that protects only a particular form of speech thereby unlawfully "favors" that speech. But *Mosley* and *Carey* both involved laws that *restricted* the plaintiff's speech in a traditional

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Shopping Ctr., 23 Cal.3d 899, 592 P.2d 341 (Cal. 1979). This Court has already rejected the notion that this incursion into a retailer's property rights violates the First Amendment. *Pruneyard*, 447 U.S. at 85-88.

public forum through broad, content-based prohibitions. *Mosley*, 408 U.S. at 92-93, 99; *Carey*, 447 U.S. at 462. The fact that the government was restricting speech in a traditional public forum was essential to the outcome of each case. *Hill v. Colorado*, 530 U.S. 703, 722-23 (2000) (noting that *Carey* "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" and distinguishing a Colorado statute that "places no *restrictions* on – and clearly does not *prohibit* – either a particular viewpoint or any subject matter that may be discussed by a speaker.") (emphasis added); *Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 55 (1983) ("The key to those decisions, however, was the presence of a public forum. In a public forum, by definition, all parties have a constitutional right of access and the state must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject.").

Ralphs tries to argue that California's common law of trespass restricts others' ability to speak and that its own invocation of this law is equivalent to the government's express prohibition against speech in *Mosley* and *Carey*. Pet., at 17. But this argument also fails. Ralphs' decision to restrict speech on its property through a trespass action is not state action under the First or Fourteenth Amendments. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567 (1972); *Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 547 (1972); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 160 n.10 (1978)

("It would intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the Fourteenth Amendment to hold that the mere existence of a body of property law in a State, whether decisional or statutory, itself amounted to 'state action' even though no process or state officials were ever involved in enforcing that body of law").

The lack of any government restriction on speech further demonstrates how Ralphs' challenge perverts the purpose of content-discrimination doctrine. 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.*, 502 U.S. 105, 116 (1991); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."). The government does not demonstrate disagreement with speech – or seek to drive certain ideas from the marketplace – by failing to protect *all* speech from *private encroachment* on an equal basis. *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 549-50 (1983) ("'[A]lthough government may not place obstacles in the path of a [person's] exercise of . . . freedom of [speech], it need not remove those not of its own creation.'") (alterations in original and internal citation omitted).

In the end, Ralphs morphs its First Amendment argument into a claim that its property rights are being infringed. Pet., at 18-19. But the First Amendment does not protect Ralphs' common-law or constitutional property rights, and no claim to a constitutional infringement on those rights is before the Court. *See infra*, Part III.

D. There Is No Conflict Over the Moscone Act's Constitutionality in Need of this Court's Resolution.

Ralphs argues that the California Supreme Court's decision conflicts with *Waremart Foods*, 354 F.3d 870. But in that case, the D.C. Circuit merely made a prediction that the California Supreme Court would overrule its decision in *Sears*, 25 Cal.3d 317. That prediction turned out to be wrong: the California Supreme Court ratified its earlier interpretation of the Moscone Act as creating a right to access a retailer's private property. The D.C. Circuit's decision suggests that such an interpretation of state law would raise constitutional problems, but the court did not have to actually resolve the constitutional issue. The D.C. Circuit may very well view matters differently if it is presented directly with the constitutional question in the future, now that it has the benefit of the California Supreme Court's interpretation of the Moscone Act and detailed constitutional analysis.

In *Waremart Foods*, the D.C. Circuit reviewed a National Labor Relations Board decision holding that

a grocery store violated the NLRA by seeking to exclude union organizers from its property. Whether Waremart violated the Act turned on whether the organizers had a right to be on the store's property under California law. *Waremart Foods*, 354 F.3d at 872; *see Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 217 n.21 (1994) ("The right of employers to exclude union organizers from their private property emanates from state common law, and while this right is not superseded by the NLRA, nothing in the NLRA expressly protects it."). The Board held that the organizers had a right of access, based on the Moscone Act and *Sears*, 25 Cal.3d 317. But on review, the D.C. Circuit decided "it was not clear where the Supreme Court of California stood on the subject" and certified the question to that Court. *Waremart Foods*, 354 F.3d at 871. When the California Supreme Court declined to respond, the D.C. Circuit analyzed this issue of state law itself.

The D.C. Circuit predicted that the California Supreme Court would disavow *Sears* and hold that union organizers do not have a right to be on the private sidewalks of a stand-alone grocery store. *Id*. at 874-76. It based this conclusion on the fact that "four opinions of intermediate appellate courts in California . . . have held that state law does not provide a free speech right to those seeking to engage in expressive activities on the private sidewalks or in the private parking lots of stand-alone supermarkets." *Id*. at 874. "Given the absence of any controlling precedent from the California Supreme Court,"

the court concluded, "we will follow these intermediate appellate decisions." *Id*. at 876.

In a cursory passage, the D.C. Circuit also opined that the Moscone Act was at odds with *Mosley* and *Carey*. *Id*. at 874-75. But it did not hold the statute unconstitutional or unenforceable. Rather, it predicted that "if the meaning of the Moscone Act came before the California Supreme Court again, it would either hold the statute unconstitutional or construe it to avoid unconstitutionality." *Id*. at 875. The D.C. Circuit was not called on to analyze this First Amendment issue in any depth, since it saw a purely state-law basis for concluding that Waremart could ban non-employees from its sidewalks. The court did not explain how its interpretation of *Mosley* and *Carey* could be squared with the NLRA's statutory right of access or whose speech rights the Moscone Act purportedly abridged.

As it turned out, the D.C. Circuit's speculation that the California Supreme Court would alter its interpretation of the Moscone Act or construe it differently to avoid a constitutional problem was incorrect. An inconsistency between a federal court's prediction of what a state supreme court will hold and what that state court actually does hold is not a conflict that this Court needs to resolve.

Moreover, there is no reason to believe that the D.C. Circuit would follow its *dicta* on the Moscone Act's constitutionality if presented with that issue in the future. For the reasons explained above and in

the California Supreme Court's decision, the *dicta* are incorrect. A future D.C. Circuit panel should be given the opportunity to fully consider the issue on the merits.

Ralphs is misinformed when it argues that "the NLRB is bound by the D.C. Circuit to treat the [Moscone] Act as unconstitutional." Pet., at 22. The NLRB is not bound to follow the precedent of any particular circuit court, since its decisions are subject to review not only in the D.C. Circuit, but in any circuit in which "the unfair labor practice in question was alleged to have occurred" or where the employer "resides or transacts business." 29 U.S.C. § 160(e), (f). In a decision after *Waremart Foods*, the Board interpreted the case as an application of *state law*, relevant only because the California Supreme Court had not yet spoken. *Macerich Management Co.*, 345 NLRB 514, 517 (2005) ("[T]he most recent and definitive statement of California law was made in *Waremart* where the court declared unequivocally that *Sears* does not represent California law. We are aware of no California court that has disagreed with that assertion."). Now that the California Supreme Court has spoken, the Board can be expected to follow its ruling.

But even if the NLRB did decide in some future case to follow the D.C. Circuit's *dicta*, this would not create a practical problem for employers in the sense that they would be subject to conflicting obligations. It would simply mean that an employer would be unable to eject the speakers from its property under

California state law, but would not face additional liability under the NLRA for seeking to do so.

II. Ralphs Has No Standing to Litigate the First Amendment Rights of Third-Party Speakers and Has Waived Any Compelled-Speech Claim of Its Own.

Even if Ralphs' First Amendment arguments had some theoretical basis, this would not be the proper case in which to address them because Ralphs does not have third-party standing to raise the constitutional rights of hypothetical speakers. None of the exceptions to the bar on third-party standing apply to Ralphs' claims.

Ralphs waived any argument that its own right against compelled speech is involved. Pet., at 39a-40a (Liu, J., concurring) ("In challenging the constitutionality of the Moscone Act and section 1138.1, Ralphs does not and cannot argue that its own freedom of speech is burdened."). The argument would have been foreclosed by *Pruneyard*, 447 U.S. at 86-88 in any case. *See also Rumsfeld v. Forum for Academic & Inst. Rights*, 547 U.S. 47, 65 (2006).

Instead, Ralphs claims that Section 1138.1 and the Moscone Act unconstitutionally discriminate against hypothetical, third-party speakers who might want to speak on Ralphs' property, but cannot invoke

the Moscone Act or Section 1138.1 if Ralphs tries to silence them.[4]

Such hypothetical speakers might have standing to raise their own claims that the statutes discriminate against them, but Ralphs does not have standing to argue these claims for them. *Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."); *Los Angeles Police Dep't*, 528 U.S. at 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."); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.,* 454 U.S. 464, 474 (1982). This is so "even when the very same allegedly illegal act that affects the litigant also affects a third party." *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 720 (1990); *United States v. Payner,* 447 U.S. 727, 731-32 (1980).

The rule against third-party standing

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[4] The California Supreme Court did not address Ralphs' standing, perhaps because it saw a paramount need to reverse the appellate court's decision on the merits. But regardless of whether Ralphs had standing in state court to make its First Amendment argument, it lacks standing under Article III and this Court's prudential standing doctrine to do so here. *Doremus v. Bd. of Educ. of Borough of Hawthorne*, 342 U.S. 429, 434-35 (1952); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64-65 (1997).

> represents a "healthy concern that if the claim is brought by someone other than one at whom the constitutional protection is aimed," the courts might be "called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights."

Kowalski v. Tesmer, 543 U.S. 125, 129 (2004) (internal citations omitted).

This case does not fall within any of the exceptions to the bar on third-party standing. Ralphs does not claim that either statute contains overbroad restrictions that violate the First Amendment, or that any such overbreadth threatens to chill the speech of absent persons. *See Sec'y of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956-57 (1984); *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). Rather, Ralphs argues that the statutes are *underinclusive* in *protecting* speakers from *Ralphs'* attempts to stop them from speaking.

Nor is this a case in which Ralphs' interests are aligned with the hypothetical speakers whose rights it invokes and "it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court." *Barrows v. Jackson*, 346 U.S. 249, 257 (1953). California has not interfered with Ralphs' ability to engage in joint or contractual conduct with the third-party speakers whose

rights it seeks to litigate. *Cf. Joseph H. Munson Co.,* 467 U.S. at 954-58; *Craig v. Boren*, 429 U.S. 190, 192-97 (1976); *Doe v. Bolton*, 410 U.S. 179, 188-89 (1973). Ralphs does not claim any "close" relationship or common interest with such speakers. *Powers v. Ohio*, 499 U.S. 400, 411 (1991); *Kowalski*, 543 U.S. at 130. In fact, their interests would be diametrically opposed: the speakers would wish to access Ralphs' property, and Ralphs would want to stop them from doing so. Nor is there any "hindrance" that would prevent a person who wished to speak about religion, consumer rights, or animal cruelty on Ralphs' property from challenging the statutes. *See Kowalski*, 543 U.S. at 130; *cf. Campbell v. Louisiana*, 523 U.S. 392, 398 (1998); *Powers*, 499 U.S. at 414 ("barriers to a suit by an excluded juror are daunting").

III. Ralphs Did Not Raise Any Takings Clause Challenge Below, Nor Did the California Supreme Court Rule on Such a Claim.

This case does not involve a Takings Clause challenge to Section 1138.1 or the Moscone Act. Ralphs tries to import such a claim into its petition to deflect attention from the weakness of its First Amendment claims. *See* Pet., at i, 18-20.

Ralphs' petition does not comply with Supreme Court Rule 14.1(g)(i) because it contains no "specification of the stage in the proceedings, both in the court of first instance and in the appellate courts" when Ralphs alleges it raised a Fifth Amendment claim.

Throughout its petition, Ralphs misleadingly refers to claims and adjudications as having arisen under the "U.S. Constitution" – rather than under the First and Fourteenth Amendments, as actually litigated. *See* Pet., at i, 10, 12.

Ralphs made one brief mention of the Fifth Amendment during this litigation – a half-page passage in its answering brief to the California Supreme Court. It stated incorrectly that the Fifth Amendment's Takings Clause gave it a "right to prohibit all expressive activity on its premises." This reference to the Takings Clause was not part of Ralphs' challenge to Section 1138.1 or the Moscone Act, but part of its separate argument that the sidewalks in front of its store were not a public forum under the California Constitution's Liberty of Speech Clause. Its sole constitutional argument against the statutes was that they were content-discriminatory under the First and Fourteenth Amendments. Neither the intermediate appellate court nor the California Supreme Court perceived Ralphs to have raised any Fifth Amendment challenge to Section 1138.1 or the Moscone Act. Pet., at 1a-31a, 70a-107a.

There is no basis for permitting Ralphs to raise a Takings Clause challenge in this petition. 28 U.S.C. § 1257(a); *Adams v. Robertson*, 520 U.S. 83, 90 (1997) ("[I]t would be unseemly in our dual system of government to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider.") (internal citation omitted); *Street v. New York*, 394 U.S. 576, 582 (1969) (when

"the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary"). This Court's comity rule affords state courts "'an opportunity to consider the constitutionality of the actions of state officials and, equally important, proposed changes' that could obviate any challenges to state action in federal court." *Adams*, 520 U.S. at 90 (internal citation omitted).

Even if Ralphs had raised a takings challenge at some earlier point, the claim would have been insubstantial and unsupported by any necessary facts. In *Pruneyard*, 447 U.S. at 83, this Court dismissed a similar takings challenge, holding that "the 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 Taking Clause." Ralphs would have had no basis for raising a *per se* takings challenge, because its property is open to the public. *Yee v. City of Escondido* 503 U.S. 519, 531 (1992) ("Because they voluntarily open their property to occupation by others, petitioners cannot assert a per se right to compensation based on their inability to exclude particular individuals."); *Pruneyard*, 447 U.S. at 82-84 (applying regulatory-takings balancing test); *cf. Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987) (uncompensated conveyance

of easement across *private residential property* as a condition for zoning approval).

Regulatory takings challenges "depend[ ] largely 'upon the particular circumstances [in the] case.'" *Penn Cent. Trans. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (internal citation omitted). "These 'ad hoc, factual inquiries' must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances." *Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 295 (1981); *Yee*, 503 U.S. at 523 (regulatory takings cases "necessarily entail[ ] complex factual assessments of the purposes and economic effects of government actions"); *Pruneyard*, 447 U.S. at 83 (whether restriction on shopping center's right to exclude violates Takings Clause "entails inquiry into such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations"); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 501-02 (1987).

Here, the record contains no evidence that Section 1138.1 or the Moscone Act have had any effect on Ralphs' "investment-backed expectations." There is no evidence on whether the existence of the statutes resulted in any diminution in the store's property value. Ralphs made no effort to present any takings claim below, submitting no competent evidence on the economic impact of the statutes.

Even if Ralphs had some colorable takings claim, it would not be entitled to injunctive relief against UFCW – the only relief at issue here – because an action for just compensation against the State would be available. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984) ("Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking."). Nor has Ralphs sought to exhaust any claim for just compensation before the appropriate California bodies. *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-95 (1985); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 733-34 (1997).[5]

[5] *Amici* California Grocers Association, *et al.*, include a short footnote at the end of their brief suggesting that there is a preemption issue involved in this case. Amicus Br. of California Grocers Association, *et al.*, at 19 n.6. Ralphs has never challenged either statute as preempted by federal labor law, and does not do so in its certiorari petition. The California Supreme Court did not address any labor-preemption claim.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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