No. 12-1162

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*

## REPLY BRIEF FOR PETITIONER

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## INTRODUCTION

Under the decision below, store owners must host on their private property protesters espousing labor-related views, at the whim and on the schedule of the protesters, solely because of the subject matter of the protestors' speech. The Union not only defends that holding, but contends store owners have no standing to challenge the constitutionality of statutes supposedly requiring that result. That cannot be correct.

As Ralphs' petition explained, this Court's decisions in *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972) and *Carey v. Brown*, 447 U.S. 455 (1980) preclude content-based preferential treatment by the State. The D.C. Circuit so held regarding one of the same California statutes challenged here. Only this Court can resolve the conflict.

Ruling for Ralphs would neither have "radical implications" nor take down a host of statutes. *Contra* Opp. 15, 19. What is "radical" is the California Supreme Court's decision. If not reviewed, store owners will be forced to host labor-related expression on their private property, even though they can exclude all other expressive activity. As the multiple business amici demonstrate, this Court's intervention is needed now.

## ARGUMENT

### A. The California Supreme Court's Decision Is Contrary To Decisions Of This Court

The Union attempts to defend the merits of the decision below. But that is the ultimate question on which Ralphs seeks review. If this Court does not grant review, businesses in California will be governed by a reading of the federal Constitution that is contrary to decisions of this Court.

#### *1.* **Mosley** *and* **Carey** *are fatal to California's preference for labor-related speech*

a. If the picketers on Ralphs' privately owned entrance area had been picketing about any subject other than labor, the protesters would have been trespassers, and Ralphs could have obtained an injunction barring them from Ralphs' private property. Although the Union asserts that "all Californians have the right to access shopping centers' common areas to communicate with the public under California's Constitution" (Opp. 19-20 n.3), the California Supreme Court expressly rejected such a right regarding Ralphs' Sacramento grocery store entrance, holding that the "supermarket's privately owned entrance area is not a public forum." Pet. App. 2a; *see id.* at 9a-11a. As the Court of Appeal explained, because Ralphs' store entrance area is "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." Pet. App. 84a. Moreover, injunctive relief would have been

available to eject trespassers engaging in expressive activity on Ralphs' private property, as confirmed by the California Supreme Court's express approval of several intermediate appellate decisions affirming such injunctions. Pet. App. 9a-11a; *see* Pet. 4-5.

The *only* reason Ralphs was unable to obtain an injunction is that the Moscone Act and Section 1138.1 exempt labor-related speech—and only labor-related speech—from state trespass laws.

*Mosley* and *Carey* are fatal to applying the Moscone Act and Section 1138.1 in this way. Pet. 15-18. Under the First Amendment and the Equal Protection Clause, the State does not get to pick "one particular subject" for wholesale exclusion from prohibitions on trespassing. *See Carey*, 447 U.S. at 461.

b. That *Mosley* and *Carey* involved regulation of speech on public sidewalks and that this case involves purely private property (Opp. 20-21) should have been a reason to rule for Ralphs, not against it. Surely the government cannot force private-property owners to accommodate protesters based solely on the subject of the protest, when the government cannot constitutionally make that preferential accommodation in public fora.

*Perry Education Association v. Perry Local Educators' Association* (Opp. 21) supports Ralphs, not the Union. There, the government could exclude speech based on content because the government owned the property and had not opened it as a public forum.

460 U.S. 37, 55 (1983). Here, Ralphs is the property owner and has a constitutionally protected right to exclude expressive activity. *See* Pet. 18-19.

Nor do the "state action" decisions cited by the Union (Opp. 21-22) defeat Ralphs' claim. Indeed, those decisions demonstrate that the Union has no First Amendment right to protest on Ralphs' private property. *See, e.g.*, *Lloyd Corp. v. Tanner*, 407 U.S. 551, 568 (1972) ("this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned"). The unconstitutional state action here is California's content-based statutory preference forcing Ralphs to host labor-related speech on its private property, despite Ralphs' constitutionally protected right to exclude all other speakers. *See Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994).

c. *Mosley* and *Carey* cannot be distinguished by claiming (Opp. 11, 17-18) that the Moscone Act and Section 1138.1 do not restrict speech. As amicus United States Chamber of Commerce observes, that argument "betrays a myopic reading of this Court's cases." Chamber Br. 8. Private-property picketing such as the Union's is otherwise prohibited by the common law of trespass, Pet. App. 9a-11a, just as picketing generally was prohibited by the laws in *Mosley* and *Carey*. What was wrong in those cases was not the general restriction on picketing; it was the exception for just one subject. *Mosley*, 408 U.S. at 95 ("The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its

subject matter."); *Carey*, 447 U.S. at 460-461 ("On its face, the Act accords preferential treatment to the expression of views on one particular subject * * * ."). The Moscone Act and Section 1138.1 share that same fatal flaw.

The Union quotes from *Hill v. Colorado* (Opp. 21), but that decision confirms that "accord[ing] preferential treatment to expression concerning one particular subject matter" is "constitutionally repugnant." 530 U.S. 703, 722-723 (2000). The statute in *Hill* was saved not because it did not restrict speech (it did) but because—unlike the Moscone Act and Section 1138.1—it did not "draw[ ] distinctions based on the subject" of speech. *Id.* at 723.

Thus, the Moscone Act and Section 1138.1 cannot be "subject to rational-basis review" in the circumstances here. Opp. 18. "When government regulation discriminates among speech-related activities" based on content, strict scrutiny applies. *Carey*, 447 U.S. at 461-462. The Union has never attempted to make the requisite showing under strict-scrutiny analysis.

d. The Union notes (Opp. 2-3) that this Court upheld a state statute similar to the Moscone Act. *Senn v. Tile Layers Protective Union, Local No. 5*, 301 U.S. 468 (1937). But that was against a different constitutional challenge—and the picketing there was on public streets, not private property. *Id.* at 477-479.

### *2. Section 1138.1 is unconstitutional for the same reasons as the Moscone Act*

In the circumstances here, Section 1138.1 suffers from the same constitutional infirmity as the Moscone Act.

Section 1138.1 and the Moscone Act work in tandem to preclude injunctive relief in labor disputes. Section 1138.1 requires "unlawful acts" for an injunction. Cal. Labor Code § 1138.1(a). But the Moscone Act mandates that it "shall be legal" to engage in "[p]eaceful picketing or patrolling involving any labor dispute." Cal. Civ. Proc. Code § 527.3.

Section 1138.1 does not stop there: it establishes extra substantive hurdles to injunctive relief by requiring evidence of irreparable harm to property and proof that law enforcement is unwilling or unable to protect the property. Cal. Labor Code § 1138.1(a).[1] While Section 1138.1 also creates procedural barriers (such as requiring testimony in court), it is by no means a "purely procedural statute." Opp. 5. As the Court of Appeal observed, Section 1138.1 "is more than just a rule of procedure"; it "imposes prerequisites that make it virtually impossible for a property

[1] The Union claims that Ralphs may continue to "press the police to arrest those who commit illegal acts." Opp. 14. But law enforcement refused to act here without a court order. Pet. App. 4a, 78a. And under the decision below, the Union's actions are not illegal.

owner to obtain injunctive relief" when a protester's speech is about labor. Pet. App. 102a.

To be sure, Section 1138.1 can apply to situations not involving expressive activity and perhaps, in the rare case, speech not about labor. *See* Opp. 12-14. But labor-related activities commonly include expressive activities (such as the picketing here) and when it does, the speech in the mine run of cases is going to be about labor. Under the decision below, Section 1138.1 entitles speakers on that one topic to occupy the property of another, who otherwise would have the right to eject the speakers.

The Union claims "Section 1138.1 is dispositive" and independently "presents a sufficient basis" to deny injunctive relief. Opp. 17. But that is all the more reason to decide its constitutionality. The Court of Appeal held that but for Section 1138.1 and the Moscone Act, Ralphs would be entitled to an injunction. Pet. App. 105a-107a.

In any event, review of the Moscone Act is needed. Absent its legalization of the Union's otherwise unlawful trespass, Ralphs would be better positioned to obtain an injunction under Section 1138.1.

***3. The petition does not implicate the numerous statutes cited by the Union***

The Union suggests a decision for Ralphs "would have radical implications" and "call into question a large number of statutes" such as the federal Norris-LaGuardia Act, the National Labor Relations Act

(NLRA), and even the Prison Litigation Reform Act (PLRA). Opp. 15-16, 19. That hyperbole should not dissuade the Court from granting review.

a. Unlike the Moscone Act, the Norris-LaGuardia Act does not provide that trespassory picketing "shall be legal." Cal. Civ. Proc. Code § 527.3. This Court has not construed the Norris-LaGuardia Act to give unions free rein to trespass on private property based on the content of their speech. Nor was that the aim of the act, which instead was to stop the then-existing practice of "us[ing] federal judges as 'strike-breaking' agencies." *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, 457 U.S. 702, 716 (1982); Chamber Br. 14-16.

Moreover, application of the Norris-LaGuardia Act (or any other statute) to situations not involving expressive activity (Opp. 12-13) is not at issue here. For example, even if this Court reverses the decision below, the Norris-LaGuardia Act will continue to preclude injunctions halting certain work stoppages. *See, e.g.*, *Buffalo Forge Co. v. United Steelworkers of Am., AFL-CIO*, 428 U.S. 397, 403-404 (1976).

Nor are other state acts modeled on the Norris-LaGuardia Act imperiled—unless other states follow the California Supreme Court. This Court's immediate guidance could prevent that. Chamber Br. 16-19.

b. The NLRA and this Court's decisions interpreting it (Opp. 19) present different circumstances. The NLRA balances the employer's private-property

rights with the organizational rights of employees, the exercise of which often involves employee speech on the employer's property. *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 506 (1978); *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976). But there is no such balancing when (as here) the speakers are not employees: there is no exception to trespass laws for non-employees, except in unusual circumstances like company-owned towns. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 531-535 (1992); *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 205 (1978).

c. The Union's sky-is-falling arguments suggest laws like the PLRA would be called into question by reversal. Opp. 15-16. But even assuming the PLRA is not content-neutral, the Constitution permits greater restriction of First Amendment rights in prisons. *Beard v. Banks*, 548 U.S. 521, 528 (2006).

The Union also asks "what is one to make of" this Court's defamation decisions? Opp. 20. Defamation is categorically excluded from First Amendment protection, and certain distinctions thus may be made. *See R.A.V. v. St. Paul*, 505 U.S. 377, 383, 388 (1992). Still, the government could not permit defamation only as to particular viewpoints or subjects. *See ibid.*

At bottom, the Union's arguments presume that content-based discrimination is the norm. Not so: "Content-based regulations are presumptively

invalid," *id.* at 382, and this Court has not hesitated to declare such preferences unconstitutional.

**B. The California Supreme Court's Decision Conflicts With The D.C. Circuit**

The California Supreme Court considered but expressly rejected the D.C. Circuit's decision in *Waremart Foods v. NLRB*, 354 F.3d 870 (D.C. Cir. 2004) (*D.C. Waremart*). Pet. App. 25a-27a. Only this Court "can definitively resolve the disagreement." Pet. App. 67a-68a (Chin, J., dissenting).

The Union tries to minimize the conflict, claiming the D.C. Circuit "merely" predicted (incorrectly) how the California Supreme Court would interpret the Moscone Act. Opp. 23-26. That is true as far as it goes. But the D.C. Circuit held that the construction adopted by the decision below "violates the First Amendment to the Constitution" in light of *Mosley* and *Carey*. *D.C. Waremart*, 354 F.3d at 875. That conclusion is not "dicta" (Opp. 25); it compelled *D.C. Waremart*'s result.

In a future case, the D.C. Circuit would be bound by the California Supreme Court's construction of the Moscone Act. But it also would be bound by its own holding that the Act so construed is unconstitutional.

The Union claims that the NLRB will follow the California Supreme Court, not the D.C. Circuit. Opp. 26. That is doubtful with respect to the Moscone Act's constitutionality, as *D.C. Waremart* is a federal appellate decision. Nevertheless, were the NLRB to do so,

the employer surely would appeal to the D.C. Circuit, where favorable precedent exists. *See* 29 U.S.C. § 160(f) (aggrieved party may obtain review in regional circuit or D.C. Circuit).

**C. The Union's Standing And Waiver Arguments Are Unfounded**

1. Ralphs has standing to challenge the Moscone Act and Section 1138.1. *Contra* Opp. 1, 27-30. Ralphs has suffered an injury—the presence of protesters on its private property—that would be redressed by this Court's declaration that the Moscone Act and Section 1138.1 are unconstitutional. No more is required. *INS v. Chadha*, 462 U.S. 919, 935-936 (1983); *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 79 (1978).

Ralphs does not assert the rights of any third party; it asserts its own right to exclude the Union from its private property. The relief Ralphs seeks would not open Ralphs' property to all protesters; it would reinstate the default rule recognizing Ralphs' right to exclude all expression. Pet. App. 103a-104a (Court of Appeal: "the statute may not be extended to apply to all cases because the Legislature did not intend such a drastic invasion of property rights"). The particular legal theory that Ralphs asserts is irrelevant to the standing analysis. *Duke Power*, 438 U.S. at 78-81 (plaintiffs need not "demonstrate a connection between the injuries they claim and the constitutional rights being asserted").

Were Ralphs asserting the rights of hypothetical non-labor protesters, the prudential third-party standing doctrine would not preclude its challenge. *See Craig v. Boren*, 429 U.S. 190, 194-197 (1976) (beer vendor had standing to bring equal-protection challenge to statute proscribing beer sales to males under 21 and females under 18).

2. Ralphs preserved, and continues to assert, a Takings Clause challenge. *Contra* Opp. 1, 30-34.

Ralphs repeatedly pressed the takings issue in the California Supreme Court, and that Court had ample opportunity to address it. In its merits brief, Ralphs contended the Union's interpretation of the statutes would effect an unconstitutional taking by compelling "free public use of private property in a manner that interferes with the property owner's reasonable investment-backed expectations." Answer Br. 13. In it its brief responding to the Union's amici, Ralphs explained that it "sued to protect its own *Fifth* Amendment right to use its private property as permitted by law." Ralphs' Consolidated Answer to Amicus Briefs 4. And in response to the Court's request for supplemental letter briefs, Ralphs asserted that under the Union's construction, "the enforcement of those statutes will constitute a prohibited taking of Ralphs' private property." Ralphs' Sept. 27, 2012 Letter Br. 2.

Moreover, throughout the proceedings in the trial court and the Court of Appeal, Ralphs advanced its constitutionally protected right to exclude protesters

from its private property. *See, e.g.*, C.A. Opening Br. 33-34; C.A. J.A. 27-28. Ralphs' position throughout was that its modest commercial establishment was not a public forum under the analysis of *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 82-85 (1980)—and that any other analysis would result in a taking.

Those assertions preserved the takings claim for this Court's review. *Id.* at 85 n.9 (similar assertions preserved compelled-speech claim). In any event, the California Supreme Court "render[ed] an unexpected interpretation of state law," *ibid.*, holding that the entrance area was not a public forum yet Ralphs cannot eject the Union protestors.

The Union's claim that there is "no evidence" of a taking (Opp. 33) is untrue. The decision below gives members of the public "a permanent and continuous right to pass to and fro" on private property and allows the Union to interfere with Ralphs' business. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 832 (1987); *see* Cal. Retailers Ass'n Br. 5-10. Indeed, the California Supreme Court prohibited Ralphs from imposing its reasonable time, place, and manner restrictions. Pet. App. 31a. The Union complains of hearsay (Opp. 6), but additional testimony about Union harassment of Ralphs' customers was given, without objection, after the sustained objection. C.A. J.A. 560.

**D. The Issue Presented Is Important**

As amici confirm, this Court's intervention is needed now. Under the decision below, labor-related protesters are free to intrude on private property at will, unencumbered by trespass laws or law enforcement.

This threat is real. Severe problems already have developed. *See* Complaint, *Wal-Mart Stores, Inc. v. United Food & Commercial Workers Int'l Union*, No. BC508587 (Super. Ct. Cal. May 10, 2013) (alleging Union trespassing inside stores disrupting operations, harassing customers, and blocking access to some stores).[2] In virtually every State, protests on private property would be enjoined (Cal. Grocers Ass'n Br. 4-6)—but absent this Court's review, not in California. *See Magic Laundry Servs., Inc. v. Workers United Serv. Employees Int'l Union*, No. CV-12-9654-MWF, 2013 U.S. Dist. LEXIS 53296, at *15-*18 (C.D. Cal. Apr. 8, 2013) (citing decision below to dismiss claim for unauthorized union entry into business through rear door).

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[2] Available at http://www.bloomberglaw.com/public/document/WALMART_STORES_INC_VS_UNITED_FOOD_AND_COMMERCIAL_WORKERS_IN_Docke/2.

## CONCLUSION

The petition should be granted.

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