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Case No. S _____

SUPREME COURT
FILED
MAR - 8 2011
Frederick K. Onizon Clerk
Deputy

IN THE SUPREME COURT OF CALIFORNIA

RALPHS GROCERY COMPANY,
Plaintiff and Appellant

v.

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

After a Decision of the Court of Appeal
Fifth Third Appellate District, Case No. F058716
(Fresno Superior Court Case No. 09 CE CG
00349 DRF,
The Hon. Donald Franson, Jr., Judge, Presiding)

PETITION FOR REVIEW

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RALPHS GROCERY COMPANY,
Plaintiff and Appellant

v.

**UNITED FOOD AND COMMERCIAL
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Defendant and Respondent.

After a Decision of the Court of Appeal
Third Appellate District, Case No. F058716
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00349 DRF,
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**TO THE HONORABLE CHIEF JUSTICE TANI CANTIL-SAKAUYE AND
THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT
OF THE STATE OF CALIFORNIA:**

Defendant-Respondent United Food & Commercial Workers Union
Local 8 petitions this Honorable Court to grant review of the published
decision of the California Court of Appeal, Third Appellate District, filed
on January 27, 2011. A copy of the opinion is attached as Exhibit A.

STATEMENT OF ISSUE PRESENTED

1. Did the Court of Appeal err in holding that Labor Code §1138.1 and the Moscone Act, Code of Civil Procedure §527.3, violate the First Amendment to the United States Constitution and Article 1, Section 2 of the California Constitution?
2. Did the Court of Appeal err in holding that Ralphs has standing to assert the free-speech rights of hypothetical third parties?

WHY REVIEW SHOULD BE GRANTED

This case raises issues that are near-identical to those in *Ralphs Grocery Company v. United Food & Commercial Workers Local 8*, Case No. S185544 (“*Sacramento Ralphs*”), review of which is pending in this Court. Like the Third Appellate District in that case, the Fifth Appellate District struck down Labor Code § 1138.1 and the Moscone Act, Code of Civil Procedure § 527.3, as facially unconstitutional violations of free-speech rights. Although Ralphs never raised a claim under California’s Liberty of Speech Clause, and the parties never briefed such a claim, the

Fifth Appellate District ruled that the statutes violate that constitutional provision.

The Fifth Appellate District's decision is no more defensible than the Third Appellate District's. The Fifth Appellate District rightly disavowed the Third Appellate District's holding that the statutes violate Ralphs's free-speech rights by forcing it to host speech with which it disagrees. But the Fifth Appellate District failed to identify any other constitutional principle that could justify invalidating the statutes.

The court held that Labor Code § 1138.1 and the Moscone Act are unconstitutional because “[l]aws which prohibit speech based on its content—or, in this case, based on the failure of the speech to address a ‘labor dispute’—are presumptively invalid.” (*Ralphs Grocery Company v. United Food & Commercial Workers Union Local 8* (2011) 192 Cal.App.4th 200, slip op. at p. 5 [hereinafter “*Fresno Ralphs*”]). But this is inaccurate. Neither Labor Code § 1138.1 nor the Moscone Act *prohibits* anyone's speech based on its “failure . . . to address a ‘labor dispute’ ” or on any other basis. Labor Code § 1138.1 does not regulate speech at all—it regulates court procedure in any case arising or growing out of a labor dispute. The Moscone Act protects certain forms of labor-related speech against injunction, but does not prohibit or restrict any speech. Like the First Amendment to the U.S. Constitution, California's Constitution only bars acts that *restrain or abridge* speech. (CAL. CONST., Art. I, sec. 2(a)

["A law may not restrain or abridge liberty of speech or press."].) The challenged statutes do neither.

Elsewhere, the Fifth Appellate District admitted that its holding was not based on Labor Code § 1138.1 or the Moscone Act restricting anyone's speech. Instead, the Fifth Appellate District ruled that "the state may not act to selectively *create* a free speech right applicable only to the few, while excluding others[.]" (*Fresno Ralphs, supra, slip op.* at p. 5 [emphasis added].) The court's conclusion that the Legislature may only *protect* speech on an all-or-nothing basis is unprecedented, inconsistent with the Constitution's express language, and incompatible with many statutes and judicial doctrines.

The well-reasoned dissent by Presiding Justice Wiseman got it right—the majority's decision is "not supported by existing constitutional principles. The challenged statutes do not burden anyone's speech." (*Fresno Ralphs, supra, slip op.* at p. 11 [Wiseman, P.J., dissenting].)

The Fifth Appellate District's errors in its discussion of Ralphs's standing mirror those in its ruling on the merits. While the Third Appellate District concluded that Ralphs's own speech rights were at stake, the Fifth Appellate District correctly declined to follow this approach. Instead, it held that Ralphs could challenge the statutes based on their alleged discrimination against hypothetical, non-labor speakers.

This does not present a judiciable controversy—Ralphs has no standing to assert the discrimination claims of hypothetical third parties. (*Rubio v. Superior Court* (1979) 24 Cal.3d 93, 103; *People v. Garcia* (1999) 21 Cal.4th 1, 11.) But the Fifth Appellate District concluded that there is a “public interest exception” to this well-established rule. According to the majority, Ralphs’s interests as a property owner are sufficient to permit it to assert the “public interest in nondiscriminatory legislation.” (*Fresno Ralphs, supra, slip op.* at p. 6.) This is so, according to the court, even though Ralphs has no constitutional property rights at stake and its interests are antithetical to those of the hypothetical speakers whose speech rights it purports to represent. (Cf. *Fresno Ralphs, supra, slip op.* at p. 10 [Wiseman, P.J., dissenting].) The Fifth Appellate District’s approach to the justiciability of Ralphs’s constitutional discrimination claim is contrary to this Court’s settled precedent.

Because this case presents identical issues to those raised in the *Sacramento Ralphs* case, the Court should grant review here as well.

FACTUAL AND PROCEDURAL BACKGROUND

Factual Background

The factual background to this case is similar to that in the *Sacramento Ralphs* case. Defendant and Respondent United Food & Commercial Workers Union 8 (the “Union”) represents employees at

SaveMart, Safeway, Raleys, and other grocery retailers, which provide family health benefits to employees at their union stores. (JA 0060.) Foods Co, which is a subsidiary of Ralphs, refuses to provide such benefits at its non-union stores. Because Foods Co's failure to provide family health benefits undermines the ability of its union competitors to do so, the Union announced a boycott of the non-union Foods Co store on Shields Avenue in Fresno. (JA 0095; 0557.)

The Shields Avenue Foods Co is in a commercial shopping center that includes a Subway restaurant, pizza shop, Starbucks, H&R Block, and other stores. (JA 0096; RT 6.)

The Union began demonstrating at the store in October 2008, and continued to do so until July 2010. (JA 0096.) The demonstrations were entirely peaceful. The police visited several times, but did not arrest any demonstrator, nor did the Union receive any complaints from the police about its conduct. (JA 0096.) Although the Fifth Appellate District contended that there were "allegations of confrontations between picketers and store employees" and "of occasional aggressive efforts by picketers," these allegations were contained only in affidavits submitted by Ralphs, which were contradicted by affidavits submitted by the Union. (*Fresno Ralphs, supra, slip op.* at p. 1; cf. JA 0095-0098.) The Union objected to the affidavits that Ralphs filed, and the trial court neither ruled on these evidentiary objections nor credited Ralphs's evidence. (JA 0091-0093.)

In response to the Union's demonstrations at its Fresno and Sacramento stores, Ralphs promulgated a policy severely restricting expressive activities at all of its California Foods Co stores. (JA 0031-0032.) This policy states that no more than two people from any organization may be outside a Foods Co store at any time. (JA 0031, ¶ 7.) It declares blackout dates on which no expressive activity may take place, including the entire week before Martin Luther King, Jr. Day, Presidents' Day, Easter, Memorial Day, Fourth of July, Labor Day, and Halloween. (*Id.*, at ¶ 8(b).) On other days, expressive activity is banned between 11:00 a.m. and 1:30 p.m., and between 4:00 p.m. and 7:00 p.m. (*Id.* at ¶ 8(c).) The policy makes distributing leaflets impossible by banning expressive activity in the parking lot and within 20 feet of the store entrance, although a leafleter could stand much closer to the door without blocking anyone from entering or exiting. (*Id.* at ¶ 8(a).)

After Ralphs promulgated its speech rules, the Union continued to peacefully demonstrate as it had before. Throughout the period of the Union's demonstration, there was no blocking of ingress or egress, no mass pickets, no excessive or amplified noise, no violence or threats, and no property damage. (JA 0096.)

As in the *Sacramento Ralphs* case, many other speakers used the Foods Co sidewalk in addition to the Union. Groups solicited near to the entrance and during prohibited times, as well as in the parking lot. (JA

0096-0097.) In January 2009, a group of people from a church stood in front of the store's entrance handing out leaflets, but was not asked to leave. (JA 0097.) Other vendors sold products in the parking lot and on the sidewalk. (*Id.*) Yet Ralphs filed suit to force the Union, and only the Union, to comply with its unreasonable rules.

Procedural Background and Decision Below

Ralphs sued the Union for declaratory and injunctive relief in January 2009. (JA 1-11.) One month later, Ralphs filed a motion for a preliminary injunction to enjoin the Union from engaging in expressive activities on the sidewalk in front of its store. (JA 12-22.) After a hearing on April 7, 2009, the trial court issued an Order denying Foods Co's request. (JA 0556-0559.)

The trial court found that Labor Code § 1138.1 and the Moscone Act precluded the court from issuing an injunction prohibiting the Union's demonstration. Ralphs contended that the statutes violated the First Amendment to the United States Constitution, but the trial court rejected this view. (JA 0557-0558.) The trial court also held that Ralphs had failed to provide evidence meeting the requirements for issuing an injunction set forth in Labor Code § 1138.1. (JA 0558.) The trial court found that Ralphs did not meet its burden of proving that unlawful acts had been threatened. (*Id.*; see Labor Code § 1138.1(a)(5).) Ralphs offered no live testimony at

the hearing, and failed to give notice to the Fresno chief of police, as Labor Code § 1138.1 requires. (JA 0558; see Labor Code § 1138.1(b).) The trial court therefore held that Ralphs was not entitled to an injunction. (JA 0559.) Because Ralphs was not entitled to an injunction under Labor Code § 1138.1, the trial court did not address whether the Union had a constitutional right to demonstrate on the Foods Co sidewalk under *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899. The trial court received no evidence on this issue.

In a divided opinion, the Fifth Appellate District reversed. The majority held that “the Moscone Act and Labor Code section 1138.1 are unconstitutional under article I, section 2 of the California Constitution” because “[t]he two statutes make an impermissible distinction between labor picketing and all other peaceful picketing.” (*Fresno Ralphs, slip op.* at p. 2.) At no point before the trial court or in briefing to the Fifth Appellate District did Ralphs assert that the statutes violated its rights under California’s Constitution. The Fifth Appellate District applied California’s Liberty of Speech Clause *sua sponte*. It explained only that it would “look to the California Constitution for guidance”—rather than the First Amendment as briefed by the parties—because “the speech rights in question were created under state law.” (See *id.* at p. 4 n. 3.) While the court based its decision on California’s Liberty of Speech Clause, it

indicated that its analysis would be the same as under the First Amendment.

(*Id.* at p. 5.)

While the Third Appellate District in *Sacramento Ralphs* held that Labor Code § 1138.1 and the Moscone Act violate *Ralphs*'s First Amendment right to exclude speech from its property, both *Ralphs* and the Fifth Appellate District disavowed this view. (*Fresno Ralphs, slip op.*, at p. 2 [“In the present case, appellant does not assert a First Amendment right to be free from union picketing in front of its store[.]”]; *id.* at p. 8 [Wiseman, P.J., dissenting] [“At oral argument, appellant’s counsel conceded that appellant is not asserting any constitutional free-speech rights of its own.”].)

The Fifth Appellate District’s majority struggled to explain whose free-speech rights the statutes burden. At times, the majority implied that the statutes somehow restrict other, hypothetical speakers’ rights. The court stated that “[l]aws which *prohibit* speech based on its content—or, in this case, based on the failure of the speech to address a ‘labor dispute’—are presumptively invalid.” (*Fresno Ralphs, slip op.*, at p. 5 [emphasis added].) At other points, however, the majority recognized that neither Labor Code § 1138.1 nor the Moscone Act restrict anyone’s speech. Instead, the Fifth Appellate District held that laws that *protect* speech, but that do not extend the same protection universally, violate the Constitution. (*Ibid.* [“We conclude the state may not act to selectively create a free

speech right applicable only to the few, while excluding all others, in the absence of a compelling state interest.”].)

The majority opinion recognized that the Union’s picketing “does [not] violate [Ralphs’s] constitutionally protected property rights.” (*Id.* at p. 2.) But the concurring opinion contended that “[t]his case requires judicial resolution of the conflicts that arise when free speech rights clash with private property rights. Neither set of rights is absolute.” (*Id.* at p. 6 [Kane, J., concurring].) The concurring opinion did not explain why such balancing was proper in deciding whether to declare two popularly enacted statutes unconstitutional under California’s Liberty of Speech Clause. Nor did it reconcile this statement with the majority opinion’s conclusion that Ralphs does not have any constitutionally protected property right at stake.

The majority also addressed the question of Ralphs’s standing to assert constitutional speech rights that are not its own. The court recognized that “a case normally must present an actual controversy between the parties before the courts will entertain it.” (*Id.* at p. 3.) But the majority held that whether an actual controversy existed was “an exercise of discretion” and that Ralphs’s “assertion of its own interests as a property owner” and “its assertion of a public interest in nondiscriminatory legislation” were “sufficiently congruous . . . ‘to assure that all of the relevant facts and issues will be adequately presented.’ ” (*Ibid.* [internal quotations omitted].)

Presiding Justice Wiseman dissented, finding that Ralphs does not have standing to assert hypothetical third parties' free-speech claims and that Labor Code § 1138.1 and the Moscone Act are constitutional.

Justice Wiseman noted that Ralphs had abandoned any claim that the statutes burden its own speech rights. (*Id.* at p. 8 [Wiseman, P.J., dissenting].) Although neither Ralphs nor the majority made clear whose free-speech rights were impacted, Ralphs's "argument by necessity is based on the constitutional rights of hypothetical speakers[.]" (*Ibid.*) But, as the dissenting opinion pointed out, such hypothetical speakers, if successful, "would receive no relief, as their speech would still be enjoined if the statutes are invalidated." (*Ibid.*) Ralphs's position, the dissenting opinion continued, was therefore very different from those of the parties in *Police Department of Chicago v. Mosley* (1972) 408 U.S. 92 and *Carey v. Brown* (1980) 447 U.S. 455, in which the Court "vindicated the free-speech rights of parties to the case who were criminally prosecuted for speech. In the present case, by contrast, no party's right to speak has been burdened." (*Id.* at p. 9.)

Nor could Ralphs satisfy the requirements for third-party standing, since it could not claim a close relation or common interest with any third party whose speech rights were at stake. (*Ibid.* [citing *Selinger v. City Council* (1989) 216 Cal.App.3d 259, 270-271].) "To the contrary, one imagines that hypothetical third-party speakers' interests would be to

enforce their rights to free speech on appellant's property, but appellant's interest would be to enjoin them by invoking its property rights.

Invalidation of the two statutes here at issue would not advance the third parties' interests in any way." (*Ibid.*; see also *id.* at p. 10 ["Appellant's interests in this case are, by contrast, antithetical to those of the hypothetical third-party speakers whose rights it asserts[.]".])

The dissenting opinion's treatment of the merits overlapped with its discussion of Ralphs's standing. As the dissenting opinion summarized:

The majority opinion essentially concludes that, unless state law allows state courts to enjoin either *all speech* or *no speech* on private property at the owner's request, then the constitutional right to free expression of someone is being violated. This contention is not supported by existing constitutional principles. The challenged statutes do not burden anyone's speech. To the contrary, the effect of the statutes on the speakers at whom they are aimed, i.e., people involved in "labor disputes" is to *prevent* the suppression of their speech through injunction. . . . The state and federal Constitutions condemn the *suppression* of speech, not the *protection* of it. The hypothetical trespassing nonlabor speakers whose rights appellant is asserting would be silenced by laws relating to trespass and laws allowing the issuance of injunctions, not by the Moscone Act or Labor Code section 1138.1.

(*Id.* at p. 11.)

Ralphs's frustration that the Union's demonstration impeded its property interests was irrelevant, the dissent concluded, and the majority's decision "attempts to drive the square peg of an invasion of property rights into the round hole of a constitutional free-speech violation." (*Id.* at p. 12.)

The court was “not in a position to relieve [Ralphs’s] frustration . . . because appellant has not shown that the Moscone Act and Labor Code § 1138.1 are unconstitutional.” (*Id.* at p. 10.) The proper audience for Ralphs’s claim is the Legislature, whose “legislative judgment . . . requires deference unless binding authority compels its invalidation.” (*Id.* at p. 12.)

This Petition for Review is timely filed, pursuant to California Rules of Court, Rule 8.500(e)(1), after the Court of Appeal’s January 27, 2011 decision, for which Respondent did not seek a petition for rehearing.

LEGAL DISCUSSION

I. The Court Should Grant Review to Correct the Fifth Appellate District’s Misapplication of Content-Discrimination Doctrine.

A. The issue presented here is already pending before this Court.

In *Sacramento Ralphs*, this Court will review whether Labor Code § 1138.1 and the Moscone Act violate the First Amendment to the United States Constitution. This was also the issue briefed to the Fifth Appellate District. The Fifth Appellate District, *sua sponte*, addressed whether Labor Code § 1138.1 and the Moscone Act violate Article 1, Section 2 of the California Constitution. The issues presented in the two cases, however, are identical, since California’s approach to content discrimination mirrors that under the federal Constitution. (See *Los Angeles Alliance For Survival*

v. *City of Los Angeles* (2000) 22 Cal.4th 352, 367-378 [applying First Amendment precedent on content discrimination under California Liberty of Speech clause]; *Fashion Valley Mall, LLC v. N.L.R.B.* (2007) 42 Cal.4th 850, 865-869 [same]; *Snatchko v. Westfield LLC* (2010) 187 Cal.App.4th 469, 480 [same]; see also *Fresno Ralphs, supra, slip op.* at p. 2.)

B. The Fifth Appellate District identified no speech-clause violation.

1. The statutes do not burden anyone's speech.

The Fifth Appellate District's decision is confused. While the Third Appellate District in *Sacramento Ralphs* concluded—erroneously—that the statutes infringe on Ralphs's free-speech rights by effectively compelling it to speak, the Fifth Appellate District rightly rejected this view. But it did not identify any other way in which the statutes burden speech.

The majority opinion states at one point that “[l]aws which prohibit speech based on its content—or, in this case, based on the failure of the speech to address a ‘labor dispute’—are presumptively invalid.” (*Fresno Ralphs, supra, slip op.* at p. 5 [emphasis added].) But neither Labor Code § 1138.1 nor the Moscone Act *prohibits* any speech, based on its content or otherwise. Labor Code § 1138.1 regulates the standards for granting injunctions in a broad category of cases—those arising or growing out of a labor dispute. To the extent it might apply in a case involving speech—as

here—it is speech protective. The Moscone Act prohibits injunctions against specified forms of labor-related speech; it does not *prohibit* other forms of speech that are not related to a labor dispute. If Ralphs seeks to restrict speech on its property, it does so by invoking trespass law and the courts' equity jurisdiction, not Labor Code § 1138.1 or the Moscone Act. Like the First Amendment, California's Liberty of Speech clause only bars laws that restrain or abridge speech. (CAL. CONST., Art. I, Sec. 2(a).) The Fifth Appellate District's holding that the challenged statutes do so was simply wrong.

Elsewhere, by contrast, the majority contended that the statutes are unconstitutional because they do not protect *enough* speech. (*Fresno Ralphs, supra, slip op.* at p. 5 [“We conclude the state may not act to selectively create a free speech right applicable only to the few, while excluding all others, in the absence of a compelling state interest.”].) Putting aside whether Labor Code § 1138.1 creates a “speech right,” see *infra*, the Fifth Appellate District's reasoning is unprecedented and would lead to the invalidation of numerous judicial doctrines and statutory laws.

No court has held that a purely speech-protective statute violates California or federal free-speech rights because it does not apply universally. Judicially created free-speech protections are inherently content-based. “[S]peech on “matters of public concern” . . . is “at the heart of the First Amendment’s protection.”” (*Snyder v. Phelps* (2011) __

S.Ct. ___, *slip op.* at p. 5 [internal citations omitted].) “Accordingly, ‘speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to *special protection.*’” (*Id.* at p. 6 [emphasis added, citing *Connick v. Myers* (1983) 461 U.S. 138, 145].) Courts dissect the content of speech to determine whether it is entitled to heightened protection from common-law torts such as defamation (*New York Times Co. v. Sullivan* (1964) 376 U. S. 254) and intentional infliction of emotional distress (*Snyder, supra*; *Hustler Magazine, Inc. v. Falwell* (1988) 485 U.S. 46). Special protections apply to labor speech as well. (*Linn v. United Plant Guard Workers* (1966) 383 U.S. 53, 65 [requiring heightened, actual-malice standard in defamation suits arising out of labor disputes]; *Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 600.) It is absurd to argue that these bedrock First Amendment protections in fact violate constitutional content-discrimination norms because they are not also extended to speech about private matters or to non-labor speech. But Ralphs is contending that California’s Legislature may not do what the judiciary regularly does—provide targeted protection against common-law torts to a particular form of speech based on its content.

As the Union has explained elsewhere, if adopted, the Fifth Appellate District’s view would profoundly destabilize the law. Many state and federal statutes recognize particular dangers to specific forms of speech and accordingly protect them procedurally and substantively. (See

Sacramento Ralphs, Opening Br. on Merits, at pp. 38-41 [citing laws providing targeted speech-related protections].)

The only cases involving content-discrimination that the Fifth Appellate District relied upon were *Mosley* and *Carey, supra*. (See *Fresno Ralphs, supra, slip op.* at pp. 2, 5.) But these cases involved laws that flatly prohibited speech in public forums, exempting only labor picketing. The laws were unconstitutional because they *restricted* the plaintiff's speech based on its content. (See *Mosley, supra*, 408 U.S. at p. 99 ["In this case, the ordinance itself describes impermissible picketing not in terms of time, place, and manner, but in terms of subject matter."]; *Carey, supra*, 447 U.S. at 462 ["[I]t is the content of the speech that determines whether it is within or without the statute's blunt prohibition."].) The Fifth Appellate District did not address this fundamental difference between *Mosley* and *Carey* and the statutes at issue here. (Cf. *Fresno Ralphs, supra, slip op.* at p. 9 [Wiseman, J., dissenting].)

The recent decision in *Best Friends Animal Society v. Macerich Westside Pavilion Property LLC* (Cal. Ct. App. Mar. 1, 2011) ___ Cal.Rptr.3d ___, No. B221067, 2011 WL 711584, is a straightforward application of *Mosley* and *Carey* under California's Constitution and further illustrates this difference. In *Best Friends*, an animal-rights organization challenged a shopping mall's time, place and manner restrictions. (*Id., slip op.* at pp. 1-2.) Under the mall's rules,

noncommercial speech faced onerous restrictions—it could only take place in out-of-the-way areas designated by the mall, was banned altogether during blackout dates, and was required to cease when the store closest to the designated area was closed to the public. (*Ibid.*) “Qualified” labor speech, by contrast, was not subject to these restrictions. (*Id.* at p. 1.) As in *Mosley* and *Carey*, the defendant’s action *restricted* the plaintiff’s speech and these restrictions applied because of the content of this speech. (See *id.* at p. 9.) The court of appeal accordingly upheld an injunction prohibiting the mall from enforcing its restrictions against non-commercial, non-labor speakers like the plaintiff. (*Id.* at p. 11.)

Unlike the regulations at issue in *Mosley*, *Carey*, and *Best Friends*, Labor Code § 1138.1 and the Moscone Act do not *restrict* anyone’s speech. These statutes do not violate the First Amendment or California’s Constitution.

In other places, the majority opinion blurs the lines between constitutional free-speech analysis and adjudication of Ralphs’s property rights. The majority opinion correctly states that Ralphs does not have any constitutional property right to bar the Union from demonstrating on its property. (*Fresno Ralphs, supra, slip op.* at p. 2; see *Pruneyard Shopping Center v. Robins* (1980) 447 U.S. 74, 84 [no Takings Clause claim]; *Snatchko v. Westfield LLC* (2010) 187 Cal.App.4th 469, 490 [same]; *Sears,*

Roebuck & Co. v. San Diego County Council of Carpenters (1979) 25

Cal.3d 317, 332 [no Due Process Clause claim.]

The concurring opinion, by contrast, states that the case “requires judicial resolution of the conflicts that arise when free speech rights clash with private property rights.” (*Fresno Ralphs, supra, slip op.* at p. 6 [Kane, J., concurring].) These property rights “have constitutional, statutory, and common law roots.” (*Ibid.*) But since it is established that Ralphs has no constitutional property right to bar the Union from demonstrating against it on its property, the concurring opinion can only be based upon Ralphs’s common-law trespass rights. According to the concurring opinion, then, a court may invalidate Labor Code § 1138.1 and the Moscone Act under California’s Liberty of Speech Clause because they interfere with Ralphs’s common-law property rights.

Such judicial activism harkens back to the *Lochner* era, when courts interpreted the Due Process Clause to freeze the common law and thereby invalidated popular measures. (*Lochner vs. New York* (1905) 198 U.S. 45.) As Justice Wiseman concluded in dissent, the “majority’s approach attempts to drive the square peg of an invasion of property rights into the round hole of a constitutional free-speech violation” and in doing so “exceeds its proper authority by circumventing the Legislature and establishing new constitutional law without legal necessity.” (*Id.* at p. 12 [Wiseman, P.J., dissenting].)

The Court should grant review to correct the Fifth Appellate District's misapplication of First Amendment and California content-discrimination doctrine.

2. Labor Code § 1138.1 does not regulate speech and is not subject to facial free-speech challenge.

As in *Sacramento Ralphs*, the Fifth Appellate District's approach to Labor Code § 1138.1 is particularly misguided. That statute does not regulate speech and does not create "speech rights." (Cf. *Fresno Ralphs*, *supra*, *slip op.* at p. 5.) It regulates court procedure for granting injunctions in any case "arising or growing out of a labor dispute"—an extremely large category of cases. (Labor Code § 1138.1(a).)

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

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

Labor Code § 1138.1 is not directed “narrowly and specifically” at speech or expressive conduct.¹ Labor Code § 1138.1 does not by its terms seek to regulate speech or expressive conduct—it sets forth rules of equity procedure that govern in any case arising from a labor dispute. Like the identical language in the Norris-LaGuardia Act, Labor Code § 1138.1 applies in situations that do not involve speech or expressive conduct, such as when a union seeks an injunction to stop an employer from further encumbering its capital assets (*Drivers, Chauffeurs Local 71 v. Akers Motor Lines, Inc.* (4th Cir. 1978) 582 F.2d 1336, 1341), when a party to a collective bargaining agreement seeks an injunction staying or enjoining a pending arbitration proceeding (*Camping Const. Co. v. Dist. Council of Iron Workers* (9th Cir. 1990) 915 F.2d 1333, 1342-43; *AT&T Broadband, LLC v. IBEW* (7th Cir. 2003) 317 F.3d 758, 759-760), or when a union seeks an injunction requiring the employer to hire workers from a seniority list. (*District 29, United Mine Workers v. New Beckley Mining Corp.* (4th Cir. 1990) 895 F.2d 942, 945-47.)

¹ This further distinguishes Labor Code § 1138.1 from the laws held unconstitutional in *Mosley* and *Carey*, both of which specifically targeted picketing and demonstrating. (*Mosley, supra*, 408 U.S. at pp. 92-93; *Carey, supra*, 447 U.S. at p. 457.)

The majority's fundamental misapprehension of Labor Code § 1138.1 runs throughout its opinion. Thus, the majority states that "Labor Code § 1138.1 appear[s] to be [an] isolated and singular attempt[] to expand to private forums the state constitutional free speech established for public forums" and that the statute is "related to speech and only speech[.]" (*Fresno Ralphs, supra, slip op.* at p. 4.) But this ignores the fact that Labor Code § 1138.1 applies to all cases growing out of labor disputes, not just those involving speech, and that it is neither "isolated" nor "singular"—it is modeled *verbatim* on the federal Norris-LaGuardia Act and state laws in at least 22 other states.²

Nor is the fact that Labor Code § 1138.1 might have some effect on expressive activity in a particular category of cases enough to make out a First Amendment challenge. The courts "have not traditionally subjected every criminal and civil sanction imposed through legal process to 'least restrictive means' scrutiny simply because each particular remedy will have some effect on the First Amendment activities of those subject to sanction."

² See 29 U.S.C. § 107; Ariz. Rev. Stat. § 12-1808; Colo. Rev. Stat. § 8-3-118; Conn. Gen. Stat. § 31-112 *et seq.*; Haw. Rev. Stat. § 380-7; Idaho Code § 44-701 *et seq.*; Ill. Comp. Stat. ch. 820 § 5/1 *et seq.*; Ind. Code § 22-6-1-6; Kan. Stat. § 60-904; La. Rev. Stat. § 23:844; 26 Me. Rev. Stat. § 5; Md. Lab. & Empl. Code § 4-314; Mass. Gen. Laws 214 § 6; Minn. Stat. § 185.13; N.J. Stat. § 2A:15-51; N.M. Stat. § 50-3-1; N.Y. Lab. ch. 31, art. 22-a, § 807; N.D. Century Code § 34-08-01; Or. Rev. Stat. § 662.080; 43 Pa. Stat. § 206i; R.I. Gen. Laws § 28-10-2; Utah Code U.C.A. § 34-19-1; Wash. Rev. Code § 49.32.072; Wis. Stat. § 103.56; Wyo. Stat. § 27-7-101 *et seq.*

(*Arcara v. Cloud Books, Inc.* (1986) 478 U.S. 697, 706; *Bailey v. City of National City* (1991) 226 Cal.App.3d 1319, 1332; see also *Norton v. Ashcroft* (2d Cir. 2002) 298 F.3d 547, 553 [“[T]here is no disparate impact theory of the First Amendment.”].)

Neither Labor Code § 1138.1 nor the Moscone Act restrict or abridge speech. Labor Code § 1138.1 does not regulate speech at all and is not subject to a facial challenge.

II. Ralphs Has No Standing to Assert the Constitutional Rights of Hypothetical Third Parties.

As Justice Wiseman’s dissent notes, the standing issue in this case is intertwined with the merits. Ralphs has standing to assert its own constitutional speech rights, but it has not done so in this case and would be unsuccessful if it did. (*Fresno Ralphs, supra, slip op.* at p. 2; *Pruneyard, supra*, 447 U.S. at p. 87; *Snatchko, supra*, 187 Cal.App.4th at p. 490.)

Ralphs may not assert the content-discrimination claims of hypothetical third parties who might wish to demonstrate on its property, even if its own interest in the case might be furthered by asserting those claims.

The Court has made clear in a variety of contexts that “a charge of unconstitutional discrimination can only be raised in a case where this issue is involved in the determination of the action, and then only by the person or a member of the class of persons discriminated against.” (*People v. Globe Grain & Mill Co.* (1930) 211 Cal. 121, 127-127-128; accord *Rubio*,

supra, 24 Cal.3d at p. 103; *Estate of Horman* (1971) 5 Cal.3d 62, 77-78; *Lumber Co v. Bank of America etc. Assn.* (1936) 7 Cal.2d 14, 22; *Garcia, supra*, 21 Cal.4th at p. 11 [“Defendant, in short, lacks standing to assert the equal protection claims of hypothetical felons who may be treated more harshly because their prior offenses were committed as juveniles.”]; see also *Ashwander v. Tennessee Valley Authority* (1936) 297 U.S. 288, 346-348 [Brandeis, J. concurring]; *Los Angeles Police Dept. v. United Reporting Pub. Corp.* (1999) 528 U.S. 32, 40-41 [“To the extent that respondent’s ‘facial challenge’ seeks to rely on the effect of the statute on parties not before the Court . . . its claim does not fit within the case law allowing courts to entertain facial challenges.”].) “Indeed, [t]his is a matter on which the courts in all jurisdictions are in full agreement.”” (*Rubio, supra*, 24 Cal.3d at p. 103 [citing 16 Am.Jur.2d, Constitutional Law, § 123, p. 320 n.6].)³

³ While the courts have recognized a limited exception to this principle where no member of the class would ever be in a position to complain about the alleged discrimination, that is obviously not the case here. (See *Rubio*, 24 Cal.3d at p. 103; *Barrows v. Jackson* (1953) 346 U.S. 249, 257.) Nor is this a case involving a claim of First Amendment “overbreadth”—another context in which courts have relaxed the requirement that litigants raise only their own constitutional claims. (See, e.g., *Secretary of State of Md. v. Joseph H. Munson Co., Inc.* (1984) 467 U.S. 947, 957; *Broadrick v. Oklahoma* (1973) 413 U.S. 601, 612.) There is no claim here that Labor Code § 1138.1 or the Moscone Act chill the speech of other speakers through vague or overbroad restrictions. To the contrary, Ralphs asserts that the statutes are underinclusive in their speech protections. (See *Fresno Ralphs, supra, slip op.* at p. 11 [Wiseman, P.J., dissenting].)

Neither the majority nor concurring opinion cites to any of this hornbook law. Instead, the majority opinion concludes that there is a “public interest exception” to the actual controversy rule, and that the court has discretion over whether Ralphs’s constitutional claims are judiciable. (*Fresno Ralphs, supra, slip op.* at p. 3.) Both the majority and concurring opinions hold that because Ralphs has a strong desire to protect its own “interests as a property owner” it may assert any constitutional claim it wishes in defense of these interests.

There is no basis for these conclusions. The “public interest” doctrine has been applied by some California appellate courts in declaratory judgment cases that lack ripeness. (See 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 21, p. 84; *California Water & Tel. Co. v. Los Angeles* (1967) 253 Cal.App.3d 16, 23-24 [public utilities may challenge constitutionality of ordinance that applied to them despite the fact that none had been prosecuted, since “[a] person need not violate or plan to violate a penal ordinance before he can obtain a declaration construing it and deciding its application to him.”].) But the doctrine does not permit a plaintiff to assert the constitutional discrimination claims of a non-party.

Nor is it relevant to Ralphs’s standing that it very much wants the statutes to be declared unconstitutional in order to further its property interests. (Cf. *Fresno Ralphs, supra, slip op.* at p. 3.) The fact that a plaintiff has a collateral interest in someone else’s constitutional

discrimination claim does not mean that the plaintiff can raise it. (See, e.g., *Rubio, supra*, 24 Cal.3d at p. 103 [defendant cannot challenge exclusion of resident aliens from jury service—although the issue might affect his conviction—where he does not allege that he is a resident alien]; *Garcia, supra*, 21 Cal.4th at p. 11 [defendant may not assert the “equal protection claims of hypothetical felons” in order to forward his interpretation of Three-Strikes Law].) Indeed, the majority’s view would invalidate the rule in *People v. Globe Grain & Mill Co.*, *Rubio*, and *Garcia*—a party seeking to assert a non-party’s constitutional discrimination claim will always do so to forward its own, collateral interest in the case.⁴

The rule against raising non-parties’ discrimination claims is not based on some strict, Article III “case or controversy” requirement. (Cf. *Fresno Ralphs, supra, slip op.* at p. 6.) Rather, as the Supreme Court has explained, “[w]ithout such limitations—closely related to Art. III concerns

⁴The concurring opinion’s sole authority for its contrary view was *Buchanan v. Warley* (1917) 245 U.S. 60, a case that pre-dates the Supreme Court’s modern approach to third-party standing. The Court subsequently clarified the approach taken in *Buchanan*, holding that third-party standing only exists where the plaintiff can show that its interests are congruous with those of the discriminatee and the discriminatee is unable to bring suit in its own name. (See *Barrows, supra*, 346 U.S. at p. 257.) The concurring opinion also contends that *Ralphs* could raise non-parties’ discrimination claims because it asserted these claims “as a shield, not as a sword.” (*Fresno Ralphs, supra, slip op.* at p. 8 [Kane, J., concurring].) No California court has previously recognized this distinction. In fact, the rule against raising non-parties’ discrimination claims has been applied to criminal defendants challenging their convictions. (*Rubio, supra*, 24 Cal.3d at p. 103; *Garcia, supra*, 21 Cal.4th at p. 11.)

but essentially matters of judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.” (*Warth v. Seldin* (1975) 422 U.S. 490, 500; see also *Singleton v. Wulff* (1976) 428 U.S. 106, 113-14 [“[T]he courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not.”].)

That is precisely the problem with Ralphs’s attempt to raise the discrimination claims of hypothetical, non-labor speakers. Judicial intervention will not protect any such individual’s rights; the antidiscrimination interest that Ralphs seeks to “protect” is an essentially abstract one. As the dissent pointed out, striking down Labor Code § 1138.1 and the Moscone Act would not advance the interests of non-labor speakers—Ralphs could continue to enjoin their speech as it had done previously. (*Fresno Ralphs, supra, slip op.* at p. 8 [Wiseman, P.J., dissenting].)

There is no free-floating “public interest in nondiscriminatory legislation” that plaintiffs may channel to challenge statutes they do not like. The Fifth Appellate District’s ruling on Ralphs’s standing conflicts

with this Court's rulings dating back more than 80 years. The Court should grant review on this issue as well.

CONCLUSION

The Fifth Appellate District, like the Third Appellate District, misapplied content-discrimination doctrine to invalidate statutes that do not burden speech. The Fifth Appellate District also erred in allowing Ralphs to assert the constitutional claims of hypothetical third-party speakers. The Court should grant review of this case for both reasons.

Dated: March 8, 2011

Respectfully submitted,

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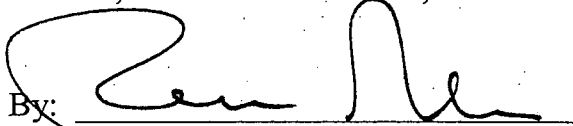
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Pursuant to Rule 8.204(c)(1) of the California Rules of Court, counsel hereby certifies that the above brief is produced using 13 point Times New Roman font, with 13-point and 14-point Cambria font for the headers, and contains 6,621 words, including footnotes, and excluding the cover, the signature block and this certificate. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: March 8, 2011

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

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On March 8, 2011, I served the foregoing document described as:

PETITION FOR REVIEW

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