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 a Decision by the Court of Appeal,
Third Appellate District, Case No. C060413

ANSWER TO PETITION FOR REVIEW

MIRIAM A. VOGEL (SBN 67822)
TIMOTHY F. RYAN (SBN 51488)
TRITIA M. MURATA (SBN 234344)
MORRISON & FOERSTER LLP
555 West Fifth Street, Suite 3500
Los Angeles, California 90013-1024
Telephone: 213.892.5200
Facsimile: 213.892.5454

Attorneys for Plaintiff and Appellant,
RALPHS GROCERY COMPANY

SERVICE ON ATTORNEY GENERAL REQUIRED
CALIFORNIA RULES OF COURT, RULE 8.29(c)(1)

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INTRODUCTION

Foods Co, a privately-owned grocery store, is not by any reasonable definition a *Pruneyard*-type shopping center. It is the quintessential modest retail establishment expressly excluded from *Pruneyard's* purview.

The choice in this case was between (i) allowing Foods Co to obtain injunctive relief compelling a union to follow Foods Co's reasonable time, place and manner rules for expressive activity, and (ii) compelling Foods Co to give the union free rein on Foods Co's private property to picket and distribute leaflets wherever and whenever the picketers wanted to be. In a well reasoned and carefully crafted opinion based on established legal principles and the actual facts of this case (not those conjured for the petition for review), the Third Appellate District resolved this dispute in Foods Co's favor. This Court should do likewise by denying the Union's petition.

STATEMENT OF THE CASE

A. Foods Co is the quintessential modest retail establishment, and College Square is not, by any definition, a Pruneyard shopping mall.

Foods Co's Sacramento store is located in College Square, a modest commercial development that also houses a few small stores and some empty storefronts. (JA 258-260, 368-369) People go to Foods Co to shop, not to linger, socialize, congregate or be entertained. There are no movie theaters or other forms of entertainment in College Square, nothing to entice anyone (not even teenagers) to use this private property as a gathering place. (JA 41, 368-369.)

The Union's fanciful suggestion that this modest retail establishment somehow resembles an old-fashioned town square is entirely imagined, not real. The "three common courtyards" (Pet. 9) are "courtyards" in name only and, most importantly, there is no evidence that the Union ever used or intended to use these areas for its expressive activities. (Slip Opn., p. 7.) As the Court of Appeal explained, the Union *did not use* these so-called courtyards — all of its expressive activities took place at Foods Co's entrance and on the apron around the entrance — areas that "were not designed and presented to the public as public meeting places" but were, instead, areas where Foods Co, "as a private property owner, could limit the speech allowed and could exclude anyone desiring to engage in prohibited speech." (Slip Opn., p. 14.)

Whatever issues there are in this case, they are issues related to modest retail establishments, not to giant shopping centers. (Compare *Snatchko v. Westfield LLC* (2010) 187 Cal.App.4th 469 [No. C059985, filed Aug. 11, 2010 by the Third District, Pet. for Rev. to be filed Sept. 20,

2010; Westfield's Galleria, a true *Pruneyard* mall, has more than a million square feet of retail space, and more than 130 tenants, including four major department stores]; and see *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899 (*Pruneyard*) [21-acre mall with 65 shops, 10 restaurants, and a cinema]; *Fashion Valley Mall, LLC v. National Labor Relations Bd.* (2007) 42 Cal.4th 850 (*Fashion Valley*) [six major department stores, an 18-theater movie complex, and nearly 200 shops].)

The unremarkable bottom line is that people visit Foods Co to buy groceries.

B. The Union's picketing.

Although many of Foods Co's stores have employees who belong to labor unions, the employees of the Sacramento Foods Co store chose to remain non-union. (RT 47-50; JA 41, 51.) When the Sacramento store opened in July 2007, Union picketers arrived to encourage people not to shop at Foods Co because it is not a union store. (Slip Opn., p. 8.) Although College Square is bounded on all four sides by public streets and sidewalks (JA 62), the picketers walked back and forth in front of Foods Co's doors, carrying signs and handing out flyers (Slip Opn., p. 8), and Foods Co's customers had to walk around them to get in and out of the store (JA 41-43). The picketers returned five days each week and engaged in the same activities for about eight hours each day. (Slip Opn., p. 8.)

In January 2008, Foods Co implemented new time, place and manner rules for expressive activity and gave copies of the rules to the Union. (Slip Opn., p. 8.) The picketers ignored the rules. (Slip Opn.,

p. 8.)[1] Foods Co's customers complained that the picketers blocked their way and yelled at them (RT 13-14; JA 42-44) but law enforcement refused Foods Co's request to remove the picketers from the property. (Slip Opn., pp. 8-9.)

Although other organizations and individuals are allowed to engage in expressive activity on Foods Co's private property (Pet. 10-11), they are all required to comply with Foods Co's rules — and unlike the Union, most do comply. If they don't, they are asked to leave. (JA 46-47; RT 25.)

C. The trial court proceedings.

In April 2008, Foods Co sued the Union for declaratory and injunctive relief and for trespass. (JA 1-10.) Foods Co's motion for a preliminary injunction was denied, but only after the trial court explained that in its view (1) the Moscone Act (Code Civ. Proc., § 527.3),[2] by providing special protections for labor activities, constitutes impermissible content-based discrimination in violation of the First and Fourteenth Amendments to the United States Constitution, and (2) that Labor Code Section 1138.1, which imposes Draconian burdens on injunctive relief against labor activity,[3] is similarly flawed but (3) nevertheless enforceable

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[1] The rules prohibit the distribution of literature, physical contact with any person, and the display of signs larger than two feet by three feet. The rules also prohibit speech within 20 feet of the entrance to the store, and ban all speech during specified hours and on specified days before designated holidays. (Slip Opn., p. 8.)

[2] All references to section 527.3 are to that section of the Code of Civil Procedure.

[3] All references to section 1138.1 are to that section of the Labor Code.

because the Sacramento Superior Court was bound by the Third Appellate District's decision upholding that statute. (*Waremart Foods v. United Food & Commercial Workers Union* (2001) 87 Cal.App.4th 145 (*Cal Waremart*).) (Slip Opn., p. 12.) Foods Co appealed.

D. The Court of Appeal's opinion.

In a thorough and thoughtful opinion, the Third Appellate District reversed and remanded the cause to the trial court with directions to grant the preliminary injunction requested by Foods Co.

First, the Court of Appeal rejected the Union's contention that the entrance and apron area at the front of Foods Co's store are public fora, distinguished Foods Co's modest retail establishment from large shopping centers such as *Pruneyard* and *Fashion Valley* (Slip Opn., pp. 11-16) and found Foods Co's Sacramento store "indistinguishable from the stand-alone stores" that are the subject of a number of intermediate appellate court decisions. (*Albertson's, Inc. v. Young* (2003) 107 Cal.App.4th 106 (*Albertson's*); *Costco Companies v. Gallant* (2002) 96 Cal.App.4th 740 (*Costco*); *Slevin v. Home Depot* (N.D. Cal. 2000) 120 F.Supp.2d 822 (*Slevin*); *Trader Joe's Co. v. Progressive Campaigns, Inc.* (1999) 73 Cal.App.4th 425 (*Trader Joe's*); *Van v. Target Corp.* (2007) 155 Cal.App.4th 1375 (*Van*).) As the Court of Appeal put it, because the entrance area "was not a public forum, [Foods Co], as a private property owner, could limit the speech allowed and could exclude anyone desiring to engage in prohibited speech." (Slip Opn., p. 14.)

Second, the Court of Appeal separately considered the constitutionality of the Moscone Act and section 1138.1. Relying on *Police Department v. Mosley* (1972) 408 U.S. 92 (*Mosley*) and *Carey v. Brown*

(1980) 447 U.S. 455 (*Carey*), both of which invalidated laws favoring labor speech over all other speech, the Court of Appeal declared both California statutes unconstitutional (Slip Opn., p. 16-34) — the Moscone Act because it impermissibly "denies [owners of private property] 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" (Slip Opn., p. 22), and section 1138.1 because it impermissibly "favors speech relating to labor disputes over speech relating to other matters" by adding "requirements for obtaining an injunction against labor protestors that do not exist when the protest, or other form of speech, is not labor related." (Slip Opn., p. 28.) Because there is no compelling state interest to afford special protection to labor speech, neither statute can withstand strict scrutiny review.

Third, the Court of Appeal declined to follow *In re Lane* (1969) 71 Cal.2d 872 (*Lane*), *Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union* (1964) 61 Cal.2d 766 (*Schwartz-Torrance*), *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters* (1979) 25 Cal.3d 317 (*Sears II*), *M Restaurants, Inc. v. San Francisco Local Joint Executive Board* (1981) 124 Cal.App.3d 666 (*M Restaurants*), and its own decision in *Cal Waremart*, 87 Cal.App.4th 145, primarily because none of those cases considered the First Amendment implications of *Carey* and *Mosley*. (Slip Opn., pp. 16, 23-24.)

Given the effect of the Court of Appeal's decision, it is hardly surprising that the Union filed the pending petition for review. But given the soundness of that decision, Foods Co submits that the petition should be summarily denied.

E. A note about the related case involving Foods Co's Fresno store.

A virtually identical lawsuit — same Union, same size and type of Foods Co store, same picketing, same rules, same issues — is pending in the Fifth Appellate District and oral argument is set for next month (October). (*Ralphs Grocery Company v. United Food and Commercial Workers Union Local 8*, 5th Civ. No. F058716.) (See Part III, *post.*)

THE REASONS WHY REVIEW SHOULD BE DENIED

As we will now explain, the Court of Appeal's decision is correct and should not be disturbed. Review should be denied.

I. FOODS CO'S SACRAMENTO STORE IS NOT THE FUNCTIONAL EQUIVALENT OF A PUBLIC FORUM.

As the Court of Appeal correctly held, Foods Co's Sacramento store is not the functional equivalent of a traditional public forum within the meaning of *Pruneyard*, 23 Cal.3d 899 or *Fashion Valley*, 42 Cal.4th 850. Leaving to one side the fact that California is one of only five states imposing quasi-public obligations on property that is otherwise privately owned and open to the public only for commercial purposes (*Fashion Valley*, 42 Cal.4th at pp. 870, 874-876, dissenting opn. of Chin, J.; *Hudgens v. NLRB* (1976) 424 U.S. 507, 517-521 (*Hudgens*) [federal law does not follow *Pruneyard*]; *UFCW, Local 919 v. Crystal Mall Assocs., L.P.* (Conn. 2004) 852 A.2d 659, 666-669), there is no *factual* reason in this case to

extend the public forum doctrine to Foods Co's modest retail establishment.[4]

Neither is there any legal reason to make that leap of logic. California's intermediate reviewing courts have consistently refused to extend *Pruneyard* to modest retail establishments, allowing them to restrict and even prohibit expressive activities on their private property, and this Court has never questioned those decisions. (*Trader Joe's Co.*, 73 Cal.App.4th 425, 428 [preliminary injunction barring signature solicitations at a stand-alone store]; *Costco,* 96 Cal.App.4th 740 [stand-alone stores may prohibit all expressive activity]; *Albertson's,* 107 Cal.App.4th 106 [preliminary injunction barring expressive activity at store within small commercial center]; *Slevin,* 120 F.Supp.2d 822 [privately owned apron in front of store not transformed into public property by hot dog stand or modest seating area]; *Van,* 155 Cal.App.4th 1375, 1377 [no signature gathering in area surrounding individual retail store "even when that store is part of a larger shopping center"].)

As we said, Foods Co's College Square store is not a *Pruneyard*-type shopping center. And as the Court of Appeal put it, our Sacramento store is "indistinguishable from the stand-alone stores in shopping centers" described in *Van* and *Albertson's.* (Slip Opn., p. 12.)

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[4] We are not talking about private property with all the attributes of a municipality, or private property to which there is no reasonable, feasible, alternative access (*Marsh v. Alabama* (1946) 326 U.S. 501) but only about privately owned property open to the public for a limited purpose (shopping) and otherwise accessible from adjacent public streets.

II. THE SPECIAL PROTECTION AFFORDED TO LABOR ACTIVITY BY THE MOSCONE ACT AND SECTION 1138.1 IS UNCONSTITUTIONAL CONTENT-BASED DISCRIMINATION.

The Court of Appeal held that the Moscone Act (which deprives California's courts of jurisdiction to enjoin labor-related activities) and section 1138.1 (which independently makes it virtually impossible to obtain injunctive relief against labor activities) violate the First and Fourteenth Amendments to the United States Constitution because both statutes impermissibly favor labor speech over all other speech. The Court of Appeal got it right.

A. The Moscone Act.

The Moscone Act provides that "no court nor any judge nor judges thereof, shall have jurisdiction to issue any restraining order or preliminary or permanent injunction which, in specific or general terms, prohibits any person or persons, whether singly or in concert, from [lawfully picketing, distributing leaflets, or doing any other peaceable act related to collective bargaining disputes]." (§ 527.3, subd. (b).) As the Union concedes, the Moscone Act "immuniz[es] certain kinds of labor-related speech" — and *only* labor-related speech — "on private property from trespass law." (Pet., p. 24.)

The Court of Appeal (i) relied on two United States Supreme Court cases prohibiting content-based discrimination that favors labor unions (*Mosley*, 408 U.S. 92 and *Carey*, 447 U.S. 455), (ii) rejected a number of inconsistent California cases because they failed to consider the First Amendment implications of their decisions (*Schwartz-Torrance,* 61 Cal.2d 766, *Lane,* 71 Cal.2d 872, *Sears II,* 25 Cal.3d 317, *Cal Waremart,* 87

Cal.App.4th 145, and *M Restaurants,* 124 Cal.App.3d 666, and (iii) adopted the reasoning of the D.C. Circuit Court of Appeals in *Waremart Foods v. NLRB* (D.C. Cir. 2004) 354 F.3d 870 (*D.C. Waremart*) to support its decision that the Moscone Act is constitutionally infirm. (Slip Opn., pp. 17-28.) The Court of Appeal reached the right result for the right reasons.

1. *Mosley* and *Carey*

Mosley, 408 U.S. 92, condemned a Chicago ordinance prohibiting picketing within 150 feet of a school *except* for picketing related to a labor dispute, explaining that the ordinance made an "impermissible distinction between labor picketing and other peaceful picketing." (*Id.* at p. 94.) Under the First and Fourteenth Amendments, said the Court, "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." (*Id.* at p. 96.) The Moscone Act fails for precisely this reason.

Carey, 447 U.S. 455, condemned an Illinois statute prohibiting picketing on the public streets and sidewalks adjacent to residences, *except* for picketing a place of employment in a labor dispute. (*Id.* at pp. 457, 471.) The United States Supreme Court expressly rejected the argument the Union makes here — that the state's interest in allowing labor protests justifies differential treatment — holding that the "central difficulty with this argument is that it forthrightly presupposes that labor picketing is more deserving of First Amendment protection than are public protests over other issues, particularly the important economic, social, and political subjects about which [others] wish to demonstrate." (*Id.* at p. 466.)

As the Court of Appeal pointed out, the only difference between our case and the laws at issue in *Mosley* and *Carey* is that the Moscone Act

"selectively allows speech in a private forum based on the content of the speech by withdrawing the remedy of the property owner or possessor while the laws scrutinized in *Mosley* and *Carey* selectively excluded speech from a public forum based on content. *This difference, however, is not legally significant. The effect on speech is the same: the law favors speech related to labor disputes over speech related to other matters* — it forces [Foods Co] to provide a forum for speech based on its content." (Slip Opn., pp. 21-22, italics added.)

2. *Sears II* and its progeny.

Just as the Court of Appeal correctly followed the United States Supreme Court's decisions in *Mosley* and *Carey,* so too did it properly find that the California cases reaching a different result were wrongly decided.

Sears II, in which this Court upheld the then newly enacted Moscone Act, was not followed by the Court of Appeal for two valid reasons — *Sears II* is a non-binding plurality opinion (*Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 918) and it did not consider the First Amendment issues presented by *Mosley* and *Carey*. (*Sears II,* 25 Cal.3d at pp. 327-328, fn. 5; see *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (1999) 19 Cal.4th 1182, 1195 ["An opinion is not authority for propositions not considered"].) For the latter reason, the Court of Appeal similarly (and correctly) rejected *Lane,* 71 Cal.2d 872, *Schwartz-Torrance,* 61 Cal.2d 766, *M Restaurants,* 124 Cal.App.3d 666, and its own decision in *Cal-Waremart,* 87 Cal.App.4th 145. (Slip Opn., pp. 17-28.)[5]

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[5] The Union's reliance on *Senn v. Tile Layers Protective Union* (1937) 301 U.S. 468 (Pet. 17, fn. 5) is misplaced. In *Senn* — which predates *Mosley* and *Carey* by four decades — the United States Supreme

(Footnote continues on next page.)

3. *D. C. Waremart*

The D.C. Circuit, forced to fend for itself after this Court declined its request to certify the issue, had to decide whether California law gave labor organizers a right to leaflet in the privately-owned parking lot of a stand-alone grocery store. (*D.C. Waremart*, 354 F.3d at p. 871.) Relying on *Mosley* and *Carey,* the D.C. Circuit held that *Sears II, Lane* and *Schwartz-Torrance* are no longer valid because they provide special protection for labor activities that is not afforded to expressive activities by anyone else. (*Id.* at pp. 874-877.)

Here, the Court of Appeal correctly held that the Moscone Act is substantively indistinguishable from the legislation condemned in *Mosley* and *Carey.* By allowing Union representatives to enter onto Foods Co's private property for a purpose other than shopping when entry may be forbidden to all other demonstrators, the Moscone Act grants the use of a forum to people whose views it finds acceptable, notwithstanding that this forum is otherwise closed to everyone except the owner's invitees. It follows ineluctably that the Moscone Act is facially unconstitutional and unenforceable. (*Mosley,* 408 U.S. at pp. 97-98; *Carey,* 447 U.S. at p. 470; *D.C. Waremart Foods*, 354 F.3d 870.)

(Footnote continued from previous page.)

Court rejected an equal protection challenge to Wisconsin's Little Norris-LaGuardia statute by an individual claiming his right to earn a living was unconstitutionally impinged by labor picketing targeted against him. *Senn* dealt with picketing *on a public street*, and did not in any context consider the First Amendment or content discrimination issues addressed years later in *Mosley* and *Carey*. (Slip. Op., p. 26.)

B. Section 1138.1.

Section 1138.1, subdivision (a), provides that no California court has "authority to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute" except after a hearing is held, testimony heard, and findings made that (among other things) unlawful acts have been threatened, the complainant's property will suffer substantial and irreparable injury, the complainant has no adequate remedy at law, and the police are unable or unwilling to furnish adequate protection. (Slip Opn., pp. 29-30.)

An injunction, of course, is the appropriate and traditional remedy for a continuing trespass (Slip Opn., p. 28), and in a typical, non-union situation, injunctive relief is obtained on a showing that (i) the moving party will probably prevail on the merits of its claim, (ii) irreparable harm to the plaintiff will result from a refusal to grant a preliminary injunction, and (iii) the potential harm to the plaintiff outweighs the harm the defendant will suffer if an injunction is issued. (*Bank of Stockton v. Church of Soldiers* (1996) 44 Cal.App.4th 1623, 1625-1626; Slip Opn., pp. 28-29.)

The obstacles added by section 1138.1 impose a virtually insurmountable burden on the private property owner seeking an injunction to stop labor-related activity by requiring proof of an unlawful act other than the trespass, irreparable harm to the property itself, and the inability to obtain police protection — thus using disparate treatment to accomplish the same impermissible end as the Moscone Act. (Slip Opn., pp. 28-33.)

The Court of Appeal acknowledged its contrary decision in *Cal Waremart*, 87 Cal.App.4th 145, where it summarily rejected a First Amendment challenge to section 1138.1, holding now that, had the issue

been fully briefed there as it was here, the Court would have reached a different result. (Slip Opn., p. 31.) Section 1138.1 "is more than just a rule of procedure. In effect, it differentiates speech based on its content and imposes prerequisites that make it virtually impossible for a property owner to obtain injunctive relief." (Slip Opn., p. 31.) It is unconstitutional.

C. The sky is not falling.

The Union's argument for review and against the Court of Appeal's opinion — a screed to the effect that the Third Appellate District has wiped out the Norris-LaGuardia Act and pushed unions back into the 19th century — lacks merit.

The Union's suggestion that the Court of Appeal's opinion could somehow "invalidate the federal Norris-LaGuardia Act, as well as the 'Little Norris-LaGuardia Acts' enacted by many other states" is a red herring. (Pet. 22-23.) As the Court of Appeal itself noted, "[t]his case presents the question of whether the state, based on the content of the speech, can *force the owner or possessor of real property that is not a public forum to give an uninvited group access to the private property to engage in speech.*" (Slip Opn., p. 2; italics added.) This narrow question has no bearing on federal law where it is settled that there is no automatic exception to criminal trespass laws for labor speech. (*Lechmere, Inc. v. NLRB* (1992) 502 U.S. 527, 531-535; *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters* (1978) 436 U.S. 180, 198 (*Sears*); *Hudgens,* 424 U.S. 507, 517-518; *NLRB v. Babcock & Wilcox Co.* (1956) 351 U.S. 105, 112.)

Under federal law, it is only where some unique circumstance prevents nontrespassory methods of communication with employees

(a company town, a mine, a logging camp, a remote lodge) that a labor dispute may legally spill over onto private property. (*Lechmere,* 502 U.S. at p. 535; *NLRB v. Babcock & Wilcox Co.*, 351 U.S. at p. 112; *Thornhill v. Alabama* (1940) 310 U.S. 88, 104-106; *NLRB v. Lake Superior Lumber Corp.* (6th Cir. 1948) 167 F.2d 147; *Alaska Barite Co.* (1972) 197 N.L.R.B. 1023; *NLRB v. S & H Grossinger's, Inc.* (2d Cir. 1967) 372 F.2d 26.) Of course, this is true even as to non-labor speech. (*Marsh v. Alabama, supra,* 326 U.S. 501 [Jehovah's witness's right to distribute religious literature in company town].)

Unlike federal law, under which trespassory union activity is "far more likely to be unprotected than protected" (*Sears*, 436 U.S. at p. 205), the Moscone Act mandates that trespassory union activity — and only union activity — "*shall be legal.*" (§ 527.3, subd. (b).) There is no similar language in the Norris-LaGuardia Act.

"Little Norris-LaGuardia statutes" adopted by other states have nothing to do with this case, which is about California's preferential treatment of labor speech on private property — where California stands virtually alone in its position that private commercial property must (without the owner's consent) be treated as a public free speech zone. (*Fashion Valley*, 42 Cal.4th at pp. 870, 874-876, dissenting opn. of Chin, J.) But even if other states have statutes that *do* impermissibly discriminate in favor of labor speech by exalting labor over all other types of expressive activities, those statutes must be addressed within the borders of the states they control, not by California's courts. Forty-nine other wrongs would not make our wrongheaded statutes right.

The Union's sky-is-falling diatribes (and the similar screams in the several letters requesting depublication of the Court of Appeal's opinion) are distractions designed to divert this Court's attention from the real issue in this case. (Pet. 4-5, 22-23.) As the Court of Appeal explained, the Union's concerns are imagined, not real. (Slip. Opn., p. 32 [explaining that *Ysursa v. Pocatello Education Association* (2009) __ U.S. ___ [172 L.Ed.2d 770], one of the Union's favorite cases, is inapposite because it did not involve a content-based restriction].)

The Court of Appeal's opinion does not jeopardize uncontroversial statutes (certainly not shield laws that protect a person's right to *refuse* to speak) that have nothing to do with the private property issues in our case. There is no parade of horribles and the Union's effort to inject drama into the narrow, relevant issues of this case should be rebuffed. The Court of Appeal understood the issues before it, thoughtfully analyzed the law, and published a cogent decision. It should stand.

III. REVIEW SHOULD BE DENIED NOW BECAUSE AN IDENTICAL CASE IS PENDING IN THE FIFTH APPELLATE DISTRICT, AND THIS COURT CAN DECIDE LATER WHETHER REVIEW OF THESE ISSUES IS WARRANTED.

As noted at the beginning of this brief, an identical case — same parties, same type of store, same issues, same scenario (the Fresno Superior Court denied Foods Co's motion for a preliminary injunction) — is pending in the Fifth Appellate District, and is presently set for argument in October.

If this Court decides to review the Third District's opinion that is the subject of the pending petition, it will leave not only the Fifth District but also the rest of the state's trial and appellate courts in a vacuum, without

any guidance at all during the two to three years it takes for this case to work its way through the briefing and review process. But if this Court *denies* review in this case, it can have a second bite at an identical apple after the Fresno appeal is decided. If Foods Co wins again, the Union will of course seek review (it can recycle the petition it filed in this proceeding). If the Union wins, Foods Co will seek review (and would certainly have grounds since there would then be a direct conflict between districts). Without regard to which side wins in Fresno, this Court will have the benefit of another intermediate appellate court's views on this subject. There is no down side to this approach.

CONCLUSION

For all the reasons discussed above and in the Court of Appeal's well-reasoned opinion, Foods Co respectfully submits that the Union's Petition for Review should be denied.

Dated: September 13, 2010

Respectfully submitted,

MORRISON & FOERSTER LLP

By: _____
Miriam A. Vogel

Attorneys for Plaintiff and Appellant,
RALPHS GROCERY COMPANY

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c)(1) of the California Rules of Court and in reliance on the word count of the computer program used to prepare this brief, counsel certifies that this Answer to Petition for Review was produced using 13 point Roman type and contains 4,351 words.

Dated: September 13, 2010

MORRISON & FOERSTER LLP

By: _____
Miriam A. Vogel

Attorneys for Plaintiff and Appellant,
RALPHS GROCERY COMPANY

PROOF OF SERVICE

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 555 West Fifth Street, Los Angeles, California 90013-1024. I am not a party to the within cause, and I am over the age of eighteen years.

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ANSWER TO PETITION FOR REVIEW

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Elizabeth A. Lawrence
Davis, Cowell & Bowe
595 Market Street, Suite 1400
San Francisco, CA 94105
Tel: 415-597-7200
Fax: 415-597-7201

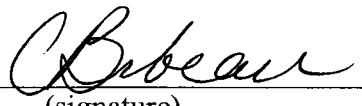
Attorneys for Defendant and Respondent United Food and Commercial Workers Union Local 8

Antonette Benita Cordero Office of the Attorney General of California 300 South Spring Street, Suite 1702 Los Angeles, CA 90013-1233 Tel: 213-897-2039 Fax: 213-897-7605	*Office of the Attorney General, Amicus Curiae for Respondent*
William J. Emanuel Natalie Ann Rainforth Littler Mendelson, PC 2049 Century Park East, 5th Floor Los Angeles, CA 90067-3107 Tel: 310-553-0308 Fax: 310-553-5583	*Attorneys for Employers Group, California Grocers Association, and California Hospital Association, Amicus Curiae for Appellant*
Clerk, Sacramento Superior Court Attn: The Hon. Loren E. McMaster 800 9th Street Sacramento, CA 95814-2686	
Clerk, Court of Appeal, State of California Third Appellate District 621 Capitol Mall, 10th Floor Sacramento, CA 95814	

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

Executed at Los Angeles, California, this 14th day of September, 2010.

C. BIBEAU
(typed)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