Case No. S185544

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

RALPHS GROCERY COMPANY,
Plaintiff and Appellant,

v.

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

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

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF POSITION OF RALPHS GROCERY COMPANY

JONES DAY
Willis J. Goldsmith*
Amanda M. Betman*
222 E. 41 St.
New York, NY 10017
Telephone: (212) 326-3939
Facsimile: (212) 755-7306

Attorneys for *Amicus Curiae* Chamber of Commerce of the United States of America

**pro hac vice* admission pending

JONES DAY
Craig E. Stewart,
Bar No. 129530
555 California Street,
26th Floor
San Francisco, CA 94104
Telephone: (415) 626-3939
Facsimile: (415) 875-5700

Attorneys for *Amicus Curiae* Chamber of Commerce of the United States of America

NATIONAL CHAMBER LITIGATION CENTER, INC.
Robin S. Conrad
Shane B. Kawka
1615 H Street, N.W.
Washington D.C. 20062
Telephone: (202) 463-5337
Facsimile: (202) 463-5346

Of Counsel for *Amicus Curiae* Chamber of Commerce of the United States of America

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INTRODUCTION

The Court of Appeal correctly concluded that the Moscone Act, Code Civ. Proc. Section 527.3 (the "Moscone Act"), and California Labor Code Section 1138.1 ("Section 1138.1") – if interpreted to immunize labor picketing from injunctive relief that would be available against trespassory picketing on all other topics – unconstitutionally favor labor-related expression over other forms of expressive activity.

No party to this matter can dispute that a California property owner is normally entitled to an injunction against trespassory picketing on any topic other than a labor controversy. Nor can it seriously be disputed that singling out labor picketing for exemption from such otherwise-available injunctions – or declaring peaceful labor picketing, unlike all other forms of peaceful but trespassory picketing, to be automatically lawful – constitutes a distinction based on the content of speech. Yet the United Food and Commercial Workers Union Local 8 (the "Union") argues that the Moscone Act and Section 1138.1 require California courts to enforce precisely such a content-based discrimination privileging labor-related expression over other forms of expression.

That position is contrary to fundamental constitutional principles. The U.S. Supreme Court not only has consistently disapproved content discrimination in general, but specifically has held that the government may

not treat "labor picketing [a]s more deserving of First Amendment protection than are public protests over other issues." (*Carey v. Brown* (1980) 447 U.S. 455, 466.) That principle is fatal to the Union's position here.

CHAMBER'S STATEMENT OF THE CASE

On July 28, 2007, Ralphs Grocery Company ("Ralphs") opened a large warehouse grocery store, Foods Co, in a retail development called College Square. The employees of Foods Co were not represented by a union. Starting on the day that Foods Co opened and continuing for five days a week, eight hours a day, agents of the Union encouraged shoppers to boycott Foods Co by handing out flyers in the entrance area and apron of Foods Co for the ensuing eight months.

On April 15, 2008, Ralphs filed a trespass action against the Union seeking injunctive relief to prevent the Union from using its private property for the Union's expressive activities. The superior court held that the Moscone Act, a California statute providing that certain labor activities "shall be legal" and cannot be enjoined, constitutes impermissible content-based discrimination in violation of the First and Fourteenth Amendments because it exalts expressive activity related to labor disputes over other forms of expressive activity. (Code Civ. Proc., § 527.3.)

In addition, the superior court expressed its view that Section 1138.1 was unconstitutional, but felt compelled to uphold the statute based on past

precedent. After an evidentiary hearing, the superior court denied Ralphs' motion for a preliminary injunction and held that Foods Co was not entitled to an injunction under Section 1138.1. Section 1138.1 sets forth unique procedural requirements for obtaining injunctions in labor disputes, such as irreparable harm to the property itself and the inability or unwillingness of public officers to provide protection. (Lab. Code, § 1138.1.)

On appeal, the Court of Appeal for the Third Appellate District held that the entrance area and apron of Foods Co was Ralphs' private property. The Court of Appeal affirmed the superior court's finding that the Moscone Act was unconstitutional content-based discrimination and also held that Section 1138.1 was unconstitutional for the same reasons. Finally, the Court of Appeal held that Ralphs was entitled to injunctive relief because the Union was trespassing on Ralphs' private property.

ARGUMENT

I. THE MOSCONE ACT AND SECTION 1138.1 CANNOT CONSTITUTIONALLY BE INTERPRETED TO CREATE A SPECIAL PRIVILEGE FOR TRESPASSORY LABOR PICKETING

Under settled First Amendment and Equal Protection law, special treatment for labor picketing is unconstitutional content-based discrimination. Accordingly, the Moscone Act and Section 1138.1 must either be held unconstitutional as applied in this case or construed as giving no special status to labor-related activity.

A. SPECIAL TREATMENT FOR LABOR PICKETING IS UNCONSTITUTIONAL CONTENT-BASED DISCRIMINATION

If the statutes at issue are applied as the Union would have this Court interpret them – *i.e.*, as creating a special labor picketing exception to otherwise applicable rules permitting injunctive relief in response to trespass[1] – they are unconstitutional. Discrimination based on the content of speech is impermissible. More particularly, the Supreme Court has held that it is unconstitutional to treat "labor picketing [a]s more deserving of First Amendment protection than are public protests over other issues." (*Carey v. Brown* ("*Carey*") (1980) 447 U.S. 455, 466; *see also Police Dep't of City of Chicago v. Mosley* ("*Mosley*") (1972) 408 U.S. 92.)

In *Mosley*, the Supreme Court struck down a Chicago ordinance that prohibited all picketing within a certain distance of a school, except picketing related to labor disputes. (*Mosley, supra*, 408 U.S. 92.) This special rule privileging "[p]eaceful picketing on the subject of a school's labor-management disputes" was unconstitutional, the Supreme Court held, because "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." (*Id.* at p. 95.)

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[1] The Court of Appeal correctly found that the apron and entrance area of Foods Co "were not designed and presented to the public as public meeting places" so as to form a public forum under the liberty of speech clause of the California Constitution. (*Ralphs Grocery Co. v. United Food and Commercial Workers Union Local 8* (2010) 186 Cal.App.4th 1078, 1091.) Thus, the Chamber does not separately address this issue.

Similarly, in *Carey*, the Supreme Court struck down an Illinois statute that prohibited picketing in residential areas, unless the picketing was related to a labor dispute. (*Carey*, *supra*, 447 U.S. 455). The statute was constitutionally infirm, the Court explained, because it "accords preferential treatment to the expression of views on one particular subject; information about labor disputes may be freely disseminated, but discussion of all other issues is restricted." (*Id.* at pp. 460-61.)

In short, long-established Supreme Court jurisprudence leaves no doubt that laws favoring labor picketing over other forms of picketing or speech are unconstitutional.

B. THE MOSCONE ACT AND SECTION 1138.1, IF INTERPRETED TO PROHIBIT INJUNCTIONS AGAINST TRESPASSORY LABOR PICKETING, ARE UNCONSTITUTIONAL

Just as legislation that would require a court to specially *dis*favor expressive activity involving a labor dispute surely would be unconstitutional under *Mosley* and *Carey*, so too are the Moscone Act and Section 1138.1 unconstitutional if interpreted to privilege labor picketing over other forms of expressive activity.

But for the Moscone Act, as the Union would have this Court interpret it, and Section 1138.1, Ralphs would be entitled to an injunction on the facts of this case. Injunctive relief is typically available upon a showing that a party is likely to prevail on the merits, will suffer irreparable

harm if injunctive relief is denied, and stands to suffer potential harm that outweighs the potential harm that may result to the opposing party from the grant of injunctive relief. (*See Trader Joe's Co. v. Progressive Campaigns, Inc.* (1999) 73 Cal.App.4th 425, 429-30.)

Typically, "a party seeking an injunction need not establish an unlawful act beyond the trespass" because, as the Court of Appeal noted, a "continuing trespass . . . constitutes irreparable harm as a matter of law for which damages are not adequate." (*Ralphs Grocery Co. v. United Food and Commercial Workers Union Local 8* ("*Ralphs*") (2010) 186 Cal.App.4th 1078, 1102-03.) This is because "[w]hen 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." (*Id.* at p. 1103.)

Here, "[t]he 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." (*Id.* at p. 1092.) As noted above, the Union argues that the Moscone Act and Section 1138.1 preclude the injunctive relief to which Foods Co would otherwise be entitled.

But as the D.C. Circuit recognized in *Waremart Foods v. NLRB* ("*Waremart II*") (D.C. Cir. 2004) 354 F.3d 870, the Moscone Act and

Section 1138.1 cannot be interpreted to privilege labor-related expressive activity in this way because such a reading would render them unconstitutional under *Mosley* and *Carey*. Consistent with the constitutional principles established by those cases, the D.C. Circuit held, "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 p. 875.)

1. If Applied To Exempt Labor Disputes From General Injunctive Principles, the Moscone Act Is Impermissible Content-Based Discrimination

The Moscone Act, as the Union would have this Court interpret it, limits the equity jurisdiction of courts in cases involving labor disputes. It thereby provides additional protection to labor-related speech:

> (b) The acts enumerated in this subdivision . . . 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. . . from doing any of the following:
>
> (2) Peaceful picketing or patrolling involving any labor dispute . . .
>
> (e) It is not the intent of this section to permit conduct that is unlawful . . . .

(Code Civ. Proc., § 527.3, subds. (b) & (e).) As *Mosley* and *Carey* make clear, if this language is interpreted as creating a special rule of lawfulness for labor picketing, the Moscone Act is unconstitutional because it "describes permissible picketing in terms of its subject matter." (*Ralphs*,

supra, 186 Cal.App.4th at p. 1094 (*citing Mosley*, *supra*, 408 U.S. at p. 95).) That is, to the extent it provides that peaceful labor picketing "shall be legal" without regard to location, the Moscone Act "denies the property owner involved in a protest over a labor dispute access to the equity jurisdiction of the courts even though it does not deny such access if the protest does not involve a labor dispute." (*Id.* at p. 1095.)

As the Court of Appeal correctly held, "*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."[2] (*Id.* (*citing Carey, supra*, 447 U.S. at pp. 464-67).)

The *Waremart II* analysis again is instructive. (354 F.3d 870.) In *Waremart II*, the D.C. Circuit considered whether the Moscone Act required the owner of a grocery store to permit handbilling by non-employee union organizers on its privately owned walkway and parking lot.

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[2] It is inconsequential that the restrictions on speech in *Mosley* and *Carey* were in public forums, while the restriction on speech in the instant matter is in a private forum (*i.e.*, Foods Co's entrance area and apron) because the Moscone Act "forces Ralphs to provide a forum for speech based on its content" and thus is content-based discrimination. (*Ralphs*, *supra*, 186 Cal.App.4th at p. 1095 (*citing Pacific Gas & Elec. Co. v. Public Util. Comm'n* (1986) 475 U.S. 1).) Rather, that the "forum for speech" the Union would have Ralphs be required to provide is Ralphs' private property only underscores the potential overreach of both statutes.

(*Id.*) The D.C. Circuit rejected this proposition – precisely the same proposition asserted by the Union here. (*Id.*)

In so holding, the court considered whether the Moscone Act could deprive a store owner of the right to exclude unwanted speech on its private property because the content of the speech was related to a labor dispute. Based on *Mosley* and *Carey*, the D.C. Circuit held that this would be unconstitutional content-based discrimination and 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 p. 875.) Based on its reading of California law, the D.C. Circuit concluded that "union organizers have no right to distribute literature in the privately-owned parking lot of a stand-alone grocery store's private property." (*Id.* at p. 871.)

In a misguided attempt to deny the existence of an unconstitutional content-based distinction, the Union relies on *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters* (1979) 25 Cal.3d 317 ("*Sears II*").) In *Sears II*, this Court interpreted the Moscone Act as exempting from the Court's equity jurisdiction any attempt to enjoin peaceful picketing by union members on Sears' private sidewalk. (*Id.* at pp. 332-33.) But the Court's holding in *Sears II* was based on the now discredited notion that the First Amendment protected the right of union members to

conduct expressive activities on private property.[3] As the D.C. Circuit noted in *Waremart II*, "the *Sears II* plurality opinion cannot reflect current California law because the rule it embraces violates the First Amendment to the Constitution." (*Waremart II, supra*, 354 F.3d at p. 875.)

Moreover, the Court in *Sears II* did not consider whether the Moscone Act created a content-based distinction in violation of the First and Fourteenth Amendments. In sum, the Union's attempt to rely on *Sears II* to support its position falls far short of the mark.

2. Section 1138.1 Is Unconstitutional

Section 1138.1 provides that a court cannot issue an injunction in a labor dispute except after "findings of fact by the court" that: (1) unlawful acts have been threatened; (2) substantial and irreparable injury to complainant's property will follow; (3) the balance of equities favors granting the injunction; (4) complainant has no adequate remedy at law; and (5) the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection. (Lab. Code, § 1138.1.)

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[3] In *Hudgens v. NLRB* (1976) 424 U.S. 507, the Supreme Court rejected this view, overruling its prior decision in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza* (1968) 391 U.S. 308, and holding that "the First Amendment protected only against governmental action and that the First Amendment therefore did not prevent an owner of a private shopping center from barring union members from picketing on its private property in violation of state trespass law." (*Waremart II, supra*, 354 F.3d at p. 873, fn. 2.)

In imposing these restrictions on injunctive relief, Section 1138.1 "add[ed] requirements for obtaining an injunction against labor protestors that do not exist when the protest, or other form of speech, is not labor related." (*Ralphs*, *supra*, 186 Cal.App.4th at p. 1099.) That is, the requirements of showing irreparable harm to property and the inability or unwillingness of public officers to provide protection are unique to labor disputes. (*See id.* at p. 1100.)

Considering these facts, the Court of Appeal correctly found that Section 1138.1 "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." (*Id.* at pp. 1100-01.) *Mosley* and *Carey* mandate precisely this result.

3. The Union's Claim That The Government May Discriminate In Its Favor So Long As It Is "Protecting" Rather Than "Suppressing" Speech is Contrary to Settled Law

The Union claims that neither the Moscone Act nor Section 1138.1 runs afoul of the rule against content-based discrimination because these statutes single out a particular form of speech for heightened protection, as opposed to suppressing speech that would otherwise be permitted. (Union

Opening Brief at pp. 42-44). This argument makes little sense, and is belied by decades of well-established constitutional principles.

In particular, the Union's proposed distinction between "promoting" and "suppressing" speech entirely misses the point of the rule against content-based discrimination. The evil of content-based discrimination lies in a governmental decision to favor some types of speech over others, regardless of whether that is accomplished by specially favoring one type of speech or specially disfavoring another – and any such discrimination can equally be depicted as "promoting" the favored speech or as "suppressing" the disfavored speech.

Here, for example, California's distinction can equally be seen as suppressing non-labor speech (by providing for near-automatic injunctions against trespassory non-labor speech) or as promoting labor speech (by exempting it from this "suppression" of other forms of trespassory picketing). The constitutional rule against content-based discrimination does not turn on this semantic distinction.

Indeed, the Supreme Court, as well as this Court, repeatedly has made clear that there is no relevant distinction between promoting favored speech and suppressing disfavored speech: regulations favoring a certain type of speech are impermissible for the same reason that regulations evidencing hostility towards a certain type of speech are impermissible. (*See e.g.*, *R.A.V. v. St. Paul* (1992) 505 U.S. 377, 386 ("The government

may not regulate use based on hostility – or favoritism – towards the underlying message expressed."); *Fashion Valley Mall, LLC v. NLRB* (2007) 42 Cal.4th 850, 866 ("Restrictions upon speech 'that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based.'"), *citing DVD Copy Central Assn., Inc. v. Bunner* (2003) 31 Cal.4th 864, 877).)

To suggest, as the Union does here, that there is a constitutionally cognizable difference between favoring speech and suppressing speech has no basis in law or logic.

II. THE MOSCONE ACT SHOULD BE CONSTRUED TO AVOID CONTENT-BASED DISCRIMINATION

As discussed above, construing the Moscone Act to permit peaceful picketing in places where other types of peaceful expressive speech would be unlawful undeniably creates a distinction based on the content of speech. However, this Court can avoid finding the Moscone Act unconstitutional by construing the statute to permit only peaceful picketing that is otherwise lawful.[4]

[4] While the Moscone Act is capable of being construed so as to avoid constitutional infirmities, no such reading of Section 1138.1 appears possible.

A. THE TERMS OF THE MOSCONE ACT ARE AMBIGUOUS AND IN CONFLICT

The Moscone Act does not consistently define permissible picketing. Thus, subdivision (b)(1) of the statute declares that picketing shall be legal so long as it is done in a "public street or any place where any person or persons may lawfully be" while subdivision (b)(2) declares that picketing shall be legal – no matter the location.

This Court previously has recognized that the statutory language of the Moscone Act "cannot be taken literally." (*Sears II*, *supra*, 25 Cal.3d at p. 325.) Indeed, a literal reading of the Moscone Act is untenable because, aside from constituting content-based discrimination, it condones peaceful picketing irrespective of location. If this were the law, a strict reading of the Moscone Act would prevent courts from enjoining union organizers from peacefully picketing in the aisles of Ralphs' Foods Co store, inside the employee break room, or in management offices. (*Id.*)

This inherent ambiguity should come as no surprise. As this Court explained in *Sears II*:

> "The Moscone Act was a compromise measure. The original bill, drafted by union attorneys, clearly sought to limit the injunctive jurisdiction of the superior court . . . . The Legislature amended the bill to add provisions proposed by management supporters without, however, deleting any of the original provisions. In section 527.3 as finally enacted, the provisions added by amendment strike a discordant stance

from those surviving from the original draft, thus creating difficult problems of statutory interpretation."[5]

(*Id.* at p. 323.)

B. THE MOSCONE ACT SHOULD BE CONSTRUED TO PERMIT ONLY PEACEFUL PICKETING THAT IS OTHERWISE LAWFUL

Since courts must "avoid the unnecessary resolution of constitutional questions," this Court must consider whether the Moscone Act can be construed in a manner consistent with its legislative purpose but so as to avoid condoning content-based distinctions. (*Northwest Austin Mun. Util. Dist. No. 1 v. Holder* (2009) 129 S.Ct. 2504, 2508; s*ee also Crowell v. Benson* (1932) 285 U.S. 22, 62 ("When the validity of an act . . . is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.").)

This Court previously has construed the language of the Moscone Act to reconcile its inconsistencies of language. (*See e.g., Kaplan's Fruit & Produce Co. v. Superior Court* (1979) 26 Cal.3d 60, 65-66, 76-80

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[5] As previously cautioned, "constitutional requirement[s] must be read into the basic procedure prescribed by Code of Civil Procedure section 527, which sets forth the steps necessary to obtain injunctive relief." (*United Farm Workers of Am. v. Superior Court of Santa Cruz County* (1975) 14 Cal.3d 902, 913 (holding that notice or evidence of reasonable efforts to give notice to defendant is required before injunctive relief in labor dispute will be granted).)

(interpreting Moscone Act and holding that peaceful picketing could properly be enjoined if blocked ingress/egress).)

And it can be done here, but only by reading the lawfulness requirement for peaceful picketing in subdivision (b)(1) of the statute into the meaning of peaceful picketing as defined in subdivision (b)(2). (*See Matson Nav. Co. v. Seafarers Int'l Union of N. Am.* (D.Md. 1951) 100 F. Supp. 730, 737 (interpreting definition of "labor dispute" in Norris-LaGuardia Act and holding that "paragraphs [of the Act] must be considered together" to determine their meaning).)

So interpreted, the Moscone Act would authorize peaceful picketing only in places where other forms of peaceful expressive activity are permitted. As the D.C. Circuit concluded, "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*, 354 F.3d at p. 875 ("[I]f 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.").) Here, then, Foods Co would be entitled to injunctive relief because its entrance area and apron are private property and non-employee organizers are trespassers.

This construction is entirely consistent with the interpretation that other courts have given the term "peaceful picketing," *i.e.*, picketing in the

"absence of any unlawful act." (*See Senn v. Tile Layers Protective Union, Local No. 5* (1937) 301 U.S. 468, 478-79 (upholding Wisconsin Little Norris-LaGuardia Act permitting picketing that is peaceful and holding "that term as used implies not only absence of violence, but absence of any unlawful act."); *Anaconda Co. v. United Auto., Aerospace and Agric. Implement Workers of Am.* (Conn.Super.Ct. 1977) 34 Conn.Supp. 157, 165 (granting injunctive relief against peaceful picketing where conduct of pickets interfered with business).)

Notably, the Norris-LaGuardia Act, after which the Moscone Act is modeled, permits injunctive relief in circumstances necessary to square its language and intent with the language and intent of other statutes and/or other considerations – a fact the Union readily admits. (*See* Union Opening Brief at p. 26 ("Where the Court has limited Norris-LaGuardia's scope, it has done so to reconcile the Act with subsequent statutory enactments, not out of constitutional concern.").) *See e.g., Boys Markets, Inc. v. Retail Clerks Union, Local 770* (1970) 398 U.S. 235, 251-53 (interpreting Norris-LaGuardia Act to permit injunctive relief against peaceful picketing where collective bargaining agreement contains mandatory arbitration procedure); *Bhd. of R.R. Trainmen v. Chicago River & Indiana R.R. Co.* (1957) 353 U.S. 30, 39-40 (interpreting Norris-LaGuardia Act to permit injunctive relief against peaceful strike that violated statutory duty to arbitrate).)

For these reasons, if the Moscone Act is to stand, it must be construed to permit injunctive relief against unlawful trespassory picketing.[6]

III. THE UNION'S ARGUMENTS ABOUT NON-CALIFORNIA STATUTES THAT ARE NOT BEFORE THIS COURT ARE UNAVAILING

The Union argues that the Moscone Act and Section 1138.1 may be applied in a content-discriminatory fashion because the Norris-LaGuardia Act and state Little Norris-LaGuardia Acts allegedly provide for similar content-based discrimination. (Union Opening Brief at p. 38). This assertion is flawed in multiple ways, and provides no support to the Union's position in this case.

As an initial matter, none of these out-of-state statutes are at issue in this case, and the extent to which they can be applied to expressive conduct (or the constitutionality of any such application) is therefore not before this Court. Moreover, any attempt to analogize these statutes to the Moscone

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[6] Such a finding would square the Moscone Act with well-settled principles of federal labor law. (*See NLRB v. Babcock & Wilcox Co.* (1956) 351 U.S. 105, 112 (holding property owners have right to exclude non-employee organizers from private company property, unless no other reasonable channels of communication are available); *Lechmere, Inc. v. NLRB* (1992) 502 U.S. 527, 535 ("[I]n practice, nonemployee organizational trespassing had generally been prohibited except where 'unique obstacles' prevent nontrespassory methods of communication with the employees.").) Moreover, as noted by the Court of Appeal, the right to possess and protect private property has long been recognized as a core right. (*Ralphs, supra*, 186 Cal.App.4th a p. 1084.)

Act is particularly strained in that the Moscone Act – unlike the Norris-LaGuardia Act – contains the blanket mandate that peaceful picketing "shall be legal."

Moreover, the Union's argument – even on its own terms – makes little sense. While the Norris-LaGuardia Act generally restricts the federal courts' authority to issue injunctions in labor disputes – and that general restriction is surely constitutional – the Union cites no case decided after *Mosley* and *Carey* holding that such special treatment for labor disputes is applicable (or may constitutionally be applied) to *expressive* conduct such as picketing.[7] Accordingly, the Union's suggestion that the Norris-LaGuardia Act establishes the constitutionality of content discrimination in favor of labor picketing is not supported by any authority.

Furthermore, the Union's hyperbolic claim that the Norris-LaGuardia Act "would be swept away" (Union Opening Brief at p. 38) by a ruling in favor of Foods Co mistakenly depicts the creation of special

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[7] Indeed, the Norris-LaGuardia Act has been construed to permit injunctive relief in various circumstances. (*See e.g.*, *Boys Markets, Inc.*, *supra*, 398 U.S. at pp. 251-53 (interpreting Norris-LaGuardia Act to permit injunctive relief against peaceful picketing where collective bargaining agreement contains mandatory arbitration procedure); *Bhd. of R.R. Trainmen, supra,* 353 U.S. at pp. 39-40 (interpreting Norris-LaGuardia Act to permit injunctive relief against peaceful strike that violated statutory duty to arbitrate); *Youngdahl v. Rainfair, Inc.* (1957) 355 U.S. 131, 138-40 (injunction against violence, intimidation, threats and obstruction upheld); *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc.* (1941) 312 U.S. 287, 295-98 (injunction against peaceful picketing with contemporaneously violent conduct).)

privileges for labor picketing as a core goal of that Act. This fundamentally misconstrues the far broader purposes and goals of the Norris-LaGuardia Act, which was aimed at leveling a playing field that had been distorted by promiscuous federal court intervention into labor disputes.

Examples of the reasons cited in the Congressional debates in support of the passage of the Norris-LaGuardia Act were the use of injunctions in labor disputes to forbid "the unions to pay any strike benefits to the strikers . . . forbid attorneys to advise the strikers as to their rights even in proceedings to dispossess the strikers from their homes," and "prohibit[] the strikers from giving any publicity to the existence of the strike or the reasons for it or their justification of it." (S.Rep.No. 163, 75th Cong., 1st Sess.)

Similarly, the Norris-LaGuardia Act was designed to address the improper resort to the courts by employers seeking to stifle labor disputes by "us[ing] federal judges as 'strike-breaking' agencies; by virtue of their almost unbridled 'equitable discretion,' federal judges could enter injunctions based on their disapproval of the employees' objectives." (*Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Assoc.* (1982) 457 U.S. 702, 716 (*citing* (1932) 75 Cong.Rec. at 4928-4938, 5466-5468, 5478-5481, 5487-5490; *see also Burlington N. Santa Fe Ry. Co. v. Int'l Bhd. of Teamsters Local 174* (2000) 203 F.3d 703, 707).)

In recommending that it become law, the Senate Committee on the Judiciary emphasized that, "[t]he primary object of the proposed legislation is to protect labor in the *lawful* and effective exercise of its conceded rights," not "to take away from the judicial power any jurisdiction to restrain by injunctive process, *unlawful acts* or acts of fraud or violence."[8] (S.Rep.No. 163, 75th Cong., 1st Sess. (emphasis added).)

In short, the Union's suggestion that enforcement of the anti-content-discrimination principles of *Mosley* and *Carey* would somehow "sweep away" the Norris-LaGuardia Act finds no support in the actual history or purposes of that Act.

CONCLUSION

For the foregoing reasons, the Chamber of Commerce of the United States of America respectfully respects that this Court affirm the judgment of the Court of Appeal in finding that Section 1138.1 and the Moscone Act

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[8] During debates on the Senate floor, Senator Norris, a key proponent of the legislation that came to carry his name, addressed concerns regarding its breadth: "The lawyers in different parts of America have under a misconception conveyed to the public at large a misunderstanding as to the bill. It is to the effect that the Senate is considering passing a bill the object of which is to prevent the courts from issuing injunctions for the protection of persons and property. Permit me to say that there is no such measure before this body. There is no effort on the part of any Senator here on either side of the Chamber or on the part of any member of the committee, minority or majority, in any way to affect – far less to reduce or destroy, the just jurisdiction of the courts in a full exercise of the equity power which is vested in the Federal courts by the Constitution of the United States." (75 Cong. Rec. 187 (1932).)

are unconstitutional content-based distinctions and that Foods Co is entitled to injunctive relief. Alternatively, as to the Moscone Act, the Court should find that it does not permit the unlawful act of trespass or any other unlawful act, and that Foods Co is entitled to injunctive relief on that basis.

Dated: April 21, 2011

Respectfully submitted,

JONES DAY

By: _____

Craig E. Stewart
Willis J. Goldsmith*
Amanda M. Betman*

Attorneys for *Amicus Curiae* Chamber of Commerce of the United States of America

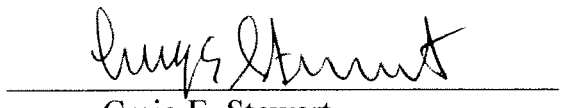
NATIONAL CHAMBER LITIGATION CENTER, INC.
Robin S. Conrad
Shane B. Kawka

Of Counsel for *Amicus Curiae* Chamber of Commerce of the United States of America

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.520(b)(1) and 8.204(c),

I certify that the foregoing brief contains 4,970 words.



Craig E. Stewart

Attorney for *Amicus Curiae*
Chamber of Commerce of the United States of America

PROOF OF SERVICE

I hereby declare that I am a citizen of the United States, I am over the age of eighteen years, and not a party to the within action. I am employed in the City of San Francisco and County of San Francisco, and my business address is 555 California Street, 26th Floor San Francisco, CA 94104-1500.

On April 21, 2011, I served the within document(s):

BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF POSITION OF RALPHS GROCERY COMPANY

by placing a true copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at San Francisco, California addressed as set forth below:

Attorney	**Party**
Miriam Vogel Timothy F. Ryan Tritia M. Murata **Morrison & Foerster, LLP** 555 W. Fifth Street, Suite 3500 Los Angeles, CA 90013-1024	*Ralphs Grocery Company* *Plaintiff and Appellant*

Sarah T. Grossman-Swenson Andrew J. Kahn Richard G. McCracken Paul Livezey More Steven Louis Stemerman Elizabeth A. Lawrence **Davis, Cowell & Bowe, LLP** 595 Market Street, Suite 1400 San Francisco, CA 94105	*United Food & Commercial Workers Union Local 8: Defendant and Respondent*
California Nurses Association 2000 Franklin Street Oakland, CA 94612	*Amicus Curiae*
Christina Cornelia Bleuler **California School Employees Association** 2045 Lundy Avenue San Jose, CA 05131-1825	*California School Employees Association*
Henry M. Willis **Schwartz, Steinsapir, Dohrmann & Sommers LLP** 6300 Wilshire Boulevard Suite 2000 Los Angeles, CA 90048-5268	*United Food and Commercial Workers Union Local 135, 770 and 1428, Amici Curiae*
J. David Sackman **Reich Adell Crost & Cvitan** 3550 Wilshire Boulevard, Suite 2000 Los Angeles, CA 90010	*Korean Immigrant Workers Alliance (KIWA), Amicus Curiae*
Robert A. Cantore **Gilbert & Sackman** 3699 Wilshire Boulevard, Suite 2000 Los Angeles, CA 90010-2732	*Attorneys for United Food and Commercial Workers Union, Local No. 324 and Studio Transportation Drivers, Local Union No. 399 of the International Brotherhood of Teamsters, Amici Curiae*

Jeffrey Stewart Wohlner **Wohlner Kaplon Phillips Young & Cutler** 16501 Ventura Boulevard, Suite 304 Encino, CA 91436-2067	*United Food and Commercial Workers Local 1167*
David A. Rosenfeld **Weinberg, Roger & Rosenfeld** 1001 Marina Village Parkway, Suite 200 Alameda, CA 94501-1091	*Weinberg, Roger and Rosenfeld*
Stephen P. Berzon Scott A Kronland Patrick Casey Pitts **Altshuler Berzon LLP** 177 Post Street, #300 San Francisco, CA 94108	*Change to Win and the Service Employees International Union*
Antonette Benita Cordero Deputy Attorney General **Office of the Attorney General of California** 300 South Spring Street, Suite 1702 Los Angeles, CA 90013-1233	*Office of the Attorney General, Amicus Curiae*
Attorney General of California P.O. Box 944255 Sacramento, CA 94244-2550	*Office of the Attorney General, Amicus Curiae*
Joseph Wender Senior Board Counsel **Agricultural Labor Relations Board** Office of the Executive Secretary 915 Capitol Mall, third Floor Sacramento, CA 95814	*Attorneys for Agricultural Labor Relations Board, Amicus Curiae*
Alan L. Schlosser **American Civil Liberties Union of Northern California** 39 Drumm Street San Francisco, CA 94111	*Attorneys for American Civil Liberties Union of Northern California, Amicus Curiae*

Donald C. Carroll **Carroll & Scully, Inc.** 300 Montgomery Street, Suite 735 San Francisco, CA 94104-1909	*Attorneys for California Labor Federation, AFL-CIO, Amicus Curiae*
Lynn K. Rhinehart General Counsel James B. Coppess Associate General Counsel American Federation of Labor and Congress of Industrial Organizations c/o Michael Rubin **Altshuler Berzon LLP** 177 Post Street, Suite 300 San Francisco, CA 94108	*Attorneys for American Federation of Labor and Congress of Industrial Organizations, Amicus Curiae*
Duane B. Beeson Teague P. Paterson **Beeson, Layer & Bodine** 1404 Franklin Street, Fifth Floor Oakland, CA 94612-3208	*Attorneys for Teamsters Joint Council No. 7, Amicus Curiae*
William J. Emanuel Natalie Rainforth **Littler Mendelson, P.C.** 2049 Century Park East, 5th Floor Los Angeles, CA 90067-3107	*Attorneys for Employers Group, California Grocers Association, and California Hospital Association, Amici Curiae*
Daniel Martin Shanley **DeCarlo Connor & Selvo** 533 South Fremont Avenue, 9th Floor Los Angeles, CA 90071	*Southwest Regional Council of Carpenters, Amicus Curiae*
Clerk, **Court of Appeal** State of California Third Appellate District 621 Capitol Mall, 10th Floor Sacramento, CA 95814-4719	

Clerk **Sacramento Superior Court** Attn: The Hon. Loren E. McMaster 800 9th Street Sacramento, CA 95814-2686	

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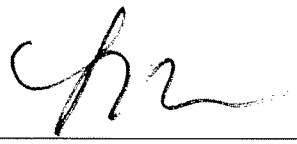
I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 21, 2011, at San Francisco, California.



Lillian Wong

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