No. 12-________

In The

Supreme Court of the United States

RALPHS GROCERY COMPANY, PETITIONER,

v.

UNITED FOOD AND COMMERCIAL
WORKERS UNION LOCAL 8.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Shortly after petitioner opened its grocery store in Sacramento, respondent union's agents began picketing on the store's private property (at the entrance to the store, on the apron area, and in the parking lot). The picketing continued five days a week, eight hours each day, for several years.

Because the content of the picketers' expression was labor-related, the California Supreme Court held that two state statutes, the Moscone Act (Cal. Civ. Proc. Code § 527.3) and Section 1138.1 of the California Labor Code, protect the union's expressive activity and bar injunctive relief to exclude the demonstrators from the store's private property. Notwithstanding the store's right to exclude all other kinds of expressive activities (political, religious, and so on), the California Supreme Court held that neither statute violates the U.S. Constitution.

In so holding, the California Supreme Court expressly disagreed with the D.C. Circuit, which has held that California's Moscone Act is unconstitutional if so construed. *Waremart Foods v. NLRB*, 354 F.3d 870 (D.C. Cir. 2004).

The question presented is:

Whether California's Moscone Act (Cal. Civ. Proc. Code § 527.3) and Section 1138.1 of the California Labor Code violate the U.S. Constitution by forcing property owners to open private property to the expressive activities of others based on the content of their speech.

PARTIES TO THE PROCEEDING

The parties are as stated in the caption.

CORPORATE DISCLOSURE STATEMENT

Ralphs Grocery Company is a wholly owned subsidiary of Food 4 Less Holdings, Inc. Food 4 Less Holdings, Inc. is a wholly owned subsidiary of Fred Meyer, Inc. Fred Meyer, Inc. is a wholly owned subsidiary of The Kroger Co. No other publicly held company owns 10% or more of the stock of Ralphs Grocery Company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ralphs Grocery Company (Ralphs) respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of California.

OPINIONS BELOW

The opinion of the Supreme Court of California (app., *infra*, 1a-69a) is reported at 290 P.3d 1116. The opinion of the Court of Appeal of California, Third Appellate District (app., *infra*, 70a-107a) is reported at 113 Cal. Rptr. 3d 88. The orders of the Superior Court of California, County of Sacramento (app., *infra*, 108a-112a, 113a-116a, 117a-124a) are unreported.

JURISDICTION

The Supreme Court of California issued its opinion on December 27, 2012. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a). Section 2403(b) of Title 28 may apply, and this petition has been served on the Attorney General of California as required by Rule 29.4(c) of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fifth Amendments and Section 1 of the Fourteenth Amendment to the U.S. Constitution; the Moscone Act, Cal. Civ. Proc. Code § 527.3; and Section 1138.1 of the California Labor Code are set forth in full in the appendix to the petition. App., *infra*, 125a-133a.

INTRODUCTION

Petitioner Ralphs owns and operates a grocery store in Sacramento, California. Soon after the store opened, respondent, the United Food and Commercial Workers Union Local 8 (the Union) started picketing Ralphs' Sacramento store, eight hours a day, five days a week. The Union's picketing was not on the adjacent public sidewalks or streets. Rather, the Union came onto Ralphs' privately owned property, marched with pickets on the private walk directly in front of Ralphs' store entrance and in its parking lot, and disrupted Ralphs' business by telling its customers to shop elsewhere.

Ralphs repeatedly told the Union protesters that they were violating the store's rules governing expressive activities, and the protesters were asked to leave. They refused. Ralphs asked law enforcement to remove the protesters from its property, but the police refused to act without a court order. So Ralphs brought this action for trespass, seeking declaratory and injunctive relief.

If the content of the protesters' speech had been about any other topic—had they been proselytizing, campaigning, protesting military action, or requesting charitable donations—the protesters would have been trespassers, and Ralphs could have obtained injunctive relief compelling them to stay off Ralphs' property.

But because the content of the protesters' speech was about labor issues, the Supreme Court of

California held that the Union representatives could not be ejected from Ralphs' private property by Ralphs or by any court. In so holding, the California Supreme Court expressly rejected any notion that the Union's expressive activities were protected by the California Constitution. Rather, its holding was based on two state statutes that single out labor-related speech for favored status: the Moscone Act and Section 1138.1 of the California Labor Code. And the California Supreme Court held that such content-based preferential treatment did not violate the U.S. Constitution.

The California Supreme Court's decision contravenes this Court's precedent. The First Amendment and the Equal Protection Clause prohibit a State from singling out a topic of speech for special protection. Indeed, this Court twice has held unconstitutional state laws that favored labor-related speech. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972); *Carey v. Brown*, 447 U.S. 455 (1980). Yet based solely on the content of the demonstrators' speech, the California Supreme Court's decision eviscerates Ralphs' right to exclude them from its private property and forces Ralphs to grant permanent access to speakers with whom it disagrees.

The California Supreme Court's decision also directly conflicts with the D.C. Circuit's decision in *Waremart Foods v. NLRB*, 354 F.3d 870 (D.C. Cir. 2004) (*D.C. Waremart*). Relying on *Mosley* and *Carey*, the D.C. Circuit held that, to the extent the Moscone Act affords greater protection to labor speech than all

other speech on private property, it violates the U.S. Constitution. The California Supreme Court considered but expressly disagreed with *D.C. Waremart*, creating a conflict that only this Court can resolve.

This Court should grant the petition and reverse the decision of the California Supreme Court. Businesses that are free to exclude all other speakers from their private property should not be forced to open their property to labor-related protesters who are there for no reason other than to drive away customers.

STATEMENT OF THE CASE

A. Legal Framework

1. Under California law, "perhaps the most fundamental of all property interests" is the "right to exclude others from entering and using" one's private property. *Monks v. City of Rancho Palos Verdes*, 84 Cal. Rptr. 3d 75, 100 (Ct. App. 2008). In general, courts in California routinely issue injunctive relief to exclude trespassers from private property. An injunction is an appropriate remedy for a continuing trespass. *See* 5 B.E. Witkin, Summary of California Law, Torts § 693 (10th ed. 2005).

"[E]ven where private property, such as a standalone retail store, is open to the public, expressive activity may be prohibited." *Costco Cos. v. Gallant*, 117 Cal. Rptr. 2d 344, 355 (Ct. App. 2002). And store owners may obtain court injunctions to enforce their rights to restrict or prohibit expressive activity on

their private property. *See, e.g.*, *Albertson's, Inc. v. Young*, 131 Cal. Rptr. 2d 721, 738 (Ct. App. 2003) (affirming preliminary injunction against expressive activity because "defendants have no right to use the privately owned premises of the Albertson's store to solicit and gather signatures for initiative petitions or for other such expressive activity"); *Van v. Target Corp.*, 66 Cal. Rptr. 3d 497 (Ct. App. 2007) (similar).

Although California deems certain privately owned shopping centers "public forums" in which expressive activities are permitted subject only to reasonable time, place, and manner restrictions, *Robins v. Pruneyard Shopping Center*, 592 P.2d 341, 346-347 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980), the California Supreme Court held here that Ralphs' "supermarket's privately owned entrance area is *not* a public forum." App., *infra*, 2a (emphasis added); *see also id.* at 7a-11a.

2. Despite a property owner's right to exclude all other expressive activities, California's Moscone Act and Section 1138.1 force a property owner to allow labor-related expressive activities on its private property, unless there is unlawful activity in addition to the trespass.

a. The Moscone Act, Section 527.3 of the California Code of Civil Procedure, immunizes labor-related speech—and only labor-related speech—from California's trespass law. It does this by declaring that certain acts "shall be legal," including "(1) [g]iving publicity to * * * any labor dispute,"

"(2) [p]eaceful picketing or patrolling involving any labor dispute," and "(3) [a]ssembling peaceably to do any of the acts specified in paragraphs (1) and (2) or to promote lawful interests." Cal. Civ. Proc. Code § 527.3(b).

The Moscone Act also prohibits any judicial action vis-à-vis lawful labor-related picketing (and the fact that the picketing might be trespassory does not make it unlawful): "no court nor any judge nor judges thereof, shall have jurisdiction to issue any restraining order or preliminary or permanent injunction which, in specific or general terms, prohibits any person or persons, whether singly or in concert, from doing any of the" specified acts. *Ibid.*

In short, the Moscone Act permits the Union to enter onto private property—under circumstances in which all other forms of expressive activities can be prohibited and judicially enjoined—and deprives California's courts of jurisdiction over such activities.

b. Even if a private-property owner can overcome the hurdle of the Moscone Act, it still must meet the extra, virtually insurmountable burdens imposed by Section 1138.1 of the California Labor Code—burdens that are not imposed if the expressive activity is *not* labor-related.

Section 1138.1 provides that "[n]o court of this state shall have authority to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute" unless it makes specific "findings of fact," including "[t]hat unlawful acts have

been threatened and will be committed unless restrained or have been committed and will be continued unless restrained"; "[t]hat substantial and irreparable injury to complainant's property will follow"; and that the police "are unable or unwilling to furnish adequate protection." Cal. Labor Code § 1138.1(a).

Moreover, Section 1138.1 requires the property owner to submit "a complaint made under oath," and the court must conduct a formal hearing at which the parties must present "the testimony of witnesses in open court, with opportunity for cross-examination, * * * and testimony in opposition thereto, if offered." *Ibid.*

In contrast, in non-labor-related cases, "the trespass itself, without a further unlawful act, justifies an injunction," "any irreparable harm, not necessarily to the property, supports injunctive relief," and "the inability or unwillingness of public officers to provide adequate protection" is not a requirement for injunctive relief. App., *infra*, 99a-100a (citing cases).

B. Factual Background

Petitioner Ralphs owns and operates retail grocery stores in California. Cal. C.A. J.A. 594. In July 2007, Ralphs opened a retail warehouse grocery store under the brand name Foods Co in a modest Sacramento commercial development, "College Square." App., *infra*, 2a-3a, 115a; Cal. C.A. J.A. 258-260, 368-369. College Square contains several businesses,

empty store fronts, and a privately owned parking lot for common customer use. App., *infra*, 2a-3a, 77a.

The Sacramento Foods Co store has only one entrance for customers. *Id.* at 3a, 77a; *see id.* at 134a (photograph of store entrance area). A sidewalk or apron extends in front of the store about 15 feet to the point where it meets a privately owned asphalt driving lane that separates the apron from the parking lot. App., *infra*, 77a; Cal. C.A. J.A. 258, 368. The entrance area (including the exit door) is about 31 feet wide. App., *infra*, 77a.

Although nearly all of Ralphs' southern California stores and many of its northern California stores (including stores operating under the Foods Co name) have collective bargaining agreements with the respondent Union and other unions, the employees of Ralphs' Sacramento Foods Co store have chosen to remain non-union. Cal. C.A. J.A. 593-595.

Soon after the Sacramento Foods Co store opened, the Union began picketing there, five days a week (Wednesday through Sunday), for eight hours each day. App., *infra*, 3a, 115a, 118a. The Union's agents, varying in numbers from four to eight, marched back and forth in front of the entrance to the store carrying picket signs, speaking to customers, and handing out flyers. *Id.* at 3a. The picketers walked in a circle near the entrance so that customers could not avoid them as they went into the store. Cal. C.A. J.A. 43. They also positioned themselves in the private parking lot. *Ibid.* Foods Co customers

complained that the picketers harassed them and made them feel uncomfortable. *Id.* at 43, 559-560.

The purpose of the picketing, as the Union acknowledges, was to disrupt the store's commercial operations by encouraging customers "to boycott Foods Co's non-union stores for not adhering to union standards." *Id.* at 67-68; *see also* app., *infra*, 3a.[1]

In January 2008, Ralphs notified the Union in writing of its time, place, and manner regulations for expressive activity at all its Foods Co stores, including the Sacramento store. The Union's agents continued to picket and did not comply with Ralphs' regulations. App., *infra*, 3a-4a, 78a.

Ralphs asked law enforcement to remove the Union representatives from the Foods Co store property. The police refused to intervene without a court order. *Id.* at 4a, 78a. The picketing continued for several years.

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[1] Although the Union's picketing initially may have served the additional purpose of trying to organize the Sacramento Foods Co's employees, the only legitimate purpose for picketing beyond August 2007 was to inform Foods Co's customers that Foods Co is a non-union store, and to encourage the customers to shop elsewhere. It is an "unfair labor practice" for a union to picket an employer for the purpose of organizing the employees into a union, beyond "a reasonable period of time not to exceed thirty days," absent permission from the National Labor Relations Board. 29 U.S.C. § 158(b)(7)(C); *NVE Constructors, Inc. v. NLRB*, 934 F.2d 1084, 1086 (9th Cir. 1991).

C. Proceedings Below

1. In April 2008, Ralphs filed this lawsuit in the Superior Court of California, County of Sacramento, seeking declaratory and injunctive relief to stop the Union's activities on its private property. App., *infra*, 4a, 79a. Ralphs asserted in its motion for a preliminary injunction that the Moscone Act and Section 1138.1 violate the U.S. Constitution. Cal. C.A. J.A. 29-32, 249-251, 410-420.

The trial court concluded that the Moscone Act violates the First Amendment and the Equal Protection Clause of the U.S. Constitution because although it offers protection to speech in a labor dispute, it "does not offer the same protection to other types of speech. The effect of the statute is to allow labor speech greater access to private property than other types of speech." App., *infra*, 119a. The trial court expressly "agree[d] with [the] analysis" of the D.C. Circuit's decision in *D.C. Waremart*. *Id.* at 121a.

The trial court stated its view that Section 1138.1 likewise was unconstitutional, but acknowledged that it was bound by a decision of the Court of Appeal of California to the contrary. *Id.* at 118a-119a (citing *Waremart Foods v. United Food & Commercial Workers Union*, 104 Cal. Rptr. 2d 359 (Ct. App. 2001) (*Cal. Waremart*)). After an evidentiary hearing, the court concluded that Ralphs did not meet Section 1138.1's prerequisites to obtain an injunction against labor-related expressive activities. *Id.* at 115a-116a.

2. The Court of Appeal reversed, holding the Moscone Act and Section 1138.1 unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution. *Id.* at 71a, 86a-104a.[2]

The Court of Appeal first determined that "the entrance area and apron of Foods Co is not a public forum" under the California Constitution. *Id.* at 84a. Those areas "were not designed and presented to the public as public meeting places." *Ibid.* "And because the area was not a public forum, Ralphs, as a private property owner, could limit the speech allowed and could exclude anyone desiring to engage in prohibited speech." *Ibid.*

Relying on this Court's decisions in *Mosley* and *Carey*, the Court of Appeal held that "the Moscone Act violates the U.S. Constitution by "declar[ing] that labor protests on private property are legal, even though a similar protest concerning a different issue would constitute trespassing," and by denying the property owner "access to the equity jurisdiction of the courts even though it does not deny such access if the protest does not involve a labor dispute." *Id.* at 92a-93a. Aligning itself with the D.C. Circuit, the court observed that *D.C. Waremart*'s "reasoning and logic * * * are persuasive." *Id.* at 97a.

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[2] The Court of Appeal expressly overruled its previous decision in *Cal. Waremart* (the decision that had constrained the trial court) on the ground that *Cal. Waremart* had not considered the content-discrimination issue. App.*, infra*, 101a.

Turning to Section 1138.1, the Court of Appeal held that the statute "suffers from the same constitutional defect as the Moscone Act—it favors speech relating to labor disputes over speech relating to other matters." *Id.* at 98a. The court explained that Section 1138.1 "adds requirements for obtaining an injunction against labor protestors that do not exist when the protest, or other form of speech, is not labor related." *Ibid.* The effect of these additional requirements makes it "virtually impossible for a property owner to obtain injunctive relief" when the content of the protesters' speech concerns a labor dispute. *Id.* at 102a.

3. The Supreme Court of California reversed, holding that the Moscone Act and Section 1138.1 do not violate the U.S. Constitution. *Id.* at 2a.

a. The Supreme Court agreed that the entrance to the Sacramento Foods Co store was purely private property: "the supermarket's privately owned entrance area is not a public forum." *Ibid.* The Supreme Court recognized that areas immediately adjacent to the entrance of the store serve the purpose of, "from the stores' perspective, advertising the goods and services available within." *Id.* at 9a. As such, expressive activities in these areas pose a "risk of interfering with normal business operations." *Ibid.* The Supreme Court thus held that the Union's picketing activities "do not have state *constitutional* protection." *Id.* at 2a.

But the Supreme Court concluded that the Union's "picketing activities do have *statutory* protection * * * under the Moscone Act and section 1138.1." *Ibid.* The Court held that the two state statutes "afford both substantive and procedural protections" to union picketing on private property, and "such union picketing may not be enjoined on the ground that it constitutes a trespass." *Id.* at 31a.

The California Supreme Court further held that the Moscone Act and Section 1138.1 "do not violate the federal Constitution's free speech or equal protection guarantees." *Ibid.* The Court held that this Court's decisions in *Mosley* and *Carey* "are distinguishable, * * * as both involved laws that restricted speech in a public forum; by contrast, 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." *Id.* at 23a. In so holding, the California Supreme Court expressly disagreed with the D.C. Circuit's decision in *D.C. Waremart*. *Id.* at 26a-27a.

b. Chief Justice Cantil-Sakauye and Justice Liu each filed separate concurring opinions. *Id.* at 32a-64a.

c. Justice Chin filed a concurring and dissenting opinion. *Id.* at 65a-69a. He agreed with the majority that "the privately owned walkway in front of the customer entrance to the grocery store is not a public forum" and that store owners could bar speech activities on their private property. *Id.* at 65a. But he

disagreed with the majority's decision to decide whether the Moscone Act and Section 1138.1 could constitutionally be applied here, and would have remanded to the trial court on that issue. *Ibid.* Instead, the majority's decision is final.

Noting the decision in *D.C. Waremart*, Justice Chin observed that the majority's decision "places California on a collision course with the federal courts." *Id.* at 67a. "[O]nly the United States Supreme Court can definitively resolve the disagreement." *Id.* at 67a-68a.

REASONS FOR GRANTING THE PETITION

REVIEW IS NECESSARY BECAUSE THE CALIFORNIA SUPREME COURT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND THE D.C. CIRCUIT ON AN ISSUE OF VITAL IMPORTANCE TO BUSINESSES

Under the California Supreme Court's decision, Ralphs is entitled to exclude all expressive activities from its Sacramento grocery store *except* labor-related expressive activities. Although holding that the California Constitution offers no protection to the Union's expressive activity here, the California Court held that two state statutes nevertheless protected the Union. But state statutes that give labor-related speech, and only labor-related speech, a free pass to trespass on private property by closing the courthouse doors to the property owner violate the federal Constitution. The California Supreme Court's decision conflicts with decisions of this Court, as well as a

D.C. Circuit decision regarding the constitutionality of one of the same California statutes at issue here.

A. The California Supreme Court's Decision Conflicts With This Court's Jurisprudence

1. Twice this Court has held unconstitutional state or local laws that favor labor-related speech over other speech.

In *Mosley*, the Court concluded that the First Amendment and the Equal Protection Clause forbade the City of Chicago from enacting an ordinance that "exempt[ed] peaceful labor picketing from its general prohibition on picketing next to a school." 408 U.S. at 94. "The central problem with Chicago's ordinance," this Court explained, "is that it describes permissible picketing in terms of its subject matter." *Id.* at 95. "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." *Ibid.* The Court held the ordinance "unconstitutional because it makes an impermissible distinction between labor picketing and other peaceful picketing." *Id.* at 94.

Likewise, in *Carey*, the Court held unconstitutional a state statute that prohibited picketing of residences, but "exempt[ed] from its prohibition 'the peaceful picketing of a place of employment involved in a labor dispute.'" 447 U.S. at 457. The Court explained that the statute "discriminates between lawful and unlawful conduct based upon the content of the demonstrator's communication." *Id.* at 460.

The Court rejected the claim that the state's interest in providing special protection for labor protests justified the discrimination. *Id.* at 466-467.

2. *Mosley* and *Carey* are fatal to the Moscone Act and Section 1138.1.

The Moscone Act provides that it "shall be legal" to engage in "[p]eaceful picketing or patrolling involving any labor dispute." Cal. Civ. Proc. Code § 527.3(b). And it deprives courts of "jurisdiction to issue any restraining order or preliminary or permanent injunction" prohibiting picketing that involves a labor dispute. *Ibid.* The Moscone Act thus grants a special forum on private property for speech on a topic the government finds acceptable, precluding property owners from seeking injunctive relief solely based on the content of the demonstrators' speech.

Likewise, by depriving courts of authority to grant injunctive relief "in any case involving or growing out of a labor dispute" except when an impossibly high hurdle is vaulted, Section 1138.1 does precisely the same thing. Cal. Labor Code § 1138.1(a). Section 1138.1 provides that no California court has authority to issue an injunction in any labor-related dispute except after a hearing is held, live testimony heard, and specific findings made. *Ibid.* Those findings must include (among other things) that unlawful acts (other than the trespass) have been threatened, the complainant's property will suffer substantial and irreparable injury, and the police are unable

or unwilling to furnish adequate protection. *Id.* § 1138.1(a)(1), (2), (5).

These requirements need not be shown to obtain an injunction if the protests are not about labor. App., *infra*, 98a-100a. And, as the Court of Appeal observed, the additional hurdles imposed by Section 1138.1 "make it virtually impossible for a property owner to obtain injunctive relief" in a labor dispute. *Id.* at 102a.

The California Supreme Court concluded that *Mosley* and *Carey* do not control here because "neither the Moscone Act nor section 1138.1 of our state law restricts speech." *Id.* at 26a. But that ignores that these statutes *favor* speech based on its content. As the dissenting Justice explained, the "Court of Appeal cases involving nonlabor speech at stores and medical clinics, which the majority purports to reaffirm, *do* limit speech." *Id.* at 68a (Chin, J., dissenting). Indeed, the California Supreme Court's decision here expressly approved decisions affirming injunctions against expressive activities on non-labor topics. *Id.* at 9a-11a (agreeing with *Albertson's*, 131 Cal. Rptr. 2d 721, and *Van*, 66 Cal. Rptr. 3d 497); *see supra* p. 12.

Thus, if the protesters' speech were about religion or politics, or if the individuals were gathering signatures or selling Girl Scout cookies, Ralphs unquestionably would have had the right to exclude the individuals from its private property. It is only because these two California statutes single out labor

speech for favored status that Ralphs must allow the Union protesters in front of the entrance to its Sacramento store. *Mosley* and *Carey* forbid that result. Under the U.S. Constitution, the State does not get to pick "one particular subject" for such favored treatment. *Carey*, 447 U.S. at 461.

3. The California Supreme Court also concluded that "[b]ecause here the walkway in front of the College Square Foods Co is not a First Amendment public forum, the holdings in *Mosley* and *Carey* do not apply." App., *infra*, 25a. The Court thus recognized that the State has no power to prefer labor-related speech on its own public streets and parks. Yet it held that the State has the power to impose that same content-based preference on private property by forcing owners to open their property to labor-related speech but not other speech.

That turns this Court's decision in *Pruneyard* on its head. Under *Pruneyard*'s rationale, an owner should have greater control to exclude expressive activity when its property is purely private. "[O]ne of the essential sticks in the bundle of property rights is the right to exclude others," and that right is "property" protected by the Fifth Amendment. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 82 & n.6 (1980). Giving members of the public engaged in labor-related expressive activities "a permanent and continuous right to pass to and fro" invades the property rights protected by the U.S. Constitution.

Cf. Nollan v. California Coastal Comm'n, 483 U.S. 825, 832 (1987).

That is exactly what the Moscone Act and Section 1138.1 do: those statutes require Ralphs to provide permanent union access to the entrance of Ralphs' store. The California Supreme Court read these state statutes (in the words of the Court of Appeal) to "force[ ] the private property owner to provide a forum for speech with which the owner disagrees and it bases that compulsion on the content of the speech." App., *infra*, 102a (citing *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 575-576 (1995); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of California*, 475 U.S. 1, 16 (1986)). That "eviscerate[s]" Ralphs' constitutionally protected right to exclude others from its private property and to refuse to host expressive activity with which it disagrees. *See, e.g.*, *Dolan v. City of Tigard*, 512 U.S. 374, 394 (1994); *Pruneyard*, 447 U.S. at 97 (Powell, J., concurring).

At least in *Pruneyard*, the shopping center was able to "restrict expressive activity by adopting time, *place*, and manner regulations that will minimize any interference with its commercial functions." 447 U.S. at 83 (emphasis added). Yet here, despite recognizing that the Union was not complying with Ralphs' reasonable time, place, and manner restrictions, the California Supreme Court held that the Moscone Act and Section 1138.1 completely bar injunctive relief. App., *infra*, 2a, 12a-14a.

4. Nor can the Moscone Act and Section 1138.1 be justified as part of "a statutory system of economic regulation of labor relations." *Id.* at 28a. While these California statutes (like other States' statutes) developed from the federal Norris-LaGuardia Act, 29 U.S.C. §§ 104, 107, none of the decisions cited by the California Supreme Court (*id.* at 28a-30a) address whether the government can favor labor-related speech over all other speech based solely on the content of the speech. Indeed, this Court in *Carey* expressly rejected the proposition that "labor picketing is more deserving of First Amendment protection than are public protests over other issues, particularly the important economic, social, and political subjects about which [the demonstrators in that case] wish to demonstrate." 447 U.S. at 466.

Moreover, this Court has held that neither the First Amendment nor federal labor laws grant unions or labor-related speech a general exemption to trespass laws. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533 (1992) ("As a rule, then, an employer cannot be compelled to allow distribution of union literature by nonemployee organizers on his property."); *Hudgens v. NLRB*, 424 U.S. 507, 520-521 (1976) (holding that union members had no First Amendment right to picket on private shopping center premises); *see also Sears, Roebuck & Co. v. San Diego Cty. Dist. Council of Carpenters*, 436 U.S. 180, 205 (1978). The only narrow exception is where it is "impossible or unreasonably difficult" for the union to distribute organizational literature without trespassing (e.g., in a

company-owned town). *Lechmere*, 502 U.S. at 533-534. Here, the union is not entering Ralphs' private property for the purpose of union organizing, so that exception has no application. *See supra* p. 9 & n.1. In any event, the Sacramento grocery store is bounded on all four sides by public streets and sidewalks, providing reasonable, feasible, and practical access to Foods Co's customers without entry onto its private property. Cal. C.A. J.A. 62; Appellant's Req. for Judicial Notice at 2 (Cal. C.A. Jan. 27, 2009).

B. The California Supreme Court's Decision Conflicts With The D.C. Circuit's Decision Regarding The Constitutionality Of The Same California Statute

The California Supreme Court's decision directly conflicts with the D.C. Circuit's decision in *D.C. Waremart* regarding the constitutionality of California's Moscone Act, "plac[ing] California on a collision course with the federal courts." App., *infra*, 67a (Chin, J., dissenting).

In *D.C. Waremart*, a California grocery store prohibited nonemployee union representatives from picketing and handbilling in the store's privately owned parking lot. At the behest of the union, the National Labor Relations Board (NLRB) held that the store had engaged in an unfair labor practice under the National Labor Relations Act, 29 U.S.C. § 158(a)(1). *D.C. Waremart*, 354 F.3d at 872. The NLRB's decision rested on its conclusion that the grocery store did not have a right under California

law to exclude union representatives from its property. *Ibid.*

The D.C. Circuit reversed. Relying on *Mosley* and *Carey*, the D.C. Circuit held that the Moscone Act's "special protection for labor activity" could not give the union the right to engage in labor picketing on a stand-alone store's private property because such a rule "violates the First Amendment to the Constitution." *Id.* at 874-875. The D.C. Circuit thus held that "labor organizing activities may be conducted on private property only to the extent that California permits other expressive activity to be conducted on private property." *Id.* at 875. And the D.C. Circuit "believe[d] 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." *Ibid.*

The D.C. Circuit's prediction about the California Supreme Court did not come to pass. Quite the contrary: expressly disagreeing with *D.C. Waremart*, the California Supreme Court adopted the very interpretation of the Moscone Act that the D.C. Circuit held unconstitutional. App., *infra*, at 25a-27a.

California businesses now are governed by both of these conflicting interpretations of the U.S. Constitution. If a store's actions against labor-related expressive activities on its private property are reviewed by the NLRB, the Moscone Act will not govern because the NLRB is bound by the D.C Circuit to treat the Act as unconstitutional (and thus not

apply it). But the same action will subject the store to the strictures of the Moscone Act within the California court system, which is bound by the California Supreme Court's different reading of the U.S. Constitution.

As Justice Chin recognized in dissent, only this Court "can definitively resolve the disagreement." App., *infra*, at 67a-68a.

C. The Petition Presents A Question Of Vital Importance To Businesses

The California Supreme Court's decision finally adjudicates and rejects Ralphs' right to exclude labor-related protesters from the areas around the private entrance to its Sacramento store. *See, e.g.*, *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 477-487 (1975). That decision places retailers and other businesses in an untenable position.

Retailers invite the public onto their property for the limited purpose of shopping, not to engage in any other conduct. As this Court explained in *Lloyd Corp. v. Tanner,* the "obvious purpose, recognized widely as legitimate and responsible activity, is to bring potential shoppers to the [store], to create a favorable impression, and to generate goodwill. There is no open-ended invitation to the public to use the [store] for any and all purposes, however incompatible with the interests of both the store[ ] and the shoppers whom [it] serve[s]." 407 U.S. 551, 565 (1972).

It is not compatible with a store's or its shoppers' interests to allow expressive activities by only one group based on the subject matter of its expression. Nor is it compatible with a store's or its shoppers' interests to allow expressive activities by everyone who has something to say—because the harassment would drive away shoppers and harm the business.

But if this decision is not reversed, retailers open to the public for the limited purpose of shopping will be forced to allow labor picketing, pamphleting, and related activities right at the doors to their stores. The store's only choice will be whether to allow others with a message (be it political or otherwise) to do the same, or not. Either way, the store risks alienating present and prospective customers who thereafter will shop elsewhere.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A
IN THE SUPREME COURT OF CALIFORNIA

RALPHS GROCERY COMPANY, Plaintiff and Appellant, v. UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 8, Defendant and Respondent.	S185544 Ct.App. 3 C060413 Sacramento County Super. Ct. No. 34-2008-00008682-CU-OR-GDS (Filed Dec. 27, 2012)

A supermarket owner sought a court injunction to prevent a labor union from picketing on the privately owned walkway in front of the only customer entrance to its store. In response, the union argued that two statutory provisions—Code of Civil Procedure section 527.3 (the Moscone Act) and Labor Code section 1138.1 (section 1138.1)—prohibited issuance of an injunction under these circumstances. The trial court denied relief, ruling that the supermarket owner had failed to satisfy section 1138.1's requirements for obtaining an injunction against labor picketing.

The Court of Appeal reversed. It held that the walkway fronting the supermarket's entrance was not a public forum under the California Constitution's provision protecting liberty of speech (Cal. Const., art. I, § 2, subd. (a)), and therefore the store owner could regulate speech in that area. It further held

that both the Moscone Act and section 1138.1, because they give speech regarding a labor dispute greater protection than speech on other subjects, violate the free speech guarantee of the federal Constitution's First Amendment and the equal protection guarantee of the federal Constitution's Fourteenth Amendment. This court granted the union's petition for review.

We agree with the Court of Appeal that the supermarket's privately owned entrance area is not a public forum under the California Constitution's liberty of speech provision. For this reason, a union's picketing activities in such a location do not have state *constitutional* protection. Those picketing activities do have *statutory* protection, however, under the Moscone Act and section 1138.1. We do not agree with the Court of Appeal that the Moscone Act and section 1138.1, which are components of a state statutory system for regulating labor relations, and which are modeled on federal law, run afoul of the federal constitutional prohibition on content discrimination in speech regulations. On this basis, we reverse the Court of Appeal's judgment and remand the matter for further proceedings.

I. FACTS

Plaintiff Ralphs Grocery Company (Ralphs) owns and operates warehouse grocery stores under the name "Foods Co." One such store is located in a retail development in Sacramento called College Square,

which also contains restaurants and other stores. The College Square Foods Co store has only one entrance for customers. A paved walkway around 15 feet wide extends outward from the building's south side, where the customer entrance is located, to a driving lane that separates the walkway from the store's parking lot, which also serves customers of other retail establishments within College Square.

When the College Square Foods Co store opened in July 2007, agents of defendant United Food and Commercial Workers Union Local 8 (the Union) began picketing the store, encouraging people not to shop there because the store's employees were not represented by a union and did not have a collective bargaining agreement. The Union's agents, in numbers varying between four and eight, walked back and forth on the entrance walkway carrying picket signs, speaking to customers, and handing out flyers. These activities generally occurred five days a week (Wednesday through Sunday) for eight hours a day. The Union's agents did not impede customer access to the store.

In January 2008, Ralphs notified the Union in writing of its regulations for speech at its Foods Co stores, including the one in College Square. Those store regulations prohibit speech activities within 20 feet of the store's entrance and prohibit all such activities during specified hours and for a week before certain designated holidays. The store regulations also prohibit physical contact with any person, the distribution of literature, and the display of any sign

larger than two feet by three feet. The Union's agents did not adhere to Ralphs's speech regulations. In particular, they handed out flyers and stood within five feet of the store's entrance. Ralphs asked the Sacramento Police Department to remove the Union's agents from the College Square Foods Co store, but the police declined to do so without a court order.

In April 2008, Ralphs filed a complaint in Sacramento County Superior Court alleging that the Union's agents, by using the walkway fronting the College Square Foods Co store as a forum for expressive activity without complying with Ralphs's speech regulations, were trespassing on its property. Among other forms of relief, Ralphs sought a temporary restraining order, a preliminary injunction, and a permanent injunction barring the Union's agents from using the College Square Foods Co store property to express their views without complying with Ralphs's regulations prohibiting certain speech activities on its property.

Although the trial court denied Ralphs's request for a temporary restraining order, it issued an order to show cause and set an evidentiary hearing on the application for a preliminary injunction. In response, the Union argued that the Moscone Act, as construed by this court in *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters* (1979) 25 Cal.3d 317 (*Sears*), barred the court from enjoining peaceful picketing on a privately owned walkway in front of a retail store entrance during a labor dispute, and that Ralphs was not able to satisfy section 1138.1's

procedural requirements for injunctions against union picketing.

On May 28, 2008, the trial court ruled that the Moscone Act violates the federal Constitution's First and Fourteenth Amendments because it favors labor speech over speech on other subjects. In reaching that conclusion, the trial court found persuasive the reasoning of the federal Court of Appeals for the District of Columbia Circuit in *Waremart Foods v. N.L.R.B.* (D.C. Cir. 2004) 354 F.3d 870 (*Waremart/ N.L.R.B.*). Regarding section 1138.1, the trial court said it would have found that statute to be unconstitutional as well had it not considered itself bound by a California Court of Appeal's decision, *Waremart Foods v. United Food & Commercial Workers Union* (2001) 87 Cal.App.4th 145 (*Waremart/United Food*), which held that section 1138.1 does *not* violate the federal or state constitutional equal protection guarantees. (*Waremart/United Food* was decided by the Third District Court of Appeal, which also decided this case.) The trial court ordered that an evidentiary hearing be held under section 1138.1 to determine whether Ralphs was entitled to the requested injunctive relief.

After conducting the evidentiary hearing, the trial court denied Ralphs's motion for a preliminary injunction. The court found that Ralphs had "failed to introduce evidence sufficient to carry its burden on any of the factors enumerated in section 1138.1." In particular, the court found that "[t]he evidence did not establish that the Union had committed any

unlawful act, or that it had threatened to do so," or "that anything the [Union picketers were] doing would cause any 'substantial and irreparable injury' to the store property, or that public officers were unable or unwilling to furnish adequate protection to plaintiff's property." The court also found that Ralphs 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* (2007) 42 Cal.4th 850." Ralphs appealed.

The Court of Appeal reversed and remanded the matter to the trial court with instructions to grant the preliminary injunction. The Court of Appeal stated that "the entrance area and apron" of the Foods Co store "were not designed and presented to the public as public meeting places," and therefore did not constitute a public forum under the state Constitution's liberty of speech provision. Because these areas did not constitute a public forum, the court concluded, Ralphs "could limit the speech allowed and could exclude anyone desiring to engage in prohibited speech." The Court of Appeal also concluded that both the Moscone Act and section 1138.1, because they give speech about labor disputes greater protection than speech on other issues, violate the federal Constitution's First and Fourteenth Amendments. The Court of Appeal acknowledged that, as to section 1138.1, it had reached a contrary result in *Waremart/United Food, supra,* 87 Cal.App.4th 145, but it said it had there "applied the rational relationship test because the plaintiff made no argument and

presented no authority to apply the strict scrutiny test."

This court granted the Union's petition for review.

II. Discussion

A. Public Forum Under the State Constitution

The California Constitution states: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." (Cal. Const., art. I, § 2, subd. (a).) It also guarantees the rights to "petition government for redress of grievances" and to "assemble freely to consult for the common good." (*Id.,* art. I, § 3, subd. (a).) Through these provisions, this court has held, our state Constitution protects speech in privately owned shopping centers. (*Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, 910 (*Pruneyard*).) A privately owned shopping center may constitute a public forum under the state Constitution because of "the growing importance of the shopping center" (*Pruneyard,* at p. 907) " 'as a place for large groups of citizens to congregate' " and "to take advantage of the numerous amenities offered" there, and also because of " ' "the public character of the shopping center," ' " which is a result of the shopping center's owner having " ' "fully opened his property to the public" ' " (*id.* at p. 910 & fn. 5).

This court in *Pruneyard* stressed that "those who wish to disseminate ideas" in shopping centers do not "have free rein." (*Pruneyard, supra,* 23 Cal.3d at p. 910.) *Pruneyard* approvingly quoted the following remarks made by Justice Mosk in an earlier case: " 'It bears repeated emphasis that we do not have under consideration the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment. As a result of advertising and the lure of a congenial environment, 25,000 persons are induced to congregate daily to take advantage of the numerous amenities offered by the [shopping center there]. A handful of additional orderly persons soliciting signatures and distributing handbills in connection therewith, under reasonable regulations adopted by defendant [shopping center] to assure that these activities do not interfere with normal business operations [citation] would not markedly dilute defendant's property rights.' " (*Pruneyard,* at pp. 910-911, quoting *Diamond v. Bland* (1974) 11 Cal.3d 331, 345 (dis. opn. of Mosk, J.).)

Our reasoning in *Pruneyard* determines the scope of that decision's application. That reasoning is most apt in regard to shopping centers' common areas, which generally have seating and other amenities producing a congenial environment that encourages passing shoppers to stop and linger, to leisurely congregate for purposes of relaxation and conversation. By contrast, areas immediately adjacent to the entrances of individual stores typically lack seating and are not designed to promote relaxation and

socializing. Instead, those areas serve utilitarian purposes of facilitating customers' entrance to and exit from the stores and also, from the stores' perspective, advertising the goods and services available within. Soliciting signatures on initiative petitions, distributing handbills, and similar expressive activities pose a significantly greater risk of interfering with normal business operations when those activities are conducted in close proximity to the entrances and exits of individual stores rather than in the less heavily trafficked and more congenial common areas. Therefore, within a shopping center or mall, the areas outside individual stores' customer entrances and exits, at least as typically configured and furnished, are not public forums under this court's decision in *Pruneyard, supra,* 23 Cal.3d 899.

Our conclusion is consistent with decisions by California's intermediate appellate courts. We consider here, as examples, the decisions in *Albertson's, Inc. v. Young* (2003) 107 Cal.App.4th 106 (*Albertson's*) and in *Van v. Target Corp.* (2007) 155 Cal.App.4th 1375 (*Van*).

Albertson's concerned a supermarket in a Nevada County shopping center called Fowler Center, between Grass Valley and Nevada City. (*Albertson's, supra,* 107 Cal.App.4th 106, 110.) The supermarket's owner sued six individuals who, for the purpose of gathering signatures on voter initiative petitions, had stationed themselves on the walkway immediately outside the supermarket's entrances. The supermarket owner sought injunctive and declaratory relief to

stop this expressive activity. The trial court granted an injunction barring the defendants from coming onto the store's premises to solicit signatures on initiative petitions. (*Id.* at p. 109) The Court of Appeal affirmed, concluding that under the state Constitution the walkway in front of the supermarket entrance was not a public forum. (*Id.* at p. 110.) It remarked that the grocery store "does not invite the public to meet friends, to eat, to rest, to congregate, or to be entertained at its premises" (*id.* at p. 120), nor was the store or its entrance area "a place where people choose to come and meet and talk and spend time" (*id.* at p. 121).

In *Van,* two individuals brought class action lawsuits against Target Corporation, Wal-Mart Stores, Inc., and Home Depot, U.S.A., Inc., alleging that the defendant store owners had unlawfully prevented them from gathering signatures in front of their stores, many of which were in shopping centers. (*Van, supra,* 155 Cal.App.4th 1375, 1378-1379.) The plaintiffs sued as representatives of "a class of individuals who gather voter signatures for initiatives, referenda and recalls and register voters for upcoming elections." (*Id.* at p. 1379.) They sought damages as well as declaratory, equitable, and injunctive relief. (*Ibid.*) The trial court denied relief, concluding that the areas in front of the entrances to individual stores located within shopping centers are not public forums for purposes of the state Constitution's liberty of speech provision. (*Id.* at p. 1381.)

The Court of Appeal in *Van* affirmed. It concluded that "neither respondents' stores themselves nor the apron and perimeter areas of the stores were comprised of courtyards, plazas or other places designed to encourage patrons to spend time together or be entertained." (*Van, supra,* 155 Cal.App.4th at pp. 1388-1389.) The court added that "the evidence showed that the stores are uniformly designed to encourage shopping as opposed to meeting friends, congregating or lingering." (*Id.* at p. 1389.) The court concluded that the entrance and exit areas of the stores in question, which were located within shopping centers, "lacked any public forum attributes." (*Id.* at p. 1391.)

We agree with these intermediate appellate decisions that to be a public forum under our state Constitution's liberty-of-speech provision, an area within a shopping center must be designed and furnished in a way that induces shoppers to congregate for purposes of entertainment, relaxation, or conversation, and not merely to walk to or from a parking area, or to walk from one store to another, or to view a store's merchandise and advertising displays.

That conclusion does not dispose of this case, however. We consider next the extent to which state labor law, and particularly the Moscone Act and section 1138.1, protect labor speech on private land in front of a business that is the subject of a labor dispute.

B. California's Moscone Act and Section 1138.1

First, we review the language of those statutes. Next, we consider the extent to which they apply to labor picketing on private property in front of doorways used by customers to enter and exit a retail store. Finally, we review the Court of Appeal's conclusion here that, because they give speech regarding labor disputes greater protection than speech on other topics, the Moscone Act and section 1138.1 violate the federal Constitution's First and Fourteenth Amendments. As we explain, we disagree with the Court of Appeal on that point.

1. The Moscone Act

The California Legislature enacted the Moscone Act in 1975. (Stats. 1975, ch. 1156, § 2, p. 2845.) It was patterned after section 104 of title 29 of the United States Code, a federal statute that is part of the Norris-LaGuardia Act (29 U.S.C. §§ 101-115), which the United States Congress enacted in 1932. The stated purpose of California's Moscone Act is "to promote the rights of workers to engage in concerted activities for the purpose of collective bargaining, picketing or other mutual aid or protection, and to prevent the evils which frequently occur when courts interfere with the normal process of dispute resolution between employers and recognized employee organizations." (Code Civ. Proc., § 527.3, subd. (a).) It provides that certain activities undertaken during a

labor dispute are legal and cannot be enjoined. (*Id.,* § 527.3, subd. (b).) Those activities are:

"(1) Giving publicity to, and obtaining or communicating information regarding the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, or by any other method not involving fraud, violence or breach of the peace.

"(2) Peaceful picketing or patrolling involving any labor dispute, whether engaged in singly or in numbers.

"(3) Assembling peaceably to do any of the acts specified in paragraphs (1) and (2) or to promote lawful interests." (Code Civ. Proc., § 527.3, subd. (b).)

Expressly excluded from the Moscone Act's protection, however, is "conduct that is unlawful including breach of the peace, disorderly conduct, the unlawful blocking of access or egress to premises where a labor dispute exists, or other similar unlawful activity." (Code Civ. Proc., § 527.3, subd. (e).)

2. Section 1138.1

Enacted by the California Legislature in 1999 (Stats. 1999, ch. 616, § 1, pp. 4343-4345), section 1138.1 was patterned after section 107 of title 29 of the United States Code; the federal provision is part of the federal Norris-LaGuardia Act. Section 1138.1 prohibits a court from issuing an injunction during a

labor dispute unless, based upon witness testimony that is given in open court and is subject to cross-examination, the court finds each of these facts:

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

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

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

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

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

3. Application to labor picketing at retail store entrances

As mentioned earlier (see pp. 10-11, *ante*), the Moscone Act declares that certain specified activities

during a labor dispute are legal and cannot be enjoined. (Code Civ. Proc., § 527.3, subd. (b).) Among those activities are "patrolling any public street or *any place where any person or persons may lawfully be*" (*id.,* subd. (b)(1), italics added) and "[p]eaceful picketing or patrolling" (*id.,* subd. (b)(2)). Our 1979 decision in *Sears, supra,* 25 Cal.3d 317, considered whether these provisions covered picketing on a privately owned walkway in front of a store's customer entrance, thereby exempting peaceful labor picketing of a targeted business from the laws of trespass. Before discussing our resolution of that issue in *Sears,* however, it will be useful to review some of this court's earlier decisions.

Since at least 1964, when this court decided *Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union* (1964) 61 Cal.2d 766 (*Schwartz-Torrance*), California law has protected the right to engage in labor speech—including picketing, distributing handbills, and other speech activities—on private land in front of a business that is the subject of a labor dispute.

In *Schwartz-Torrance,* this court considered whether the owner of a shopping center was entitled to an injunction barring peaceful union picketing in front of a bakery located in the shopping center. We recognized that under California law a labor union has a right to engage in peaceful picketing on a private sidewalk in front of the business being targeted. Although our opinion noted that labor picketing is a form of speech and cited decisions of the United

States Supreme Court construing the freedom of speech guarantee of the federal Constitution's First Amendment (*Schwartz-Torrance, supra,* 61 Cal.2d at pp. 769-771), our holding ultimately was based not on federal constitutional law but on an analysis grounded in California labor law.

In *Schwartz-Torrance,* we began by characterizing the issue presented as "one of accommodating conflicting interests: plaintiff's assertion of its right to the exclusive use of the shopping center premises to which the public in general has been invited as against the union's right of communication of its position which, it asserts, rests upon public policy and constitutional protection." (*Schwartz-Torrance, supra,* 61 Cal.2d at p. 768.) Considering first the union's interest, we stated that "[p]icketing by a labor union constitutes an integral component of the process of collective bargaining. . . ." (*Id.* at p. 768.) Citing Labor Code section 923, we stated that "[t]he Legislature has expressly declared that the public policy of California favors concerted activities of employees for the purpose of collective bargaining or other mutual aid or protection." (*Schwartz-Torrance,* at p. 769.) Citing Penal Code section 552.1, we added that "the Legislature has enacted this policy into an exception to the criminal trespass law." (*Schwartz-Torrance,* at p. 769.) Thus, we concluded, " 'the Legislature in dealing with trespasses . . . has specifically subordinated the rights of the property owner to those of persons engaging in lawful labor activities.' " (*Ibid.,* quoting *In re Zerbe* (1964) 60 Cal.2d 666, 668.) "Nor is the

union's interest in picketing diminished," we added, "because it may communicate its message at other, admittedly less advantageous, locations off plaintiff's premises." (*Schwartz-Torrance,* at p. 770.)

Turning to the property owner's interest, we said in *Schwartz-Torrance* that it "emanates from the exclusive possession and enjoyment of private property." (*Schwartz-Torrance, supra,* 61 Cal.2d at p. 771.) For land being used as a shopping center, however, the impairment of that interest resulting from peaceful labor picketing, was "largely theoretical" in view of the "public character of the shopping center." (*Ibid.*) Quoting the United States Supreme Court, we said: " 'The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.' " (*Ibid.,* quoting *Marsh v. Alabama* (1946) 326 U.S. 501, 506.) Thus, the plaintiff property owner "suffers no significant harm in the deprivation of absolute power to prohibit peaceful picketing upon property to which it has invited the entire public." (*Schwartz-Torrance, supra,* 61 Cal.2d at p. 771.) We concluded in *Schwartz-Torrance* that the defendant union's interest in communicating its message through peaceful picketing outweighed the plaintiff shopping center owner's interest in preventing a "theoretical invasion of its right to exclusive control and possession of private property." (*Id.* at p. 772.)

After reviewing sister-state decisions cited by the parties in *Schwartz-Torrance,* we summarized our

holding in these terms: "[T]he picketing in the present case cannot be adjudged in the terms of absolute property rights; it must be considered as part of the law of labor relations, and a balance cast between the opposing interests of the union and the lessor of the shopping center. The prohibition of the picketing would in substance deprive the union of the opportunity to conduct its picketing at the most effective point of persuasion: the place of the involved business. The interest of the union thus rests upon the solid substance of public policy and constitutional right; the interest of the plaintiff lies in the shadow cast by a property right worn thin by public usage." (*Schwartz-Torrance, supra,* 61 Cal.2d at pp. 774-775.)

Five years later, we again considered issues concerning labor picketing on private property in front of a retail store's entrance in *In re Lane* (1969) 71 Cal.2d 872 (*Lane*). There, a labor union officer was convicted of two misdemeanor offenses for continuing to distribute handbills on a privately owned sidewalk in front of customer entrances to a supermarket after the store's owner insisted that he leave. (*Id.* at pp. 872-874.) The handbills urged customers not to patronize the supermarket because it advertised in newspapers owned by an individual with whom the union was engaged in a labor dispute. (*Id.* at p. 873.) On the union officer's petition for a writ of habeas corpus, we granted relief, ordering that he be discharged from custody. (*Id.* at p. 879.)

Lane rested on our decision in *Schwartz-Torrance, supra,* 61 Cal.2d 766, and on the United

States Supreme Court's decision in *Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza* (1968) 391 U.S. 308 (*Logan Valley*), which held that the freedom of speech guarantee of the federal Constitution's First Amendment protected peaceful labor picketing of a business that was located in a shopping center and employed nonunion workers. (*Lane, supra,* 71 Cal.2d at pp. 874-878.) Concluding that *Schwartz-Torrance* and *Logan Valley* were consistent with each other, we stated in *Lane*: "In essence they hold that when a business establishment invites the public generally to patronize its store and in doing so to traverse a sidewalk opened for access by the public[,] the fact of private ownership of the sidewalk does not operate to strip the members of the public of their rights to exercise First Amendment privileges on the sidewalk at or near the place of entry to the establishment." (*Lane,* at p. 878.) Although the supermarket in *Lane* was not located in a shopping center, we did not attach any significance to that fact.

Three years later, in *Lloyd Corp. v. Tanner* (1972) 407 U.S. 551 (*Tanner*), the United States Supreme Court modified its view of the federal Constitution's protection for free speech activities on private property, holding that a privately owned shopping center could prohibit the distribution of handbills expressing political views unrelated to the business of the center. The high court in *Tanner* distinguished its earlier decision in *Logan Valley, supra,* 391 U.S. 308, on the ground that the latter involved labor speech that was related to one of the businesses located in the

shopping center. (*Tanner,* at p. 563.) Thereafter, in a case applying the high court's decision in *Tanner,* we noted that our decisions in *Schwartz-Torrance, supra,* 61 Cal.2d 766, and in *Lane, supra,* 71 Cal.2d 872, were likewise distinguishable from *Tanner* as involving labor picketing of businesses with which the unions had a labor dispute. (*Diamond v. Bland, supra,* 11 Cal.3d 331, 334, fn. 3.)

Four years after its 1972 decision in *Tanner, supra,* 407 U.S. 551, the United States Supreme Court extended the holding of that case to encompass labor-related speech, overruling its 1968 decision in *Logan Valley, supra,* 391 U.S. 308. (*Hudgens v. NLRB* (1976) 424 U.S. 507.) Thus, the free speech guarantee of the federal Constitution's First Amendment, as currently construed by the nation's high court, does not extend to speech activities on privately owned sidewalks in front of the entrances to stores, whether or not those stores are located in shopping centers and whether or not the speech pertains to a labor dispute.

In 1979, this court again considered the subject of labor speech on private property in a case involving a trial court's injunction prohibiting union picketing "on the privately owned sidewalks surrounding the Sears Chula Vista store even though the picketing was peaceful and did not interfere with access to the store." (*Sears, supra,* 25 Cal.3d 317, 321 (plur. opn. of Tobriner, J.).) In overturning the injunction, the three-justice lead opinion relied on California's Moscone Act. The *Sears* plurality stated: "Although

the reach of the Moscone Act may in some respects be unclear, its language leaves no doubt but that the Legislature intended to insulate from the court's injunctive power all union activity which, under prior California decisions, has been declared to be 'lawful activity.' " (*Sears,* at p. 323 (plur. opn. of Tobriner, J.), italics omitted.)

The plurality in *Sears* stated that the language of the Moscone Act's subdivision (b), "although broad and sweeping in scope and purpose, leaves some doubt respecting its application to the present context." (*Sears, supra,* 25 Cal.3d at p. 324 (plur. opn. of Tobriner, J.).) That doubt centered on the provision declaring to be legal, and not subject to injunctive relief, the patrolling of "any place where any person or persons may lawfully be." (Code Civ. Proc., § 527.3, subd. (b)(2).) The plurality found guidance in "the concluding clause of [the Moscone Act's] subdivision (a)," providing that " 'the provisions of subdivision (b) . . . shall be strictly construed in accordance with existing law governing labor disputes with the purpose of avoiding any unnecessary judicial interference in labor disputes.' " (*Sears,* at p. 325 (plur. opn. of Tobriner, J.), quoting Code Civ. Proc., § 527.3, subd. (a).) This "existing law governing labor disputes," the *Sears* plurality explained, encompassed *Schwartz-Torrance, supra,* 61 Cal.2d 766, and *Lane, supra,* 71 Cal.2d 872, decisions that had "not been overruled or eroded in later cases" and that "established the legality of union picketing on private sidewalks

outside a store as a matter of state labor law." (*Sears,* at p. 328 (plur. opn. of Tobriner, J.).)

The *Sears* plurality then explained its conclusion about the proper construction of the Moscone Act: "As we noted earlier, subdivision (a) of the Moscone Act requires the anti-injunction provisions of subdivision (b) to 'be strictly construed in accordance with existing law governing labor disputes with the purpose of avoiding any unnecessary judicial interference in labor disputes.'" (*Sears, supra,* 25 Cal.3d at p. 329 (plur. opn. of Tobriner, J.).) Construing subdivision (b) in accord with the holdings of *Schwartz-Torrance, supra,* 61 Cal.2d 766, and *Lane, supra,* 71 Cal.2d 872, which had established both "the legality of peaceful picketing on private walkways outside a store" and "the lack of necessity of judicial interference to protect any substantial right of the landowner," the *Sears* plurality concluded that the Moscone Act's subdivision (b) "bars the injunction issued in the instant case." (*Sears,* at p. 329 (plur. opn. of Tobriner, J.).)[1]

[1] In *Sears,* Justice Newman authored a separate opinion consisting of just two sentences: "I agree that the injunction order should be reversed, and I concur in nearly all of Justice Tobriner's reasoning. He detects in the Moscone Act, however, certain ambiguities that to me do not seem to be confounding; and, unlike him, I do not believe that 'the Legislature . . . intended the courts to continue to follow [all] principles of California labor law extant at the time of the enactment of section 527.3.' (Maj. opn., *ante,* at p. 330.)" (*Sears, supra,* 25 Cal.3d at p. 333 (conc. opn. of Newman, J.).) Thus, in *Sears*

(Continued on following page)

4. Validity under the federal Constitution

In concluding that our state law's Moscone Act and section 1138.1 violate the federal Constitution, the Court of Appeal here relied on two United States Supreme Court decisions, *Police Department of Chicago v. Mosley* (1972) 408 U.S. 92 (*Mosley*) and *Carey v. Brown* (1980) 447 U.S. 455 (*Carey*). Those decisions are distinguishable, however, as both involved laws that restricted speech in a public forum; by contrast, 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 (*Hudgens v. NLRB, supra,* 424 U.S. 507; *Tanner, supra,* 407 U.S. 551).

In *Mosley,* a Chicago ordinance prohibited picketing "'on a public way'" near a primary or secondary school, while the school was in session, but the ordinance permitted peaceful picketing regarding a labor dispute at the school. (*Mosley, supra,* 408 U.S. at pp. 92-93.) The United States Supreme Court concluded that the ordinance violated the federal Constitution's equal protection guarantee. Stating that "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,* at p. 95,

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Justice Newman apparently agreed with the plurality that under the Moscone Act, a labor union's peaceful picketing on a private sidewalk outside the entrance of a business that is the subject of a labor dispute is legal and may not be enjoined.

italics added), the high court concluded that "[s]elective *exclusions from a public forum* may not be based on content alone, and may not be justified by reference to content alone" (*id.* at p. 96, italics added).

In *Carey,* an Illinois statute made it illegal "'to picket before or about the residence or dwelling of any person,'" with an exception for "'peaceful picketing of a place of employment involved in a labor dispute.'" (*Carey, supra,* 447 U.S. at p. 457.) Stating that "*in prohibiting peaceful picketing on the public streets and sidewalks* in residential neighborhoods, the Illinois statute regulates expressive conduct that falls within the First Amendment's preserve" (*Carey,* at p. 460, italics added), the United States Supreme Court held the statute to be "constitutionally indistinguishable from the ordinance invalidated in *Mosley*" (*ibid.*). The Illinois statute's constitutional flaw, the high court explained, was that it "discriminate[d] between lawful and unlawful conduct based upon the content of the demonstrator's communication" (*ibid.*).

The effect of the high court's decisions in *Mosley* and *Carey* was to invalidate the challenged state and municipal laws, thus removing the general prohibition on picketing near schools in *Mosley* and the general prohibition on picketing in residential neighborhoods in *Carey.* (*Mosley, supra,* 408 U.S. at p. 94; *Carey, supra,* 447 U.S. at pp. 458-459; see *Perry Ed. Assn. v. Perry Local Educators' Assn.* (1983) 460 U.S. 37, 54 (dis. opn. of Brennan, J.) ["In *Mosley* and *Carey,* we struck down prohibitions on peaceful picketing in a public forum."].) By contrast, invalidating here the

Moscone Act and section 1138.1 would not remove any restrictions on speech or enhance any opportunities for peaceful picketing or protest anywhere, including the privately owned walkway in front of the customer entrance to the College Square Foods Co store. This is because neither the Moscone Act nor section 1138.1 abridges speech.

The high court's decisions in *Mosley* and *Carey* both involved speech on public streets and sidewalks, which are public forums under the federal Constitution's First Amendment. Privately owned walkways in front of retail stores, by contrast, are not First Amendment public forums. (*Hudgens v. NLRB, supra,* 424 U.S. 507, 520-521; *Tanner, supra,* 407 U.S. 551, 570.) As the United States Supreme Court has said: "The key to [*Mosley* and *Carey*] was the presence of a public forum." (*Perry Ed. Assn. v. Perry Local Educators' Assn., supra,* 460 U.S. at p. 55, fn. omitted.) Because here the walkway in front of the College Square Foods Co store is not a First Amendment public forum, the holdings in *Mosley* and *Carey* do not apply.

As further support for its conclusion that California's Moscone Act and section 1138.1 violate the federal Constitution's First and Fourteenth Amendments, the Court of Appeal here cited the decision of the United States Court of Appeals for the District of Columbia Circuit in *Waremart/N.L.R.B., supra,* 354 F.3d 870. At issue there was a ruling by the National Labor Relations Board that a California supermarket's owner had violated the National Labor Relations

Act (29 U.S.C. § 158(a)(1)) when it prohibited union agents from distributing handbills to supermarket customers in the store's privately owned parking lot. In making that ruling, the board had concluded that under California law the supermarket owner did not have a right to exclude union representatives from its property. (*Waremart/N.L.R.B.,* at p. 872.) The board's conclusion was based in part on our state's Moscone Act, as construed by this court in *Sears, supra,* 25 Cal.3d 317. The federal appellate court disagreed with the board, holding that "the union organizers had no right under California law to engage in handbilling on the privately-owned parking lot of WinCo's grocery store." (*Waremart/N.L.R.B.,* at p. 876.) Regarding the Moscone Act, the federal appellate court concluded, citing the United States Supreme Court's decisions in *Mosley, supra,* 408 U.S. 92, and in *Carey, supra,* 447 U.S. 455, that the act "violates the First Amendment to the Constitution" insofar as it extends greater protection to speech regarding a labor dispute than to speech on other subjects. (*Waremart/N.L.R.B.,* at pp. 874-875.)

The analysis of the federal appellate decision in *Waremart/N.L.R.B., supra,* 354 F.3d 870, failed to recognize, however, that, as we explained earlier, neither the Moscone Act nor section 1138.1 of our state law restricts speech. *Waremart/N.L.R.B.*'s analysis also failed to recognize that the United States Supreme Court's decisions in *Mosley, supra,* 408 U.S. 92, and *Carey, supra,* 447 U.S. 455, both involved laws restricting speech in a public forum, as opposed to the

situation here, involving laws that do not restrict speech and are being applied on privately owned property that is not a public forum under the First Amendment. For these reasons, we do not consider *Waremart/N.L.R.B.* persuasive on the issues we address here.

As this court has recognized, the decisions of the United States Supreme Court discussing speech regulations "do *not* require literal or absolute content neutrality, but instead require only that the [content-based] regulation be 'justified' by legitimate concerns that are unrelated to any 'disagreement with the message' conveyed by the speech." (*Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 368; accord, *Fashion Valley Mall, LLC v. National Labor Relations Bd.* (2007) 42 Cal.4th 850, 867; *DVD Copy Control Assn., Inc. v. Bunner* (2003) 31 Cal.4th 864, 877.) The state law under which employees and labor unions are entitled to picket on the privately owned area outside the entrance to a shopping center supermarket is justified by the state's interest in promoting collective bargaining to resolve labor disputes, the recognition that union picketing is a component of the collective bargaining process, and the understanding that the area outside the entrance of the targeted business often is "the most effective point of persuasion" (*Schwartz-Torrance, supra,* 61 Cal.2d 766, 774). These considerations are unrelated to disagreement with any message that may be conveyed by speech that is not related to a labor dispute with the targeted business.

Moreover, California's Moscone Act and section 1138.1, insofar as they protect labor-related speech in the context of a statutory system of economic regulation of labor relations, are hardly unique. As we have seen (pp. 9-10, *ante*), both provisions are based on the federal Norris-LaGuardia Act. The federal National Labor Relations Act (29 U.S.C. § 151 et seq.; NLRA) likewise provides content-based protections for labor-related speech in private workplaces. Under one of the NLRA's provisions, it is unlawful for an employer to interfere with employees' rights to form or join a union (29 U.S.C. § 158, subd. (a)(1)), and this provision has long been construed to protect an employee's right to speak for or against a union on the employer's premises, even though the employer may prohibit solicitations on other topics (*Republic Aviation Corp. v. NLRB* (1945) 324 U.S. 793). The NLRA expressly protects the right of *employers* to speak on the topic of unionization by providing that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." (29 U.S.C. § 158, subd. (c).)

Decisions of the United States Supreme Court support the proposition that labor-related speech may be treated differently than speech on other topics. The high court's decisions regarding the legality of secondary boycotts provide an example. In the labor context, the high court has upheld the constitutionality of the NLRA's prohibitions on secondary picketing

(*NLRB v. Retail Store Employees Union* (1980) 447 U.S. 607) and secondary boycotts (*International Longshoremen's Assn. v. Allied Intl., Inc.* (1982) 456 U.S. 212). When the high court later held that a secondary boycott by civil rights activists was constitutionally protected speech, it distinguished the NLRA cases on the ground that "[s]econdary boycotts and picketing by labor unions may be prohibited, as part of 'Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.'" (*NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 912, quoting *NLRB v. Retail Store Employees Union,* at pp. 617-618 (conc. opn. of Blackmun, J.).)

In another decision, which held that the NLRA does not preempt state court jurisdiction to determine whether a particular dispute over labor picketing should be enjoined, the high court did not suggest that special protections for labor speech would violate a federal constitutional rule mandating content neutrality in all speech regulation. (*Sears, Roebuck and Co. v. San Diego County District Council of Carpenters* (1978) 436 U.S. 180, 199.) In that decision, the court also recognized that the NLRA may exempt certain union activity on private property from state trespass laws. (*Id.* at p. 204.)

Therefore, it is well settled that statutory law—state and federal—may single out labor-related speech for particular protection or regulation, in the

context of a statutory system of economic regulation of labor relations, without violating the federal Constitution.

As we have mentioned (p. 9, *ante*), the Moscone Act's purpose is "to promote the rights of workers to engage in concerted activities for the purpose of collective bargaining, picketing or other mutual aid or protection, and to prevent the evils which frequently occur when courts interfere with the normal process of dispute resolution between employers and recognized employee organizations." (Code Civ. Proc., § 527.3, subd. (a).) As the United States Supreme Court has remarked, in regard to the federal Norris-LaGuardia Act (on which our state's Moscone Act was modeled), the congressional purpose was not only "to protect the rights of [employees] to organize and bargain collectively," but also 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 v. Panama S.S. Co.* (1960) 362 U.S. 365, 369, fn. 7.) These legislative judgments provide a sufficient justification for the provisions of California's Moscone Act and section 1138.1 that single out labor-related speech for special protection from unwarranted judicial interference.

For the reasons given above, we conclude that neither of the two state statutes at issue here—the Moscone Act and section 1138.1—violates the federal Constitution's general prohibition on content-based speech regulation.

SUMMARY AND DISPOSITION

A private sidewalk in front of a customer entrance to a retail store in a shopping center is not a public forum for purposes of expressive activity under our state Constitution's liberty-of-speech provision as construed in *Pruneyard, supra,* 23 Cal.3d 899. On the private property of a shopping center, the public forum portion is limited to those areas that have been designed and furnished to permit and encourage the public to congregate and socialize at leisure.

California's Moscone Act and section 1138.1 afford both substantive and procedural protections to peaceful union picketing on a private sidewalk outside a targeted retail store during a labor dispute, and such union picketing may not be enjoined on the ground that it constitutes a trespass. The Moscone Act and section 1138.1 do not violate the federal Constitution's free speech or equal protection guarantees on the ground that they give speech regarding a labor dispute greater protection than speech on other subjects.

The Court of Appeal's judgment is reversed and the matter is remanded for further proceedings consistent with this opinion.

KENNARD, J.

WE CONCUR:

CANTIL-SAKAUYE, C.J.
BAXTER, J.
WERDEGAR, J.
CORRIGAN, J.
LIU, J.

CONCURRING OPINION BY CANTIL-SAKAUYE, C.J.

I write separately to address further the rights set forth in the Moscone Act (Code Civ. Proc., § 527.3), to provide guidance to the lower courts and the parties on remand.

As we explained in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters* (1979) 25 Cal.3d 317 (*Sears*), the Moscone Act was a product of compromise. Although drafted by union attorneys, it was modified at the behest of supporters of management. (*Sears,* at p. 323.) In particular, the bill was amended to provide that the act "shall be strictly construed in accordance with existing law governing labor disputes," and "[i]t is not the intent of this section to permit conduct that is unlawful including 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." (Sen. Bill No. 743 (1975-1976 Reg. Sess.) § 2, as amended Aug. 26, 1975; see now Code Civ. Proc., § 527.3, subds. (a), (e).) Therefore, in determining the scope of the conduct that is lawful under the Moscone

Act, it is necessary to consider not only the rights and limitations expressly set forth in the Act, but also "'existing law.'" (*Kaplan's Fruit & Produce Co. v. Superior Court* (1979) 26 Cal.3d 60, 77 (*Kaplan's Fruit*).)

It has long been established that labor is entitled to engage in peaceful picketing to advertise its grievances for the purpose of persuading others to labor's cause. (*Hughes v. Superior Court* (1948) 32 Cal.2d 850, 854 ["'the right to picket peacefully and truthfully is one of organized labor's lawful means of advertising its grievances to the public'"]; *Lisse v. Local Union No. 31* (1935) 2 Cal.2d 312, 319 (*Lisse*) ["'"the right by all legitimate means—of fair publication, and fair and oral or written persuasion, to induce others interested in or sympathetic to their cause"'"].) "As it has ever been, the only legitimate objective of picketing thus continues to be the transmission of information to the public, so that the public may know the picketers' grievance and elect to support or reject it." (*International Molders and Allied Workers Union v. Superior Court* (1977) 70 Cal.App.3d 395, 404.)

It follows from these established principles, and is confirmed by the Moscone Act's legislative history, that labor activity with an objective other than communicating labor's grievances and persuading listeners exceeds the right to engage in peaceful picketing within the meaning of the Moscone Act. (See Ops. Cal. Legis. Counsel, No. 16257 (Aug. 4, 1975) Injunctions: Labor Disputes (Sen. Bill No. 743) 5 Assem. J. (1975-1976 Reg. Sess.) p. 9020 ["while it must be

peaceful and truthful, picketing or *other* concerted action must also be conducted for a legal purpose, and however orderly the manner in which it is conducted, the illegality of its purpose provides a complete basis for injunctive relief"].) For example, "picketing, wherein the persuasion brought to bear contains a threat of physical violence, is unlawful, and . . . the use of words and an aggregation of pickets which reasonably induce fear of physical molestation may properly be enjoined." (*Pezold v. Amalgamated Meat Cutters and Butcher Workmen of North America* (1942) 54 Cal.App.2d 120, 123.) Labor actions need not, however, carry threats of violence or intimidation to fall outside the protection of the law. Speech or conduct directed toward interference with the owner's business by means other than persuasion of patrons to labor's position also falls outside the rights enunciated in the case law. (See Ops. Cal. Legis. Counsel, No. 16257, *supra,* 5 Assem. J. (1975-1976 Reg. Sess.) p. 9021 [existing law permitted limitations on a labor organization's manner of use of a public sidewalk "so that there is neither intimidation nor undue interference with its use by . . . customers"].) For example, patrolling a small area with more signs than reasonably required to publicize the dispute and communicate the picketers' ideas to patrons may have no purpose other than interfering with the owner's business. Similarly, using large signs for the purpose of obscuring potential patrons' view of the owner's signs and displays, is not protected activity. (See *Pezold, supra,* at p. 123 ["it would be stubbornly refusing to admit the obvious not to see in the

activities of picketing on many occasions more than the mere expression of ideas"]; see also *Senn v. Tile Layers Protective Union* (1937) 301 U.S. 468, 479 [Wisconsin's "statute provides that the picketing must be peaceful; and that term as used implies not only absence of violence, but absence of any unlawful act. . . . It precludes any form of physical obstruction or interference with the plaintiff's business"]; *M Restaurants, Inc. v. San Francisco Local Joint Executive Board of Culinary Workers* (1981) 124 Cal.App.3d 666, 676 [the activities authorized by the Moscone Act are similar to the activities authorized by Wisconsin's statute].)

These principles also answer an issue we identified in *Sears, supra,* 25 Cal.3d 317, in which we observed that "a strict reading [of the Moscone Act] might appear to authorize picketing in the aisles of the Sears store or even in the private offices of its executives." (*Id.* at p. 325.) Labor is fully able to publicize its message near the entrances to a business; at that location, the picketers will cross paths with everyone who enters the business. Communicating inside the business premises is not only unnecessary, but it would invariably interfere with the business activities being conducted inside and annoy and harass patrons. Therefore, although labor may conduct its activities at the entrance of the business, it may not enter the business to do so.

Labor is generally entitled to be at the entrance of a business because that is the most effective point to communicate its grievances with the business to

potential patrons. (*Schwartz-Torrance Investment Corp. v. Bakery and Confectionery Workers' Union* (1964) 61 Cal.2d 766, 770-771.) Labor may not, however, use the location in front of the business to communicate with a distant audience if the size of its signs or the volume of its speech thereby repel patrons from the business. At the point at which the signs and the sound levels interfere with the business for reasons other than their persuasive message, the communication is no longer lawful. Labor must share the space in front of the business with patrons, and may not unduly interfere with their ingress and egress, physically or through other means. (*Kaplan's Fruit, supra,* 26 Cal.3d at p. 78.)

Finally, because the Moscone Act is to be construed "with the purpose of avoiding any unnecessary judicial interference in labor disputes" (Code Civ. Proc., § 527.3, subd. (a)), conflicts between labor's exercise of its right to communicate and an owner's right to have those who engage in conduct that is not protected by the Moscone Act removed from its property will necessarily be addressed initially between the two opposing sides and, perhaps, by law enforcement. (See Lab. Code, § 1138.1, subd. (a)(5) [a prerequisite to injunctive relief in a labor dispute is a showing "[t]hat the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection"].) A business owner will be in a superior position to recognize the impact that labor's conduct may have on its business, independent of the conduct's effect of

persuading patrons. For example, the owner will be familiar with its own promotional activities and will be aware of the impact that labor's signs, by virtue of their size, height, or location, will have on those activities. An owner may also learn from its patrons how the labor action is affecting them. Although business owners do not have a right in this context to unilaterally impose reasonable time, place, and manner restrictions on speakers—the standard when the right to speech is based on the existence of a public forum—they may certainly articulate, before any labor action or on an ad hoc basis, rules and policies aimed at curbing labor conduct that exceeds the rights recognized by the Moscone Act. Labor must abide by the owner's rules and policies to the extent required to prevent unlawful interference with the business, despite the fact that the limits imposed by the owner may reduce labor's ability to communicate its message. Otherwise, the conduct will exceed the rights codified in the Moscone Act.

We recognized in *Lisse, supra,* 2 Cal.2d 312, that "'whether picketing is lawful or unlawful depends upon the circumstances surrounding each case . . . [and] upon the conduct of the parties themselves.'" (*Id.* at p. 321) A trial court must weigh all the evidence and determine whether the conduct of those engaging in labor speech is detrimental to the owner for reasons other than persuasion of listeners to the views of the speaker. Although the owner's rules do not define the boundaries of what constitutes lawful labor conduct, the owner's experience and knowledge

with respect to its business and the manner in which the labor conduct is affecting its business, all of which presumably form the basis for the owner's rules, will be relevant to the court's determination of whether the labor activity is interfering with the business in ways other than persuasion by labor's message. If the evidence presented by the owner establishes such interference, labor's conduct will not be protected by the Moscone Act, and will constitute an unlawful trespass.

Finally, our discussion concerns only the rights codified in the Moscone Act. When labor interests engage in concerted activities on public property, they enjoy all of the protections of the National Labor Relations Act (29 U.S.C. § 151 et seq.; NLRA) And when they engage in speech in a public forum as recognized in *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, they enjoy the same speech rights afforded others under the California Constitution, subject to any restrictions imposed by federal labor law. When, however, they engage in speech on private property that is not a public forum, as in this case, their rights arise from California statutory provisions, and the extent of their rights depends on the principles codified in those provisions. Principles developed under the NLRA with respect to labor conduct on public property, or in the context of case law addressing speech in a public forum, cannot be applied to expand the right established by the Moscone Act to engage in conduct on private property. If labor's conduct on private property exceeds the

activities that are protected by the Moscone Act, its conduct will constitute an unlawful trespass, and may be excluded by the employer. (See *N.L.R.B. v. Calkins* (9th Cir. 1999) 187 F.3d 1080, 1094 ["To the extent that state law permits employers' exclusion of [concerted labor activities from private property], the NLRA does not mandate accommodation"].)

CANTIL-SAKAUYE, C.J.

WE CONCUR:

BAXTER, J.
CORRIGAN, J.

CONCURRING OPINION BY LIU, J.

I join the court's opinion and write separately to provide additional context in support of the conclusion that the two statutory provisions at issue in this case—Code of Civil Procedure section 527.3 (the Moscone Act) and Labor Code section 1138.1 (section 1138.1)—do not violate the First or Fourteenth Amendments to the United States Constitution. I also briefly discuss the scope of labor activity protected by the Moscone Act in response to the separate opinions of the Chief Justice and Justice Chin.

I.

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. Rather, it seeks to assert the First Amendment rights of hypothetical third-party speakers who might like to speak on Ralphs's private property but whose right to do so is not protected by the Moscone Act or section 1138.1. But invalidating those statutes would have no effect on the ability of such hypothetical third parties to speak; Ralphs may eject such speakers from its property under state trespass law whether or not the Moscone Act or section 1138.1 remains on the books. (See maj. opn., *ante,* at p. 19 ["invalidating . . . the Moscone Act and section 1138.1 would not remove any restrictions on speech or enhance any opportunities for peaceful picketing or protest"].)

The crux of Ralphs's First Amendment claim is not an improper denial of speech to anyone, but rather an allegation of content-based discrimination. As Justice Chin notes, the Moscone Act and section 1138.1 secure for "labor picketers, but no one else, . . . the right to engage in speech activities on [Ralphs's] property." (Conc. & dis. opn. by Chin, J., *post,* at p. 2.) The surface appeal of this account of what the statutes do must be considered in the broader context of the statutes' historical origins. As explained below, the Legislature enacted these statutes in order to restrain the role of 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. So understood, the statutes are no different from a broad range of labor, employment, and economic regulations

that arguably impinge on speech but pose no serious First Amendment concern.

A.

As today's opinion notes (maj. opn., *ante,* at pp. 9-11), the Moscone Act and section 1138.1 are almost identical to the corresponding provisions of the federal Norris-LaGuardia Act, 29 U.S.C. § 101 et seq. One of Congress's primary goals in enacting the Norris-LaGuardia Act in 1932 was to address the overuse of injunctions in labor disputes. (See Koretz, Statutory History of the United States Labor Organization (1970) pp. 162-257 (Koretz); Frankfurter & Greene, The Labor Injunction (1930) pp. 199-228 (Frankfurter & Greene).) One scholar estimates that federal and state courts issued at least 4,300 injunctions against labor protestors between 1880 and 1930. (Forbath, *The Shaping of the American Labor Movement* (1989) 102 Harv. L.Rev. 1111, 1151.) About 2,100 of these injunctions were issued during the 1920s alone, bringing the proportion of strikes met by injunctions to a high of 25 percent. (*Id.* at p. 1227.) As employers made increasing use of this tool to nip labor disputes in the bud, the labor injunction "assumed new and vast significance in [the] national economy." (Frankfurter & Greene, *supra,* at p. 24.)

Many contemporary scholars and legislators were critical of this development. They observed that labor injunctions were often unnecessary and overbroad; many of the activities enjoined were punishable

independently as crimes or torts, and "[t]he blanket wording of numerous [injunctions] frequently include[d] the residuum of conduct even remotely calculated to have effect in the dispute, but neither criminal nor tortious." (Frankfurter & Greene, *supra,* at p. 105.) Resort to injunctions meant that juries had no role in checking the exercise of judicial power. (See Forbath, *supra,* 102 Harv. L.Rev. at p. 1180 ["the 'doing away' with juries was one of the chief attractions of equity over criminal law from the employer's perspective"].) In addition, injunctions were frequently issued ex parte, without notice, and upon an inadequate evidentiary foundation. (See Frankfurter & Greene, *supra,* at p. 200 [courts issued "[t]emporary injunctive relief without notice . . . upon dubious affidavits"]; *id.* at p. 106 [the language of injunctions was often "stereotyped and transferred *verbatim* from case to case, without considered application by the court to the peculiar facts of each controversy"]; S. Rep. No. 163, 72d Cong., 1st Sess., p. 8 (1932) [Rep. of U.S. Sen. Com. on Judiciary, on Sen. No. 935: "[B]efore [the protestor] is given an opportunity to be heard, he is enjoined"], reprinted in Koretz, *supra,* at p. 172 (hereafter Senate Judiciary Report).)

Employers' reliance on injunctions was particularly subject to abuse, the critics argued, because the injunctions could not preserve the status quo and suspended only the activities of the strikers: "[T]he suspension of strike activities, even temporarily, [could] defeat the strike for practical purposes and foredoom its resumption, even if the injunction [was]

later lifted," and "[i]mprovident issue of the injunction [could] be irreparable to the defendant." (Frankfurter & Greene, *supra,* at p. 201.) Labor injunctions were also "invoked by employers, police, and the press to justify measures like arming strikebreakers or jailing pickets." (Forbath, *supra,* 102 Harv. L.Rev. at p. 1187.)

The abuse and overuse of injunctive decrees presented serious risks for the judiciary. Organized labor complained that courts were improperly engaged in "government by injunction." (Koretz, *supra,* at p. 162 ["For nearly half a century organized labor battled against what it called 'government by injunction'"]; Frankfurter & Greene, *supra,* at p. 200 ["[T]hose zealous for the unimpaired prestige of our courts have observed how the administration of law by decrees which through vast and vague phrases surmount law, undermines the esteem of courts upon which our reign of law depends. Not government, but 'government by injunction,' characterized by the consequences of a criminal prosecution without its safeguards, has been challenged."].) The threat to judicial prestige and legitimacy was a major concern motivating Congress's enactment of the Norris-LaGuardia Act. (See *Marine Cooks v. Panama S.S. Co.* (1960) 362 U.S. 365, 369, fn. 7 [Congress's purpose was "to protect the rights of laboring men to organize and bargain collectively and 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"]; Sen. Judiciary Rep., *supra,* at p. 25, reprinted in Koretz, *supra,* at pp. 192-193 ["The main purpose of these definitions is to provide for limiting the injunctive powers of the Federal courts only in the special type of cases, commonly called labor disputes, in which these powers have been notoriously extended beyond the mere exercise of civil authority and wherein the courts have been converted into policing agencies devoted in the guise of preserving the peace, to the purpose of aiding employers to coerce employees into accepting terms and conditions of employment desired by employers."].) Indeed, the Senate Judiciary Committee warned that the power to make law through injunction, combined with the power to enforce that law through findings of contempt, would result in "judicial tyranny." (Sen. Judiciary Rep., *supra,* at p. 18, reprinted in Koretz, *supra,* at p. 184.)

In response to these concerns, Senator Shipstead introduced a bill on December 12, 1927 proposing to limit federal courts' jurisdiction over labor disputes. (Sen. Judiciary Rep., *supra,* at p. 2, reprinted in Koretz, *supra,* at p. 169.) Congress held extensive hearings on the subject, some "upon application of attorneys representing corporations and organizations opposed to the enactment" of the legislation (*id.* at 3, reprinted in Koretz, *supra,* at p. 170), and various versions of the bill were vigorously debated. (See Koretz, *supra,* at pp. 240, 242 [Remarks of Rep. Beck, Debate on H.R. No. 5315, 72d Cong., 1st Sess. (1932), arguing that the proposed bill "[would] do infinite harm to both classes, employer and employee, and . . .

the innocent public," and criticizing the bill for taking "no account whatever of the motives and purposes with which a nation-wide strike or boycott can be commenced and prosecuted"]; Sen. Judiciary Rep., *supra,* at p. 4, reprinted in Koretz, *supra,* at pp. 170-171 [noting that several versions of the bill were given "adverse report[s]" by the Senate subcommittee]).

But the proposed legislation steadily gained in popularity. The House Judiciary Committee noted that "[h]earings . . . held by congressional committees over a period of years and the facts adduced [had] brought about an almost unanimity of opinion that such powers of the Federal courts [had] been exercised to the detriment of the public welfare and [needed to] be curbed." (H.R. Rep. 669, 72d Cong., 1st Sess., p. 2 (1932) [Rep. of U.S. House Com. on Judiciary, on H.R. No. 5315], reprinted in Koretz, *supra,* at p. 193.) In 1931, both political parties promised legislative reforms in their platforms. (Koretz, *supra,* at p. 172.) The proposed legislation ultimately passed by a vote of 363 to 13 in the House and 75 to 5 in the Senate. (*Id.* at p. 162.) As enacted, the Norris-LaGuardia Act reaffirmed that certain acts of labor organization were lawful (29 U.S.C § 104) and divested federal courts of their equitable power to enjoin labor disputes except under certain limited circumstances and after following specified procedures (29 U.S.C. § 107).

The Norris-LaGuardia Act limits only the power of federal courts to issue injunctions. After its

enactment, many state legislatures passed "'little Norris-LaGuardia Acts'" to place similar restraints on the injunctive powers of state courts. (*Messner v. Journeymen Barbers* (1960) 53 Cal.2d 873, 895, fn. 4 (dis. opn. by Schauer, J.).) California's Moscone Act was one such law. "The original bill, drafted by union attorneys, clearly sought to limit the injunctive jurisdiction of the superior court. The act declared its purpose expressly: to prevent 'the evils which frequently occur when courts interfere with the normal processes of dispute resolution between employers and recognized employee organizations.'" (*Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters* (1979) 25 Cal.3d 317, 323 (*Sears*), quoting Code Civ. Proc., § 527.3, subd. (a).)

As we noted in *Sears,* "[t]he preamble to the Moscone Act identifies the procedural inequities which occur when the courts issue injunctions in labor disputes. It states: [¶] . . . [¶] 'Equity procedure that permits a complaining party to obtain sweeping injunctive relief that is not preceded by or conditioned upon notice to and hearing of the responding party or parties, or that issues after hearing based upon written affidavits alone and not wholly or in part upon examination, confrontation and cross-examination of witnesses in open court, is peculiarly subject to abuse in labor litigation for each of the following reasons: [¶] (a) The status quo cannot be maintained, but is necessarily altered by the injunction. [¶] (b) The determination of issues of veracity and of probability of fact from the affidavits of the opposing

parties which are contradictory and, under the circumstances, untrustworthy rather than from oral examination in open court, is subject to grave error. [¶] (c) The error in issuing the injunctive relief is usually irreparable to the opposing party. [¶] (d) The delay incident to the normal course of appellate procedure frequently makes ultimate correction of error in law or in fact unavailing in the particular case.' (Stats. 1975, ch. 1156, § 1, p. 2845.)" (*Sears, supra,* 25 Cal.3d at p. 323, fn. 2.)

As ultimately enacted in 1975, the Moscone Act "establishe[d] the legality of certain labor practices and limit[ed] the equity jurisdiction of the superior court to enjoin such practices." (*Sears, supra,* 25 Cal.3d at p. 322.) The statute's text is written expressly as a restraint on courts. Subdivision (a) provides that "the equity jurisdiction of the courts in cases involving or growing out of a labor dispute shall be no broader than as set forth in subdivision (b) of this section, and the provisions of subdivision (b) of this section shall be strictly construed in accordance with existing law governing labor disputes with the purpose of avoiding any unnecessary judicial interference in labor disputes." (Code Civ. Proc., § 527.3, subd. (a).) Subdivision (b) provides: "The acts enumerated in this subdivision, whether performed singly or in concert, shall be legal, and no court nor any judge nor judges thereof, shall have jurisdiction to issue any restraining order or preliminary or permanent injunction which, in specific or general terms, prohibits any person or persons, whether

singly or in concert, from doing any of the following: [¶] (1) Giving publicity to, and obtaining or communicating information regarding the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, or by any other method not involving fraud, violence or breach of the peace. [¶] (2) Peaceful picketing or patrolling involving any labor dispute, whether engaged in singly or in numbers. [¶] (3) Assembling peaceably to do any of the acts specified in paragraphs (1) and (2) or to promote lawful interests." (*Id.,* § 527.3, subd. (b).)

Fifteen years later, the Legislature enacted section 1138.1, which codified the procedures that must be followed before an injunction will issue. The court must find, among other things, that "unlawful acts have been threatened and will be committed unless restrained"; that "substantial and irreparable injury to complainant's property will follow" in the absence of an injunction; and that "the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection." (Lab. Code, § 1138.1, subd. (a).)

Importantly, the statutory restraints on labor injunctions do not leave employers without a remedy for unlawful activity. Indeed, section 1138.1, subdivision (a)(5) requires the employer to show that "the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection." The existence of this

requirement implies that the police are authorized to stop any "unlawful acts" proscribed by the Moscone Act. (See *United Food & Commercial Workers Union v. Superior Court* (2000) 83 Cal.App.4th 566, 578 [section 107 of title 29 of the United States Code, from which section 1138.1 was patterned almost verbatim, " 'was based upon a recognition of the fact that the preservation of order and the protection of property in labor disputes is in the first instance a police problem' "].) In addition, if labor protestors are engaged in unlawful activity that causes the store to lose money, the employer may sue for damages. Section 1138.1 simply limits one form of relief available to the employer based on the Legislature's judgment that court-issued injunctions are a poor method of resolving labor disputes.

In sum, the Moscone Act and section 1138.1, like the federal statute they emulate, were enacted to remedy judicial practices that unfairly proscribed labor speech, not to favor labor speech over other types of expressive conduct.

B.

In its brief, Ralphs contends that the statutes violate the principle of content neutrality because they "discriminate in favor of labor speech by exalting labor over all other types of expressive activities." (See also *Waremart Foods v. NLRB* (D.C. Cir. 2004) 354 F.3d 870, 874-875.) But even if this were a proper characterization of the statutes, it is hardly obvious

that they run afoul of the First Amendment. The principal cases on which Ralphs relies—*Police Department of Chicago v. Mosley* (1972) 408 U.S. 92 and *Carey v. Brown* (1980) 447 U.S. 455—involved content-based prohibitions on speech in quintessential public forums. Outside the context of a public forum, the principle of content neutrality, though "frequently . . . identified as the First Amendment's operative core, is neither so pervasive nor so unyielding as is often thought." (Fallon, *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark,* 1994 S.Ct. Rev. 1, 2 (Fallon).) Because "large areas of communication still remain untouched by the First Amendment," the principles governing the First Amendment's applicability to speech regulation cannot be reduced to any simple formula. (Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience* (2004) 117 Harv. L.Rev. 1765, 1800-1801 (Schauer) ["the explanation for what is ultimately treated as covered by the First Amendment and what ultimately remains uncovered appears to be the result of a highly complex array of factors, some of which are doctrinal but many of which are not"].)

To begin with, the "Supreme Court has explicitly recognized several categories [of speech] within which content-based regulation is sometimes permitted, often on a relatively ad hoc basis," including commercial speech, adult speech, libel, broadcast media, speech of government employees, and student speech. (Fallon, *supra,* 1994 S.Ct. Rev. at p. 23; see *id.* at pp.

23-26.) The high court has further held that some categories of speech, defined on the basis of content, are of such low value that they do not merit First Amendment protection. (*Id.* at p. 23 ["[o]bscenity, fighting words, and child pornography are well-known examples of generally unprotected categories"].)

Moreover, many laws that regulate speech based on its content have never been thought to trigger First Amendment concern. For example, the Securities and Exchange Commission "engages in pervasive content-based control over speech" in regulating securities: it prohibits companies from making offers and advertisements without advance approval, regulates the statements candidates may make in proxy contests, and prohibits the transmission of accurate inside information from "tipper" to "tippee" in the insider trading context. (Schauer, *supra,* 117 Harv. L.Rev. at pp. 1778-1779.) Similarly, "antitrust law restricts the exchange of accurate market, pricing, and production information, as well as limits the advocacy of concerted action in most contexts; yet it remains almost wholly untouched by the First Amendment." (*Id.* at p. 1781, fns. omitted.) "[M]uch the same degree of First Amendment irrelevance holds true for the content-based regulation of trademarks, the pervasive and constitutionally untouched law of fraud, almost all of the regulation of professionals, virtually the entirety of the law of evidence, large segments of tort law, and that vast domain of criminal law that deals with conspiracy and criminal

solicitation." (*Id.* at pp. 1783-1784, fns. omitted.) Nor does it violate the First Amendment for government to impose greater punishment for crimes in which the defendant selected the victim because of the victim's race or other protected status. (*Wisconsin v. Mitchell* (1993) 508 U.S. 476, 487 [holding that penalty enhancement statute "is aimed at conduct unprotected by the First Amendment"]; *In re M.S.* (1995) 10 Cal.4th 698, 720-726 [upholding hate crimes statute against First Amendment claim alleging content-based discrimination].)

Scholars surveying this legal landscape have struggled to develop a coherent theory that explains why some regulations impinging on speech trigger First Amendment concern while others do not. Professor Schauer interprets the case law to suggest that the state may criminalize "speech [that] is face-to-face, informational, particular, and for private gain," but not speech that is "public, noninformational, and ideological [in] nature." (Schauer, *supra,* 117 Harv. L.Rev. at pp. 1801, 1802.) Further, he posits that the First Amendment's coverage in the civil context may be partly explained by the existence or absence of a sympathetic class of litigants or a well-entrenched regulatory scheme. (*Id.* at pp. 1803-1807.) Whatever the merits of these views, it is apparent that "the conceptual space covered by the First Amendment is [simply] too vast to yield to a general rule of content neutrality, a categorical prohibition of ad hoc balancing, or any other single formulation." (Fallon, *supra,* 1994 S.Ct. Rev. at p. 22.)

Most pertinent to the case before us, the Supreme Court has consistently rejected First Amendment challenges to content-based speech regulations in the context of labor relations. As today's opinion explains, content-based protections for labor-related speech in private workplaces pervade the federal National Labor Relations Act (NLRA). (Maj. opn., *ante,* at pp. 21-23.) Under 29 United States Code section 158(a)(1), it is unlawful for an employer to interfere with employees' rights to form or join a union, and "this provision has long been construed to protect an employee's right to speak for or against a union on the employer's premises, even though the employer may prohibit solicitations on other topics." (Maj. opn., *ante,* at pp. 21-22, citing *Republic Aviation Corp. v. NLRB* (1945) 324 U.S. 793.) The NLRA also protects the right of employers to speak on unionization by providing that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." (29 U.S.C. § 158(c); see also Lab. Code, § 1155 [almost identical language applicable to agricultural employers].)

Similarly, content-based prohibitions on labor-related speech pervade federal and state labor laws. The NLRA makes it unlawful for a union or its agents to engage in speech that "restrain[s] or coerce[s]" employees in their decision to unionize or bargain collectively (29 U.S.C. § 158(b)(1)); "to engage in, or to

induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services" (*id.,* § 158(b)(4)(i)); or to engage in speech that "threaten[s], coerce[s], or restrain[s] any person" with the object of forcing someone to join a union or forcing someone to cease doing business with another person (*id.,* § 158(b)(4)(ii)(A), (B)). The NLRA also prohibits picketing whose object is to force an employer to recognize a union or to force employees to join a union. (*Id.,* § 158(b)(7).) It further prohibits secondary picketing (*NLRB v. Retail Store Employees Union* (1980) 447 U.S. 607) and secondary boycotts (*International Longshoremen's Assn. v. Allied Intl., Inc.* (1982) 456 U.S. 212)—prohibitions the high court has upheld on the ground that "[s]econdary boycotts and picketing by labor unions may be prohibited, as part of 'Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.'" (*NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 912, quoting *NLRB v. Retail Store Employees Union,* at pp. 617-618 (conc. opn. by Blackmun, J.).)

Although these laws arguably favor or disfavor certain kinds of speech on the basis of content, they

have never been held to violate the federal Constitution. (See *International Longshoremen's Assn. v. Allied Intl., Inc., supra,* 456 U.S. at p. 226 ["We have consistently rejected the claim that secondary picketing by labor unions in violation of § 8(b)(4) [of the NLRA] is protected activity under the First Amendment."]; *Hudgens v. NLRB* (1975) 424 U.S. 507, 521 [holding that the "constitutional guarantee of free expression has no part to play in a case such as this" and remanding to the National Labor Relations Board to determine in the first instance the proper accommodation between labor rights and private property rights]; *NLRB v. Gissel Packing Co.* (1969) 395 U.S. 575, 616-620 [holding that interests in fair and peaceful labor relations justify limited restrictions on employers' speech in the context of labor disputes]; *Senn v. Tile Layers Protective Union Local 5* (1937) 301 U.S. 468, 472 [holding that Wisconsin Labor Code provisions authorizing peaceful picketing and publicizing of labor disputes did not violate the due process clause or the equal protection clause of the Fourteenth Amendment].)

Beyond the context of labor-management relations, many federal and state employment laws contain content-based speech protections—for example, whistleblower protections and antiretaliation provisions in civil rights laws. (See, e.g., 29 U.S.C. § 660(c) [making it unlawful to retaliate against an employee who reports a violation of the federal Occupational Safety and Health Act]; 18 U.S.C. § 1514A(a) [protecting employees who report fraud or violations

of securities law under the provisions of Sarbanes-Oxley]; 42 U.S.C. § 2000e-3(a) [protecting speech that reports or opposes status-based discrimination, harassment, or retaliation]; Lab. Code § 1102.5 [protecting disclosure of violation of state or federal law].) Federal and state employment laws also contain content-based prohibitions on speech—for example, laws against racial, sexual, or other status-based harassment. (See, e.g., 42 U.S.C. § 2000e-2 [prohibiting status-based harassment]; *Aguilar v. Avis Rent A Car System* (1999) 21 Cal.4th 121, 130 [holding that the Fair Housing and Employment Act prohibits the use of racist epithets in the workplace and does not constitute an improper prior restraint on freedom of expression].) In California, some laws compel speech based on content, including a provision of the Fair Housing and Employment Act that requires all employers with more than 50 employees to conduct trainings on prohibited discrimination. (Gov. Code, § 12950.1; 22 Cal. Code Regs., tit. 22, § 7288.0(b).) Again, these laws have never been struck down on First or Fourteenth Amendment grounds. (See, e.g., *Harris v. Forklift Systems* (1993) 510 U.S. 17 [upholding imposition of title VII liability for a broad category of sexually harassing speech that creates a hostile work environment].)

Although there may be no single theory that can account for all of the First Amendment jurisprudence discussed above, much of it can perhaps be explained by a distinction between the *economic conduct* at issue and the *expressive content* of that conduct. This

distinction is easy to discern in, say, a law against price fixing. Such a law prohibits certain kinds of speech based on content, but it does so because it is really targeting a certain kind of economic conduct. Similarly, the Moscone Act protects certain kinds of speech ("Join our union!" or "Non-union store: don't shop here!"). But it does so because it aims to promote a certain kind of economic conduct—labor dispute resolution through collective bargaining—that the Legislature believes conducive to its public policy goals for the workplace and the economy. (See Code Civ. Proc., § 527.3, subd. (a) [Moscone Act aims "to promote the rights of workers to engage in concerted activities for the purpose of collective bargaining, picketing or other mutual aid or protection, and to prevent the evils which frequently occur when courts interfere with the normal processes of dispute resolution between employers and recognized employee organizations"].) Viewed this way, the Moscone Act and section 1138.1 are not speech regulations but economic regulations that govern the relationship between labor and management. Like a price-fixing statute, they fall outside the scope of First Amendment concern. (Cf. *R.A.V. v. St. Paul* (1992) 505 U.S. 377, 389 ["[S]ince words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation's defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech"].)

In sum, a vast array of federal and state employment and labor laws, many of which protect, prohibit, or even compel speech based on its content, has never been held to violate the federal Constitution. The comprehensive regulatory regimes that govern employer-employee relations reflect careful balancing of the interests of labor and management within the context of a legislature's broad economic goals. The Moscone Act and section 1138.1 are part of such a regime, and neither statute violates the First Amendment prohibition on content-based speech regulation.

II.

As to the scope of substantive rights set forth in the Moscone Act, I offer a few comments in response to the separate opinions of the Chief Justice and Justice Chin.

Justice Chin points out that the NLRA does not compel an employer to allow nonemployee labor organizers onto its business premises unless its employees are otherwise inaccessible. (Conc. & dis. opn. by Chin, J., *post,* at p. 4, citing *Lechmere, Inc. v. NLRB* (1992) 502 U.S. 527, 539.) This is true, but not particularly relevant to the scope of the Moscone Act. As we explained in *Sears,* nothing in federal law "confers on the employer an affirmative right to exclude union pickets unless such picketing constitutes an unfair labor practice." (*Sears, supra,* 25 Cal.3d at p. 332; see also *Thunder Basin Coal Co. v.*

Reich (1994) 510 U.S. 200, 217, fn. 21 ["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."]; *NLRB v. Calkins* (9th Cir. 1999) 187 F.3d 1080, 1094 ["State trespass law that does not guarantee the right to exclude causes no conflict [with federal law], in that it does not prohibit federally protected conduct; instead, such law grants broader accommodation of protected conduct than is required by the federal labor law."].) Accordingly, our state law may, and does, grant labor organizers broader rights without conflicting with federal law.

In her concurring opinion, the Chief Justice aims to provide guidance to lower courts and the parties in construing the rights secured by the Moscone Act. She quotes *Pezold v. Amalgamated Meat Cutters and Butcher Workmen of North America* (1942) 54 Cal.App.2d 120, 123, for the proposition that "picketing, wherein the persuasion brought to bear contains a threat of physical violence, is unlawful, and . . . the use of words and an aggregation of pickets which reasonably induce fear of physical molestation may properly be enjoined." (Conc. opn. by Cantil-Sakauye, C.J., *ante,* at p. 2.) This proposition is undoubtedly correct, since acts of physical violence and intimidation are unlawful under the Moscone Act. (See Code Civ. Proc., § 527.3, subd. (e) ["It is not the intent of this section to permit conduct that is unlawful including 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."].)

However, the remainder of the Chief Justice's analysis gives me pause. The Chief Justice proposes the principle that "labor activity with an objective other than communicating labor's grievances and persuading listeners exceeds the right to engage in peaceful picketing" under the Moscone Act. (Conc. opn. by Cantil-Sakauye, C.J., *ante,* at p. 2.) Although this principle may be sensible in the abstract, I worry it will be difficult to apply in practice. The Chief Justice suggests, for example, that "patrolling a small area with more signs than reasonably required to publicize the dispute" is not protected. (*Id.* at p. 3.) But if reasonableness is the test, then we must ask reasonable to whom? Business owners are likely to argue that any labor activity that drives customers away is unreasonable. Yet the fact that labor activity may dissuade customers from shopping at a store cannot alone be grounds for concluding that the activity unlawfully interferes with the operation of the business. After all, that is often the whole point of the labor activity authorized by the Moscone Act. And if customers are in fact driven away, how is a court to determine whether they were driven away out of sympathy with the protesters' cause, out of disgust with the protestors' cause, or out of a desire simply not to be hassled regardless of the protestors' cause? Whether labor protestors have used "more signs than

reasonably required to publicize the dispute" would seem to turn on such difficult inquiries.

The Chief Justice also suggests that signs larger than a certain size may be prohibited. (Conc. opn. by Cantil-Sakauye, C.J., *ante,* at pp. 3, 4.) But it is not clear how courts would determine what sign size would be permissible in various contexts. While it may be true that large signs (what is large?) are not strictly necessary to convey the basic message of a labor protest, it is also true that larger signs are likely more effective in conveying that message. At what point does a court say that the communicative value of a marginally more effective form of protest is outweighed by the incremental potential for interference with the business? Answering this question becomes particularly difficult when a case involves nontraditional forms of protest designed to have an emotional impact on the intended audience. For example, unions have protested what they consider to be unfair labor practices by staging mock funerals or inflating giant rat balloons near the entrance of the target establishment. (See Rakoczy, *On Mock Funerals, Banners, and Giant Rat Balloons: Why Current Interpretation of Section 8(b)(4)(ii)(B) of the National Labor Relations Act Unconstitutionally Burdens Union Speech* (2007) 56 Am. U. L.Rev. 1621, 1623.) Again, while such tactics may not be necessary to convey protestors' basic message, they are likely more effective at capturing patrons' attention and creating a lasting impression.

Of course, we can assign to ourselves and the lower courts the task of making case-by-case judgments as to what is "reasonable." The task would involve balancing labor's communication interests against management's economic interests in each case. But such balancing, done under the auspices of construing a statute, seems to contemplate a rather substantial degree of ad hoc judicial policy-making. Moreover, the balancing inquiry will, I fear, serve as a standing invitation for litigants to draw courts into the business of resolving labor disputes—which is precisely what the Legislature sought to prevent by passing the Moscone Act. (See *ante,* at pp. 6-7.)

In determining what is lawful protest activity under the Moscone Act, I believe courts should hew closely to the text of the Moscone Act itself. The statute provides that the following activities "shall be legal": (1) "[g]iving publicity to" the existence of a labor dispute by "any . . . method not involving fraud, violence or breach of the peace"; (2) "[p]eaceful picketing or patrolling involving any labor dispute"; and (3) "[a]ssembling peaceably" to do the activities outlined in paragraphs (1) and (2). (Code Civ. Proc., § 527.3, subd. (b).) The statutory text contains several built-in limitations on legal protest activities: The activities must be peaceful. They must not involve fraud, violence, or breach of the peace. And, as subdivision (e) provides, "[i]t is not the intent of this section to permit conduct that is unlawful including 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." (*Id.,* subd. (e).) Thus, the text of the Moscone Act itself defines what activities unlawfully interfere with the conduct of the business and proscribes such activities. Courts should tightly tether the "lawfulness" inquiry to the statutory text in order to avoid the hazards of judicial policymaking and excessive involvement in labor disputes.

Finally, the Chief Justice notes that a business "owner will be familiar with its own promotional activities and will be aware of the impact that labor's signs, by virtue of their size, height, or location, will have on those activities." (Conc. opn. by Cantil-Sakauye, C.J., *ante,* at p. 4.) Because of that familiarity, the Chief Justice says, business owners "may certainly articulate, before any labor action or on an ad hoc basis, rules and policies aimed at curbing labor conduct that exceeds the rights recognized by the Moscone Act. Labor must abide by the owner's rules and policies to the extent required to prevent unlawful interference with the business, despite the fact that the limits imposed by the owner may reduce labor's ability to communicate its message." (*Id.* at p. 5.)

I am not sure what to make of this passage. A business can certainly adopt whatever restrictions it deems best for its own interests. But I do not see how "rules and policies" adopted by a business owner carry any weight in resolving what activities are "lawful" under the Moscone Act, beyond the weight of the evidence introduced by the business owner to

demonstrate an unlawful interference with the business. Any suggestion that courts should defer to restrictions imposed by a business owner or treat such restrictions as a starting point for assessing what is lawful finds no support in the Moscone Act. The statute does not mention such restrictions or remotely hint that labor picketers must adhere to such restrictions. Although a business owner is entitled to introduce evidence that a labor protest is obstructing patrons' access or egress to the store or is otherwise fraudulent, violent, or disorderly, the fact that a business has codified its desired restrictions into a set of "rules and policies" has no independent bearing on the legal analysis.

In sum, the text of the Moscone Act provides storeowners with important protections from unreasonable interference with their business operations. Judicial restraint—the very principle that the Legislature sought to enforce by passing the Moscone Act (see *ante,* at pp. 6-7)—counsels that courts, in determining what is lawful protest activity, should avoid ad hoc balancing and should instead evaluate the conduct at issue against the terms of the statute itself.

LIU, J.

I CONCUR:

WERDEGAR, J.

CONCURRING AND DISSENTING OPINION BY CHIN, J.

I agree with the majority that the privately owned walkway in front of the customer entrance to the grocery store is not a public forum under *Fashion Valley Mall, LLC v. National Labor Relations Bd.* (2007) 42 Cal.4th 850 (*Fashion Valley*) and *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899. (Maj. opn., *ante,* at pp. 5-9.) I also agree that cases such as *Van v. Target Corp.* (2007) 155 Cal.App.4th 1375 and *Albertson's, Inc. v. Young* (2003) 107 Cal.App.4th 106 correctly allowed the store owners of those cases to bar speech activities on their premises. (Maj. opn., *ante,* at pp. 7-8; see *Fashion Valley, supra,* at p. 880 (dis. opn. of Chin, J.).) The majority opinion also implicitly reaffirms the correctness of a series of decisions holding that antiabortion protesters have no right to engage in speech activities on the privately owned parking lots and walkways of medical clinics that provide abortion services. (*Feminist Women's Health Center v. Blythe* (1995) 32 Cal.App.4th 1641; *Allred v. Harris* (1993) 14 Cal.App.4th 1386; *Planned Parenthood v. Wilson* (1991) 234 Cal.App.3d 1662; *Allred v. Shawley* (1991) 232 Cal.App.3d 1489; see *Waremart Foods v. N.L.R.B.* (D.C. Cir. 2004) 354 F.3d 870, 876 (*Waremart*).)

But I cannot agree with the majority's interpretation of the Moscone Act (Code Civ. Proc., § 527.3) and Labor Code section 1138.1 (hereafter, collectively, the Moscone Act), and its conclusion that both provisions are constitutional. (But, given the majority opinion, I

do agree with the cautionary comments regarding the scope of the Moscone Act in the Chief Justice's concurring opinion.) These statutory provisions are probably constitutional on their face. But the difficult questions are *how* they should be applied and whether they are valid *as applied.*

When it denied injunctive relief, the trial court believed that the entrance to the store was a public forum under California law. As the majority holds, the trial court erred in this respect. It is not clear what the court would have done had it correctly found the property not to be a public forum. What is clear is that the decision facing the trial court would have been quite different. Rather than decide difficult statutory and constitutional questions in a vacuum—and rely primarily in so doing on old California cases decided under a legal landscape that is now obsolete (see *Fashion Valley, supra,* 42 Cal.4th at p. 880 (dis. opn. of Chin, J.))—we should instead remand the matter to the trial court to reconsider the matter with a correct understanding of California's public forum law. Only on a concrete record following a trial court decision free of legal error should we attempt to decide the remaining questions.

Allowing labor picketers to picket at the entrance to the grocery store—along with the majority's reaffirmation of the Court of Appeal decisions denying free speech rights to others on similar private property—means that labor picketers, but no one else, have the right to engage in speech activities on that property. As applied to medical clinics, it apparently

means, for example, that nurses can picket on clinics' parking lots and walkways—including, presumably, protesting against being required to aid in providing abortion services—but antiabortion protesters, and others with their own message, may not do so. To discriminate in this way based on the content of the speech, or who the speaker is, raises serious constitutional questions.[1]

Today's opinion places California on a collision course with the federal courts. As the majority recognizes, the *Waremart* court held that permitting labor speech, but not other speech, on private property would violate the United States Constitution as interpreted in *Carey v. Brown* (1980) 447 U.S. 455 (statute prohibiting picketing at private homes but excepting from the prohibition picketing involving a labor dispute is unconstitutional) and *Police Department of Chicago v. Mosley* (1972) 408 U.S. 92 (ordinance prohibiting picketing near schools but excepting from the prohibition picketing related to a labor dispute is unconstitutional). (*Waremart, supra,* 354 F.3d at pp. 874-875.) Although only the United States Supreme Court can definitively resolve the

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[1] The plurality opinion in *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters* (1979) 25 Cal.3d 317, on which the majority heavily relies, did not consider this constitutional question or whether it should follow the precept that a court considering a statute that raises serious constitutional questions should strive to interpret that statute in a way that avoids any doubt concerning its validity. (See *Young v. Haines* (1986) 41 Cal.3d 883, 898.)

disagreement between the majority and the *Waremart* court, the *Waremart* court was not clearly wrong.

The majority claims its interpretation of the Moscone Act is valid because the act does not limit free speech. (Maj. opn., *ante,* at pp. 17-19) It is true that the Moscone Act, itself, does not limit speech. But the Court of Appeal cases involving nonlabor speech at stores and medical clinics, which the majority purports to reaffirm, *do* limit speech. Thus, the majority upholds content-based discrimination between labor and nonlabor speech, which presents the difficult constitutional question the *Waremart* court identified. Additionally, the majority appears to find no constitutional violation because the Moscone Act merely protects "labor-related speech in the context of a statutory system of economic regulation of labor relations." (Maj. opn., *ante,* at p. 21.) Perhaps. But on this incomplete record, it is not clear to me that the high court would permit content-based discrimination on this ground. At the least, before deciding this question, we should have before us the trial court's ruling incorporating the correct understanding that the property at issue is not a public forum. We should know, and consider, exactly what economic or labor interests are actually at stake.

Under federal law, labor organizers have no right to contact employees on private property "unless the employees are otherwise inaccessible." (*Lechmere, Inc. v. NLRB* (1992) 502 U.S. 527, 534 [interpreting the National Labor Relations Act].) The record in this

case indicates that to the left of the store entrance, as one faces it, is a courtyard area with benches that the shopping center maintains. The point was not developed at trial, but it appears likely that this courtyard area is a public forum under the majority opinion in *Fashion Valley, supra,* 42 Cal.4th 850. (I dissented in *Fashion Valley,* but I recognize that it now represents the law in California.) If this is correct, labor picketers (and others) could present their message next to the store, meaning that neither the store nor its employees are inaccessible to anyone. (See *Lechmere, Inc. v. NLRB, supra,* at pp. 529, 541 [labor organizers had no right to enter private property to present their message when suitable public property was available nearby].) Given the seemingly slight difference between picketing next to the store and at its entrance, it is far from clear to me that the high court would permit California to discriminate in this way between labor-related speech and all other speech.

We should remand the matter to the Court of Appeal with directions to remand it back to the trial court to reconsider its ruling in light of this court's holding that the entrance walkway in front of the store is not a public forum. Then, and only then, should we decide the remaining statutory and constitutional questions based on a full and concrete record.

CHIN, J.

APPENDIX B

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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RALPHS GROCERY COMPANY, Plaintiff and Appellant, v. UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 8, Defendant and Respondent.	C060413 (Super. Ct. No. 34-2008-00008682-CU-OR-GDS (Filed Jul. 19, 2010)

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

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

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

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

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

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

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

Accordingly, we reverse and remand.

LEGAL BACKGROUND

"The First Amendment to the United States Constitution provides that 'Congress shall make no law . . . abridging the freedom of speech. . . .' This fundamental right to free speech is 'among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action.' [Citations.]" (*Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141, 1147.) "For corporations as for individuals, the choice to speak includes within it the choice of what not to say. [Citation.]" (*Pacific Gas & Electric Co. v. Public Utilities Com.* (1986) 475 U.S. 1, 16 [89 L.Ed.2d 1, 12].) Forcing a speaker to host or accommodate another speaker's message violates the host's free speech rights. (*Hurley v. Irish-American Gay Group* (1995) 515 U.S. 557, 566 [132 L.Ed.2d 487, 498-499] (*Hurley*) [state cannot require parade to include group whose message the parade's organizer does not wish to send].)

The California Constitution protects, among other things, liberty of speech and private ownership of real property. The liberty of speech clause of the California Constitution states: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." (Cal. Const., art. I, § 2, subd. (a).) Concerning private property, the constitution states: "All people are by nature free and independent and have inalienable rights. Among these are . . . acquiring,

possessing, and protecting property. . . ." (Cal. Const., art. I, § 1.)

"As a general rule, landowners and tenants have a right to exclude persons from trespassing on private property; the right to exclude persons is a fundamental aspect of private property ownership. [Citation.] An injunction [exercising the court's equity jurisdiction] is an appropriate remedy for a continuing trespass. [Citation.]" (*Allred v. Harris* (1993) 14 Cal.App.4th 1386, 1390 (*Allred*).) However, if the private property is a public forum under the California Constitution, the courts may not enjoin those who enter the private property and engage in speech, conforming with the reasonable time, place, and manner restrictions of the property owner, because, under those circumstances, the owner has no right to exclude, and, therefore, it is not a trespass. (*Ibid.*)

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

Whether the areas within shopping centers and around large retail stores are public forums for the purpose of speech under California law has been the subject of litigation for many years. In *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899

(*Pruneyard*), the California Supreme Court held that the liberty of speech clause of the California Constitution protected speech in a privately-owned shopping center, subject to the owner's reasonable time, place, and manner restrictions, because the owner had created a public forum for speech. (*See Fashion Valley Mall, LLC v. National Labor Relations Bd.* (2007) 42 Cal.4th 850, 858 (*Fashion Valley*) [following *Pruneyard*].) The shopping center at issue in *Pruneyard* consisted of 21 acres, with 65 shops, 10 restaurants, and a cinema. (*Pruneyard, supra,* at p. 902.)

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

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

p. 2845), and Labor Code section 1138.1, enacted in 1999 (Stats. 1999, ch. 616, § 1).

The Moscone Act limits the equity jurisdiction of the courts in cases involving labor disputes. (*Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters* (1979) 25 Cal.3d 317, 321 (*Sears II*).) (We refer to this case as *Sears II* because that is how it is referred to in most cases and literature on the subject, even though there is no reason here to discuss the prior decision arising from that case.) The Moscone Act declares that conduct relating to a " 'labor dispute,' " such as peaceful picketing, "shall be legal, and no court nor any judge nor judges thereof, shall have jurisdiction to issue any restraining order or preliminary or permanent injunction which, in specific or general terms, prohibits any person or persons, whether singly or in concert, from [engaging in the specified conduct]." (Code Civ. Proc., § 527.3, subd. (b).) The Moscone Act defines " 'labor dispute' " broadly. (Code Civ. Proc., § 527.3, subd. (b)(4).)

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

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

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

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

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

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

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

FACTS AND PROCEDURE

Plaintiff Ralphs Grocery Company (Ralphs) owns Foods Co, a large warehouse grocery store located in Sacramento in a retail development called College

Square. The employees of Foods Co are not represented by a union. Defendant United Food and Commercial Workers Union Local 8 (the Union) has negotiated with Ralphs to make Foods Co a union store, but the parties reached an impasse.

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

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

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

Foods Co opened on July 25, 2007. On that day, between eight and 10 agents of the Union picketed

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

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

The Union's agents generally did not adhere to Foods Co's rules for speech. They handed out flyers and stood within five feet of the doors. Foods Co management called the Sacramento Police Department and asked the officers to remove the Union's agents. The officers gave the Union's agents a copy of Foods Co's rules for speech and told Foods Co management that giving the rules to the Union's agents was all they would do at that point because the Sacramento Police Department is unwilling to remove peaceful picketers from Ralphs's property. After the officers left, the Union's agents continued to violate Foods Co's rules.

Several other groups or individuals have used Foods Co's entrance area and apron, as well as the

parking lot, to engage in speech. Groups or individuals have solicited money for causes, panhandled, gathered signatures on petitions, and sold, at various times, subscriptions to a newspaper, DVDs, and tamales or burritos.

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

Before the evidentiary hearing was held, the parties submitted briefing on the law involved in the dispute. The trial court issued a tentative ruling concerning the law in which the court held that (1) the Moscone Act violates the First and Fourteenth Amendments of the United States Constitution, considering United States Supreme Court precedent, and is therefore unenforceable; (2) the trial court is bound by the decision of this court in *Waremart Foods v. United Food & Commercial Workers Union* (2001) 87 Cal.App.4th 145 (*Waremart I*), in which we held that Labor Code section 1138.1 does not violate federal and state constitutional guarantees of equal protection; and (3) the evidentiary hearing would focus on whether, applying Labor Code section 1138.1, "Ralphs is entitled to injunctive relief under California

law, considering the issue of whether the location in question is a public forum, and if so, whether the time, place and manner restrictions on expressive speech are reasonable."

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

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

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

"The Court finds that [Ralphs] operates a grocery store, Foods Co, at which the defendant Union has picketed five days a week, 8 hours a day, since the

store opened in July 2007. The evidence did not establish that the Union had committed any unlawful act, or that it had threatened to do so. There was no evidence that anything the [Union was] doing would cause any 'substantial and irreparable injury' to the store property, or that public officers were unable or unwilling to furnish adequate protection to plaintiff's property.

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

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

DISCUSSION

I

Public or Private Forum

We first turn to the question of whether the entrance area and apron of the Foods Co store is a

public or private forum. Rejecting the Union's argument, discussed below, that we need not consider this question, we conclude that the entrance area and apron of the Foods Co store is a private forum under California law.

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

The Foods Co store in College Square is indistinguishable from the stand-alone stores in shopping

centers in *Van, supra,* 155 Cal.App.4th 1375, a case in which the Court of Appeal held that the entrance areas and aprons of such stores are not public forums.

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

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

Distinguishing the front of the large, individual stores from the common areas of the shopping centers,

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

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

This remains true even though Ralphs granted the right to other groups to use the entrance and apron area of Foods Co for speech. The trial court found that groups unrelated to the Union were allowed to solicit money or signatures in the front entrance area. But this did not transmute the property

into a public forum. A private owner may selectively permit speech or prohibit speech in a private forum without affecting the private nature of the forum. (*Albertson's, supra,* 107 Cal.App.4th at p. 125.)

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

Considering the United States Supreme Court and California Supreme Court cases decided since *Lane* and *Schwartz-Torrance,* which relied on the First Amendment, the only continuing vitality of *Lane* and *Schwartz-Torrance* lies in the jurisprudence

of the analogous liberty of speech clause in the California Constitution. *Lane* and *Schwartz-Torrance* are no longer independently viable. Thus, *Lane* and *Schwartz-Torrance* cannot be read to expand the rights of individuals engaging in speech on private property beyond the analysis in *Pruneyard* and *Fashion Valley.* That analysis requires, as a starting point, a determination of whether the area is a public or private forum. Applying that analysis, we conclude that, because the area in front of the Foods Co store is not a public forum, the Union's free speech rights, whether under the federal First Amendment or the state liberty of speech clause, are not infringed.

II

Constitutionality of Statutes

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

1138.1 validly prevented the trial court from enjoining the trespass. Applying binding precedents, we conclude that the Moscone Act and Labor Code section 1138.1 are unconstitutional.

A. *Moscone Act*

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

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

unconstitutional content-based discrimination under the First and Fourteenth Amendments. We finally conclude that the Moscone Act, as interpreted by the *Sears II* plurality, violates the First and Fourteenth Amendments of the United States Constitution because it favors speech relating to a labor dispute over other types of speech.

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

In *Sears II,* the California Supreme Court reviewed an order restraining union agents from peacefully picketing on a privately owned sidewalk surrounding the plaintiff's stand-alone department store. While the case was pending on appeal, the Legislature passed the Moscone Act, which the Supreme Court considered in reviewing the trial court order. (*Sears II,* 25 Cal.3d at pp. 320-321.) Three justices of the court cited the court's prior decisions as establishing the legality of picketing on private sidewalks outside the store as a matter of state labor law. (*Id.* at p. 328.) Thus, the plurality concluded that "the sidewalk outside a retail store has become the traditional and accepted place where unions may, by peaceful picketing, present to the public their views

respecting a labor dispute with that store. Recognized as lawful by the decisions of this court, such picketing likewise finds statutory sanction in the Moscone Act, and enjoys protection from injunction by the terms of that act. In such context the location of the store whether it is on the main street of the downtown section of the metropolitan area, in a suburban shopping center or in a parking lot, does not make any difference. Peaceful picketing outside the store, involving neither fraud, violence, breach of the peace, nor interference with access or egress, is not subject to the injunction jurisdiction of the courts." (*Id.* at pp. 332-333.)

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

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

In *Mosley,* a 1972 case, the United States Supreme Court considered a Chicago ordinance that generally prohibited picketing within 150 feet of a school, but made a specific exception for picketing in

a labor dispute. The plaintiff was a man who frequently picketed, always peacefully, outside a high school, carrying a sign that stated that the high school discriminated racially. He sued for injunctive and declaratory relief because he was told that, if he picketed after the effective date of the ordinance, he would be arrested. (*Mosley, supra,* 408 U.S. at pp. 92-93.) The court held that the ordinance violated the First Amendment and the Equal Protection Clause of the Fourteenth Amendment because of the ordinance's "impermissible distinction between labor picketing and other peaceful picketing." (*Mosley, supra,* at p. 94.) "The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign. But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. [Citations.]" (*Mosley, supra,* at p. 95.)

The *Mosley* court concluded: "Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of

status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." (*Mosley, supra,* 408 U.S. at p. 96 fn. omitted.)

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

The obvious difference between the Moscone Act and the laws scrutinized in *Mosley* and *Carey* is that the Moscone Act selectively allows speech in a private forum based on the content of the speech by withdrawing the remedy of the property owner or

possessor while the laws scrutinized in *Mosley* and *Carey* selectively excluded speech from a public forum based on content. This difference, however, is not legally significant. The effect on speech is the same: the law favors speech related to labor disputes over speech related to other matters—it forces Ralphs to provide a forum for speech based on its content. (*See Pacific Gas & Electric Co. v. Public Utilities Com., supra,* 475 U.S. 1.)

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

Accordingly, as applied in this case, the Moscone Act violates the First and Fourteenth Amendments of the United States Constitution. The Act affords preferential treatment to speech concerning labor disputes over speech about other issues. It declares that labor protests on private property are legal, even

though a similar protest concerning a different issue would constitute trespassing. And it denies the property owner involved in a protest over a labor dispute access to the equity jurisdiction of the courts even though it does not deny such access if the protest does not involve a labor dispute.

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

The *Sears II* plurality decision did not consider the First Amendment issue. The decision stated: "[T]he Moscone Act, interpreted in light of prior decisions of this court, declares such peaceful picketing [on the private property sidewalks surrounding the store] to be legal and thus not subject to injunction. Rejecting Sears' contention that it enjoys a federally protected right to enjoin peaceful picketing on property it has opened to public use, we conclude that the trial court lacks jurisdiction to enjoin the

picketing at issue here." (*Sears II, supra,* 25 Cal.3d at p. 321.) Thus, the decision found that the Moscone Act applies to a case such as ours in which union agents are peacefully picketing on private property and that there is no federal right to enjoin such peaceful picketing. However, the *Sears II* decision did not consider the First and Fourteenth Amendment implications of its decision, whether the statute's provisions declaring labor picketing on private property to be legal constituted content-based discrimination. Those are the implications of *Sears II* that we consider today. Since *Sears II* did not consider the constitutional issue, it does not stand as authority, binding or persuasive, on that issue. (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 127 [cases not authority for propositions not considered].)

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

Furthermore, the *Sears II* opinion was signed by just three justices of the court, a plurality, and

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

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

The Union's reliance on *M Restaurants* as a precedent that the Moscone Act is consistent with the First and Fourteenth Amendments is also misplaced

for two reasons. First, *M Restaurants* did not consider picketing on private property, and, second, any pronouncements in *M Restaurants* about the constitutionality of denying injunctive relief based on the Moscone Act are dicta because injunctive relief was granted.

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

On appeal, the *M Restaurants* court considered whether injunctive relief could be sustained under the newly-enacted Moscone Act. On the subject of equal protection, the court stated that "the statute bears a rational relationship to its purpose" (*M Restaurants, supra,* 124 Cal.App.3d at p. 677), but the court did not discuss whether the statute treats speech related to labor disputes differently from

speech relating to other issues. After finding no constitutional problems with the Moscone Act, the court nevertheless concluded that the picketers' conduct was unlawful and the Moscone Act did not prevent the trial court from exercising its equity jurisdiction to enjoin the unlawful conduct. (*Id.* at pp. 685-686.) Therefore, the court's discussion of the constitutionality of the Moscone Act was unnecessary to the decision. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 620 [decisions authority only for points actually involved and decided].)

Accordingly, *M Restaurants* is unpersuasive.

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

Although decisions of the federal circuit courts are not binding on us, the reasoning and logic of *Waremart II* are persuasive. (*Barrett v. Rosenthal*

(2006) 40 Cal.4th 33, 58 [decisions of lower federal courts not binding but may be persuasive].)

Therefore, as did *Waremart II,* we conclude that the Moscone Act violates the First and Fourteenth Amendments as applied to the circumstances of this case because it favors speech related to a labor dispute over speech related to other issues. To render it constitutional, the Moscone Act must be read to allow speech, in a private forum, related to a labor dispute only to the extent that speech related to other issues is allowed. Because the Union's agents were trespassing in this case, the Moscone Act cannot be construed to prohibit the courts from exercising their equity jurisdiction as they would in a case not involving a labor dispute.

B. *Labor Code section 1138.1*

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

"An injunction is an appropriate remedy for a continuing trespass. [Citation.]" (*Allred, supra,* 14 Cal.App.4th at p. 1390, fn. omitted.) "To obtain a preliminary injunction, the plaintiff must establish the defendants should be restrained from the challenged activity pending trial. [Citations.] The plaintiff

must show (1) a reasonable probability it will prevail on the merits and (2) that the harm to the plaintiff resulting from a refusal to grant the preliminary injunction outweighs the harm to the defendant from imposing the injunction. [Citation.]" (*Bank of Stockton v. Church of Soldiers* (1996) 44 Cal.App.4th 1623, 1625-1626.) "[I]n order to obtain injunctive relief the plaintiff must ordinarily show that the defendant's wrongful acts threaten to cause irreparable injuries, ones that cannot be adequately compensated in damages. [Citation.] Even in an action for trespass to real property, in which damage to the property is not an element of the cause of action, 'the extraordinary remedy of injunction' cannot be invoked without showing the likelihood of irreparable harm. [Citation.]" (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1352, italics omitted.)

While some of the requirements of Labor Code section 1138.1 for obtaining injunctive relief in a labor dispute are the same as the requirements when there is no labor dispute involved, other requirements of Labor Code section 1138.1 are unique to labor disputes. For example, to obtain an injunction against trespass in a labor dispute, the property owner or possessor must show that (1) unlawful acts have been threatened and will be committed (Lab. Code, § 1138.1, subd. (a)(1)), (2) substantial and irreparable injury to the property will follow (Lab. Code, § 1138.1, subd. (a)(2)), and (3) public officers will not or cannot intercede (Lab. Code, § 1138.1, subd. (a)(5)). On the other hand, when no labor dispute is involved, (1) the

trespass itself, without a further unlawful act, justifies an injunction (*Allred, supra,* 14 Cal.App.4th at p. 1390 [injunction available against trespass]; but *see Waremart I, supra,* 87 Cal.App.4th at p. 158 [peaceful picketing not unlawful act under statute]); (2) any irreparable harm, not necessarily to the property, supports injunctive relief (*Uptown Enterprises v. Strand* (1961) 195 Cal.App.2d 45, 52 [injury to reputation and business interest suffices]); and (3) the inability or unwillingness of public officers to provide adequate protection is not an element of trespass or a requirement of injunctive relief.

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

As we explained with respect to the Moscone Act, the strict scrutiny test applies to differential treatment of speech based on its content. (*Fashion Valley, supra,* 42 Cal.4th at p. 865; *Consolidated Edison v.*

Public Serv. Comm'n, supra, 447 U.S. at p. 541.) As in the case of the Moscone Act, there is no compelling state interest justifying this differential treatment. (*See Carey, supra,* 447 U.S. at pp. 464-467.) Therefore, as applied to the circumstances of this case, Labor Code section 1138.1 violates the First and Fourteenth Amendments of the United States Constitution.

We recognize that we reached a contrary result in *Waremart I, supra,* 87 Cal.App.4th 145. In that case, we stated that Labor Code section 1138.1 passes constitutional muster under the rational relationship test. But we applied the rational relationship test because the plaintiff made no argument and presented no authority to apply the strict scrutiny test. (*Waremart I, supra,* at p. 158.)

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

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

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

For example, the most recent case cited by the Union, *Ysursa v. Pocatello Educ. Ass'n* (2009) ___ U.S. ___, [172 L.Ed.2d 770] (*Ysursa*), is inapposite. In that case, a state law prohibited use of union dues for political speech if the dues were deducted from a state employee's wages. The unions sued, asserting that the ban on payroll deductions for political activities was a restriction on speech based on its content, violating the First and Fourteenth Amendments. The United States Supreme Court disagreed. It held that, although content-based restrictions "are 'presumptively invalid' and subject to strict scrutiny" (*Ysursa, supra,* at p. ___, [172 L.Ed.2d at p. 777]), this was not a content-based restriction because the state was not

obligated to provide payroll deductions at all, and the law did not abridge the union's freedom of speech—"they are free to engage in such speech as they see fit." (*Id.* at p. ___, [172 L.Ed.2d at pp. 777-778].) Here, on the other hand, the government is effectively forcing Ralphs to provide a forum for speech with which it disagrees by withholding the only real peaceful remedy for excluding the Union from using Ralphs's private property for the Union's speech. Unlike the situation in *Ysursa,* Labor Code section 1138.1 abridges Ralphs's free speech rights by forcing it to host or accommodate speech with which it disagrees.

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

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

"When a statute's differential treatment of separate categories of individuals is found to violate equal protection principles, a court must determine whether the constitutional violation should be eliminated or cured by extending to the previously excluded class the treatment or benefit that the statute affords to

the included class, or alternatively should be remedied by withholding the benefit equally from both the previously included class and the excluded class. A court generally makes that determination by considering whether extending the benefit equally to both classes, or instead withholding it equally, would be most consistent with the likely intent of the Legislature, had that body recognized that unequal treatment was constitutionally impermissible. [Citations.]" (*In re Marriage Cases* (2008) 43 Cal.4th 757, 856.) In the case cited, the California Supreme Court opted to extend marriage to same-sex couples rather than withholding marriage from everyone. (*Ibid.*)

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

III

Injunctive Relief

The Union contends that, even if we conclude that the Moscone Act and Labor Code section 1138.1 cannot be applied to this case, we should still affirm the trial court's judgment because the court made findings that would result in denial of the preliminary injunction even without applying the Moscone Act and Labor Code section 1138.1. The Union asserts that (1) there was no unlawful act, (2) there was no irreparable harm; and (3) Ralphs failed to carry its burden of showing that its rules on expressive activities were reasonable time, place, and manner restrictions under *Fashion Valley.* While the trial court made these findings, they do not support the Union's argument because (1) there is no requirement that an unlawful act beyond the trespass be committed, (2) a continuing trespass under these circumstances constitutes irreparable harm as a matter of law for which damages are not adequate, and (3) time, place, and manner restrictions under *Fashion Valley* do not apply to a private forum.

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

And the continuing trespass itself also causes irreparable harm. "'[T]he extraordinary remedy of injunction' cannot be invoked without showing the likelihood of irreparable harm. [Citations.]" (*Intel Corp. v. Hamidi, supra,* 30 Cal.4th at p. 1352.) "Injunction is a proper remedy against threatened repeated acts of trespass [citations], particularly where the probable injury resulting therefrom will be 'beyond any method of pecuniary estimation,' and for this reason irreparable. [Citation.]" (*Uptown Enterprises v. Strand, supra,* 195 Cal.App.2d at p. 52.) When a trespasser engages in activities to discourage the public from patronizing a business, the effect of the activity cannot be quantified because there is no way of knowing who would have patronized the business but for the trespasser's activities. Therefore, the unquantifiable loss of business caused by the Union's activities on Ralphs's property constitutes irreparable harm here, as a matter of law.

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

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

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

DISPOSITION

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

NICHOLSON, Acting P. J.

We concur:

RAYE, J.

ROBIE, J.

APPENDIX C

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SUPERIOR COURT OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

RALPH'S GROCERY COMPANY, dba FOODSCO, Plaintiff, vs. UFCW LOCAL 8, Defendant.	CASE NO. 34-2008-0000-8682 Date of Hearing: July 9, 2008 Judge: Hon. Loren McMaster **[~~PROPOSED~~] ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION** (Filed Oct. 3, 2008)

On April 15, 2008, Plaintiff Ralph's Grocery Company filed an ex-parte application for preliminary injunction against Defendant United Food and Commercial Workers 8 ("UFCW 8").

On April 17, 2008, the Court ordered Defendant UFCW 8 to show cause why it should not be restrained from picketing and handing out leaflets at Plaintiff's Foods Co store located at 7421 West Stockton Blvd., Sacramento.

On May 28, 2008, the Court issued a detailed ruling in which it found that the Moscone Act (Code of Civil Procedure section 527.3) to be unconstitutional, but determined that it must hold an evidentiary hearing pursuant to Labor Code section 1138.1. While this Court was of the opinion that section 1138.1 is unconstitutional for the reasons expressed in its ruling of May 28, it noted that it was bound by an opinion of the Court of Appeal, Third Appellate District, that determined the statute to be constitutional. This Court declines to re-visit its prior rulings on this matter.

On July 9, 2008, the Court held an evidentiary hearing pursuant to Labor Code section 1138.1. Appearing for Plaintiff was Morrison & Foerster by Timothy Ryan. Appearing for Defendant UFCW 8 was Davis, Cowell & Bowe by Elizabeth A. Lawrence. Both parties called witnesses and introduced exhibits into evidence. Following the hearing, the parties were permitted to file post-hearing briefs, the last of which was received July 30, 2008. Upon receipt of the last brief on July 30, the Court took the matter under submission.

The Court has considered the testimony and exhibits offered by the parties at the hearing and has

reviewed and considered the briefs filed by the parties. Pursuant to Labor Code section 1138.1, in order to obtain injunctive relief against picketing, Ralphs must prove "(1) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorized those acts. (2) That substantial and irreparable injury to complainant's property will follow. (3) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief. (4) That complainant has no adequate remedy at law. (5) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection."

The Court finds that Plaintiff failed to introduce evidence sufficient to carry its burden on any of the factors enumerated in Labor Code section 1138.1.

Specifically, the court finds:

1. Plaintiff, Ralph's Grocery Company, operates a grocery store; Foods Co, at which the defendant Union has picketed five days a week, 8 hours a day since the store opened in July 2007.

2. The evidence did not establish that the Union had committed any unlawful act, or that it had threatened to do so.

3. There was no evidence that anything the defendants were doing would cause any "substantial or irreparable injury" to the store property.

4. There was no evidence that public officers were unable or unwilling to furnish adequate protection to plaintiff's property.

5. The evidence established that other persons on the property to solicit money or signatures for their own causes placed themselves in the zone that Ralph's had declared off-limits (e.g. in front of the doors), but apparently did not cause any undue disruption to Ralph's business since little effort was made to remove them.

6. No evidence established that anything that the defendants did was any more disruptive than the actions of others.

7. Ralph's has failed to carry its burden that its rules are reasonable time, place and manner restrictions within the guidelines of *Fashion Valley Mall, LLC v. NLRB* (2007) 42 Cal.4th 850.

8. Since Ralph's has failed to meet its burden, there is no need to examine the evidence put forth by defendant.

The Motion for Preliminary Injunction is DENIED.

IT IS SO ORDERED.

Date: OCT 3 2008 /s/ Loren McMaster
Honorable Loren McMaster

Approved as to form:

/s/ Timothy F. Ryan
Timothy Ryan
Morrison & Foerster
Attorney for Plaintiff
Ralph's Grocery Company

APPENDIX D

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO GORDON D SCHABER COURTHOUSE

MINUTE ORDER

Date: 09/08/2008 Time: 02:51:43 PM Dept: 53

Judicial Officer Presiding: Judge Loren E McMaster
Clerk: T. West

Bailiff/Court Attendant: C. Carrillo
ERM: None

Case Init. Date: 04/15/2008

Case No: 34-2008-00008682-CU-OR-GDS

Case Title: RALPHS GROCERY COMPANY VS. UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 8

Case Category: Civil—Unlimited

Causal Document & Date Filed:

Appearances:

Nature of Proceeding: Ruling on Submitted Matter (Motion for Preliminary Injunction) Taken Under Submission 7/9/2008

SUBMITTED MATTER RULING

Having taken the matter under submission, the Court now rules as follows:

Plaintiff Ralphs' motion for a preliminary injunction is denied.

On April 17, 2008 the Court issued an OSC re preliminary injunction. Defendant Union was ordered to show cause why it should not be restrained from picketing and handing out leaflets at Foods Co located at 7421 West Stockton Blvd.

On May 28, 2008, the Court issued a detailed ruling in which it found the Moscone Act (Code of Civil Procedure section 527.3) to be unconstitutional, but determined that it must hold an evidentiary hearing pursuant to Labor Code § 1138.1. While this Court was of the opinion that section 1138.1 is unconstitutional for the reasons expressed in its ruling of May 28, it noted that it was bound by an opinion of the Court of Appeal, Third Appellate District, that determined the statute to be constitutional. This Court declines to re-visit its prior rulings in this matter.

On July 9, 2008, the Court held an evidentiary hearing pursuant to Labor Code § 1138.1. Both parties called witnesses and introduced exhibits into evidence. Following the hearing the parties were permitted to file post-hearing briefs, the last of which was received July 30, 2008. Upon receipt of the last brief on July 30, the Court took the matter under submission.

The Court has considered the testimony and exhibits offered by the parties at the hearing and has reviewed and considered the briefs filed by the parties.

Pursuant to Labor Code § 1138.1, in order to obtain injunctive relief against picketing, Ralphs must prove "(1) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorized those acts. (2) That substantial and irreparable injury to complainant's property will follow. (3) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief. (4) That complainant has no adequate remedy at law. (5) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection."

The Court finds that Ralphs failed to introduce evidence sufficient to carry its burden on any of the factors enumerated in section 1138.1.

The Court finds that Plaintiff, the Ralphs Grocery Company, operates a grocery store, Foods Co, at which the defendant Union has picketed five days a week, 8 hours a day, since the store opened in July 2007. The evidence did not establish that the Union had committed any unlawful act, or that it had threatened to do so. There was no evidence that anything the defendants were doing would cause any "substantial and irreparable injury" to the store property, or that

public officers were unable or unwilling to furnish adequate protection to plaintiff's property.

The evidence established that other persons on the property to solicit money or signatures for their own causes placed themselves in the zone that Ralphs had declared off-limits (e.g. in front of the doors), but apparently did not cause any undue disruption to Ralphs' business since little effort was made to remove them. No evidence established that anything that the defendants did was any more disruptive that [sic] the actions of others. Ralphs has failed to carry its burden of proof that its rules are reasonable time, place and manner restrictions within the guidelines of Fashion Valley Mall, LLC v NLRB (2007) 42 Cal.4th 850.

Since Ralph's has failed to meet its burden, there is no need to examine the evidence put forth by defendant.

Defendant to prepare the formal order.

[Declaration Of Mailing Omitted In Printing]

APPENDIX E

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO GORDON D SCHABER COURTHOUSE

MINUTE ORDER

Date: 05/28/2008 Time: 02:00:00 PM Dept: 53

Judicial Officer Presiding: Judge Loren E McMaster
Clerk: T. West

Bailiff/Court Attendant: D. Preston
ERM: None

Case Init. Date: 04/15/2008

Case No: 34-2008-00008682-CU-OR-GDS

Case Title: RALPHS GROCERY COMPANY VS. UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 8

Case Category: Civil—Unlimited

Date Filed: 04/17/2008

Appearances:

Nature of Proceeding: Motion for Preliminary Injunction

TENTATIVE RULING

On April 17, 2008 the Court issued an OSC re preliminary injunction. Defendant Union was ordered to show cause why it should not be restrained from

picketing and handing out leaflets at Foods Co located at 7421 West Stockton Blvd.

Ralphs Grocery Company operates a grocery store, Foods Co, at which the defendant Union has picketed five days a week, 8 hours a day, since the store opened in July 2007. Ralphs contends that Foods Co is a "free standing" big box store located in a commercial strip development. Ralphs contends the picketers have disrupted store operations and store management. Although Ralphs contends it has the right to bar all expressive activity at its store, in January of 2008 it adopted rules to govern expressive activities at its stores in California. Ralphs contends its Rules impose reasonable time, place and manner restrictions on all forms of expressive activity.

The issues to be addressed at this juncture are whether the Court has the authority to issue an injunction, and if so, whether it must comply with the procedural requirements of Labor Code Section 1138.1. The Court finds that CCP 527.3 ("Moscone Act") violates the 1st and 14th amendments of the U.S. Constitution. The Court further finds that it is required to conduct an evidentiary hearing under Labor Code section 1138.1. The Court is bound by the 3rd District Court of Appeal's decision in Waremart Foods v United Food and Commercial Workers Union (2001) 87 Cal.App.4th 145 ("Cal Waremart"), wherein that court held that Labor Code 1138.1 is not content based discrimination and therefore does not violate the federal and state constitutional guarantees of equal protection of the laws. Cal Waremart, at pages

157-160. This Court may not agree with the analysis therein, as it believes it was based on an erroneous interpretation of the holdings of the U.S. Supreme Court cases Mosely and Carey, (see infra). However, the decision is binding on this Court. Auto Equity Sales, Inc. v Superior Court (1962) 57 Cal.2d 450.

The Court will conduct an evidentiary hearing pursuant to Labor Code 1138.1 on June 4, 2008 at 1:30 p.m. in this Department. At that hearing, the Court will determine whether Ralphs is entitled to injunctive relief under California law, considering the issue of whether the location in question is a public forum, and if so, whether the time, place and manner restrictions on expressive speech are reasonable.

The Moscone Act declares, in part, that the following acts are legal: "giving publicity to, and obtaining or communicating information regarding the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, or by any other method not involving fraud, violence or breach of peace. CCP Section 527.3(b)(1) (emphasis added). Subdivision (b)(2) permits peaceful picketing or patrolling involving any labor dispute, whether engaged singly or in numbers. The statute does not offer the same protection to other types of speech. The effect of the statute is to allow labor speech greater access to private property than other types of speech. See e.g. Van v Target Corp (2007) 155 Cal.App.4th 1375, 1377 (big box stores Target, Home Depot, and Wal-Mart can exclude individuals who

gather voter signatures from stores' private property; store entrances are not public forums under Robins v Pruneyard Shopping Center (1979) 23 Cal.3d 899, 910.)

Ralphs contends the Moscone Act is unconstitutional because it regulates speech based on its content. Defendant Union argues that the Moscone Act does not discriminate against speech based on content because it does not expressly prevent one type of speech over another. Union contends the Court is bound by Sears, Roebuck & Company v San Diego County District Council of Carpenters (Sears II) (1979) 25 Cal.3d 317, which held that, under the Moscone Act, which reflected its prior decisions, that such peaceful picketing is legal. However, Sears II did not address the equal protection argument raised here. The only constitutional issue considered and rejected by the Sears II court was whether the Moscone Act violated the store's due process rights and constituted a "taking."

No California Court has addressed the equal protection argument raised by Ralphs with regard to the Moscone Act. The Court agrees with Ralphs' contention that the Moscone Act is analogous to the statue [sic] and ordinance held unconstitutional by the U.S. Supreme Court in the cases of Police Dep't of City of Chicago v. Mosely (1972) 408 U.S. 92, and Carey v Brown (1980) 477 U.S. 455. In those cases, the U.S. Supreme Court held that a statute and ordinance that ban all speech at certain locations, except for labor speech, constitute content discrimination in

violation of the 1st amendment: "The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter." Mosely, at 95; and "The central difficulty with this argument is that it forthrightly presupposes that labor picketing is more deserving of First Amendment protection than are public protests over other issues, particularly the important economic, social and political subjects about which these appellees wish to demonstrate." (Carey, page 466)

The only court to have addressed Ralphs' equal protection argument with regard to the Moscone Act is the United States District Court of Appeals for the D.C. Circuit, and then only after the California Supreme Court declined to decide the questions of California law that the D.C. court had certified to it. Waremart Foods v NLRB (2004) 354 F.3d 870, 871. ("Waremart") The Waremart court, interpreting California law, held the Moscone Act to be unconstitutional under the 1st amendment because it discriminated against speech based on its content, citing Mosely, and Carey, supra. The Waremart court opined 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." Waremart, at 875.

Although this Court is not bound by the Waremart case, the Court agrees with its analysis that the Moscone Act constitutes content based discrimination that violates the 1st amendment and Equal Protection Clause. And, the Court is bound by the U.S.

Supreme Court cases holding that statutes that favor one type of speech over another violate the 1st amendment. (Mosely and Carey, supra) The Moscone Act's protection of "labor" speech to the exclusion of other types of speech is the functional equivalent of a statute or ordinance that contains both the blanket prohibition and the impermissible content-based exception within its terms.

Ralphs presented authority that a statute may unconstitutionally impinge on the content of speech even though it does not expressly target the content of the speech. See e.g. ARP Pharmacy Services, Inc. v Gallagher Bassett Services, Inc. (2006) 138 Cal.App.4th 1307 (finding statute compelling prescription drug processing companies to provide statistical reports to be impermissible content-based regulation of speech). The Court requested supplemental briefing on this issue, however Union's supplemental brief was not responsive to the Court's question. Union cited inapposite cases dealing with whether statutes treating unions and employers differently, or union employers differently than non-union employers, violated the equal protection clause.

Union contends that if the Court finds the Moscone Act unconstitutional, it can cure the defect by applying the act to all types of speech. However, this result would be absurd, as it would declare "legal" all types of expressive activity on private property. This would not reflect the current state of California law, particularly considering the numerous recent appellate cases since the Pruneyard decision, involving big box or

stand alone stores which have been found not to be public forums. See eg. Van v Target Corporation (2007) 155 Cal.App.4th 1375.

The Court rejects Union's arguments that Ralph's application for injunction is preempted by the NLRA and that this dispute is subject to arbitration. The United States Supreme Court has upheld state-court jurisdiction over conduct that touches "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [it] could not infer that Congress had deprived the States of the power to act." Sears, Roebuck & Co. v San Diego County District Council of Carpenters (1978) 436 U.S. 180, 195. As to the arbitration issue, the Foods Co store being picketed does not have a collective bargaining agreement with Union that requires arbitration of this dispute.

The Court will not decide at this time the issue of whether the California Constitution protects the Union's activity at Foods Co. The Court will conduct an evidentiary hearing pursuant to Labor Code section 1138.1 on June 4, 2008 to determine whether the location is a public forum, and if so whether the rules imposed by Ralphs constitute reasonable time, place and manner restrictions. The determination of whether the private property is a public forum requires a balancing test: "Whether private property is to be considered quasi-public property subject to the exercise of constitutional rights of free speech and assembly depends in part on the nature, purpose, and primary use of the property; the extent and nature of

the public invitation to use the property; and the relationship between the ideas to be presented and the purpose of the property's occupants." Albertsons Inc. v Young (2003) 107 Cal.App.4th 106, 119.

The Court will hold the evidentiary hearing required by Labor Code 1138.1 on June 4, 2008 at 1:30 pm.

The minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or further notice is required.

COURT RULING

There being no request for oral argument, the Court affirmed the tentative ruling with the following modification. **The matter is continued to 6/11/2008.**

APPENDIX F

CONSTITUTION OF THE UNITED STATES

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX G

CODE OF CIVIL PROCEDURE OF CALIFORNIA

Part 2. Of Civil Actions
Title 7. Other Provisional Remedies in Civil Actions
Chapter 3. Injunction

§ 527.3. Injunctions in labor disputes

(a) In order to promote the rights of workers to engage in concerted activities for the purpose of collective bargaining, picketing or other mutual aid or protection, and to prevent the evils which frequently occur when courts interfere with the normal processes of dispute resolution between employers and recognized employee organizations, the equity jurisdiction of the courts in cases involving or growing out of a labor dispute shall be no broader than as set forth in subdivision (b) of this section, and the provisions of subdivision (b) of this section shall be strictly construed in accordance with existing law governing labor disputes with the purpose of avoiding any unnecessary judicial interference in labor disputes.

(b) The acts enumerated in this subdivision, whether performed singly or in concert, shall be legal, and no court nor any judge nor judges thereof, shall have jurisdiction to issue any restraining order or preliminary or permanent injunction which, in specific or general terms, prohibits any person or persons, whether singly or in concert, from doing any of the following:

(1) Giving publicity to, and obtaining or communicating information regarding the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, or by any other method not involving fraud, violence or breach of the peace.

(2) Peaceful picketing or patrolling involving any labor dispute, whether engaged in singly or in numbers.

(3) Assembling peaceably to do any of the acts specified in paragraphs (1) and (2) or to promote lawful interests.

(4) Except as provided in subparagraph (iv), for purposes of this section, "labor dispute" is defined as follows:

(i) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (a) between one or more employers or associations of employers and one or more employees or associations of employees; (b) between one or more employers or associations of employers and one or more employers or associations of employers; or (c) between one or more employees or associations of employees and one or more

employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" of "persons participating or interested" therein (as defined in subparagraph (ii)).

(ii) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(iii) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(iv) The term "labor dispute" does not include a jurisdictional strike as defined in Section 1118 of the Labor Code.

(c) Nothing contained in this section shall be construed to alter or supersede the provisions of Chapter 1 of the 1975-76 Third Extraordinary Session, and to the extent of any conflict between the

provisions of this act and that chapter, the provisions of the latter shall prevail.

(d) Nothing contained in this section shall be construed to alter the legal rights of public employees or their employers, nor shall this section alter the rights of parties to collective-bargaining agreements under the provisions of Section 1126 of the Labor Code.

(e) It is not the intent of this section to permit conduct that is unlawful including 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.

APPENDIX H

LABOR CODE OF CALIFORNIA

Division 2. Employment Regulation and Supervision
Part 3. Privileges and Immunities
Chapter 10. Unlawful Acts During Labor Disputes

§ 1138.1. Injunctions and hearings

(a) No court of this state shall have authority to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, except after hearing the testimony of witnesses in open court, with opportunity for cross-examination, in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, of all of the following:

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

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

(3) That as to each item of relief granted greater injury will be inflicted upon complainant

by the denial of relief than will be inflicted upon defendants by the granting of relief.

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

(5) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

(b) The hearing shall be held after due and personal notice thereof has been given, in the manner that the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property. However, if a complainant also alleges that, unless a temporary restraining order is issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of those five days. No temporary restraining order shall be issued unless the judicial officer issuing the temporary restraining order first hears oral argument from the opposing party or opposing party's attorney, except in the instances specified in subparagraphs (B) and (C) of paragraph (2) of subdivision (c) of Section

527 of the Code of Civil Procedure. No temporary restraining order or temporary injunction shall be issued except on the condition that the complainant first files an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of the order or injunction, including all reasonable costs, together with a reasonable attorney's fee, and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

(c) The undertaking shall be an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against the complainant and surety, upon a hearing to assess damages of which hearing the complainant and surety shall have reasonable notice, the complainant and surety submitting themselves to the jurisdiction of the court for that purpose. Nothing contained in this section shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his or her ordinary remedy by suit at law or in equity.

APPENDIX I