Case No. S185544

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

PETITION FOR REVIEW
REPLY BRIEF

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

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INTRODUCTION

The Third Appellate District struck down two California statutes that the Legislature enacted to limit the power of the State's courts. It misapplied First Amendment content-discrimination doctrine in a manner that conflicts with precedent and would call into question many California and federal laws. It created a new "negative" First Amendment right to exclude speakers from commercial property that the United States Supreme Court has expressly rejected. The court enjoined Respondent UFCW Local 8's peaceful picketing of a grocery store, notwithstanding this Court's holdings in *Schwartz-Torrance Investment Corporation v. Bakery & Confectionary Workers' Union* (1964) 61 Cal.2d 766, *In re Lane* (1969) 71 Cal.2d 872, and *Sears, Roebuck & Co. v. San Diego County Council of Carpenters* (1979) 25 Cal.3d 317, and it placed the sidewalks abutting retail stores in *Pruneyard*-type shopping centers categorically outside of California's free speech clause, even when those sidewalks are used to criticize a store's business practices.

Ralphs does not disagree that the decision below presents important questions of law that this Court should resolve. Instead, it argues that the Court should simply endorse the Third Appellate District's opinion by "summarily" denying review. (Answer, at p. 6.) But Ralphs's answering brief does not address the substantive points raised in this petition, and makes little attempt to defend the Third Appellate District's reasoning.

Ralphs does not explain how statutes that contain no restrictions on speech can violate the First Amendment, or how a private property owner's invocation of the courts' equity jurisdiction to restrict speech can amount to state action. (Cf. *Hudgens v. NLRB* (1976) 424 U.S. 507, 519-20; *Golden Gateway Ctr. v. Golden Gateway Tenants' Ass'n* (2001) 26 Cal.4th 1013, 1034.) Ralphs does not mention the "negative" First Amendment right to exclude speech that the court below granted it, or the United States Supreme Court cases denying that such a right exists. (See *PruneYard Shopping Ctr. v. Robins* (1980) 447 U.S. 74, 87; *Rumsfeld v. Forum for Academic & Institutional Rights* (2006) 547 U.S. 47, 65.) Nor does Ralphs defend the Third Appellate District's conclusion that *Schwartz-Torrance* and *Lane* are no longer viable precedent—a conclusion at odds with *Fashion Valley v. NLRB* (2007) 42 Cal.4th 850, 864 n.6.

Ralphs accuses Respondent, the American Civil Liberties Union, the AFL-CIO, and other amici who urge review of being "Chicken Littles" for warning of the decision's radical reach. (Answer, at p. 14.) But Ralphs does not explain why the Third Appellate District's constitutional reasoning would not apply equally to provisions of the Norris-LaGuardia Act, other states' Little Norris-LaGuardia Acts, the National Labor Relations Act, the Agricultural Labor Relations Act, California's anti-SLAPP law, evidentiary privileges, landlord-tenant laws, whistleblower statutes, and many other

state and federal laws that provide targeted, content-based speech protections.

Alternatively, Ralphs argues that the Court should not grant review but should let the decision stand and wait to see what happens in a case pending in the Fifth Appellate District. (Answer, at p. 16.) This proposal makes no sense. The Third Appellate District's decision demands review—it strikes down two important California statutes, contradicts this Court's settled precedent, and calls into question significant amounts of other legislation. Absent review or de-publication of the decision below, the State's trial courts will be faced with a conflict between this Court's holdings and the Third Appellate District's view.

Oral argument in the parties' Fifth Appellate District case is not scheduled until November 2010, and Ralphs's counsel recently sent a letter requesting that the hearing be pushed back until December or January. It is therefore unlikely that the Fifth Appellate District will issue any decision prior to the time within which the Court must rule on this petition. (See Cal. Rules of Court, rule 8.512(b)(1).)

When it does issue its decision, the Fifth Appellate District may well avoid ruling on the constitutionality of Labor Code § 1138.1 or the Moscone Act. For example, the Fifth Appellate District might hold that Ralphs does not have standing to challenge alleged content-discrimination against hypothetical non-labor speakers, and so avoid ruling on the merits

of Ralphs's First Amendment claims. (See *Rubio v. Super. Ct.* (1979) 24 Cal.3d 93, 103; *People v. Garcia* (1999) 21 Cal.4th 1, 11-12.) Or the Fifth Appellate District might hold that the sidewalk in front of Ralphs's grocery store is a *Pruneyard* forum, and that Ralphs's time, place and manner restrictions are unreasonable. Or it might find that Ralphs cannot meet the traditional equitable requirements for an injunction, and so not reach the issue of whether Ralphs can meet the heightened standards set forth in the challenged statutes. Under any of these scenarios, this Court would have no opportunity to review the constitutionality of Labor Code § 1138.1 and the Moscone Act, and the Third Appellate District's view would remain the law.

The Court should grant the petition for review and provide guidance to the State's courts on the important constitutional issues raised in this case.

ARGUMENT

A. Labor Code § 1138.1 and the Moscone Act Are Constitutional.

Ralphs clearly devoted attention to its answer brief's rhetorical flourishes—including a context-less photo of its storefront—but it failed to address the legal substance of this petition. Ralphs provides no real defense of the Third Appellate District's ruling that Labor Code § 1138.1 and the

Moscone Act are unconstitutional; it simply recites the court's holding. (See Answer, at pp. 9-14.)

The Third Appellate District's reasoning is profoundly wrong. (Pet., at pp. 15-29.) Neither Labor Code § 1138.1 nor the Moscone Act abridges anyone's speech, even indirectly. The court's reliance on *Police Department v. Mosley* (1972) 408 U.S. 92 and *Carey v. Brown* (1980) 447 U.S. 455 was therefore misplaced. (Pet., at pp. 17-20.) It is "the government's ability to impose content-based *burdens* on speech that raises the specter that the government might effectively drive certain ideas or viewpoints from the marketplace." (*Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.* (1991) 502 U.S. 105, 116 [emphasis added].)[1] Neither statute burdens any speech.

In order to make a facial challenge to the statutes, Ralphs was required to "demonstrate a substantial risk that the application of the provision will lead to the *suppression* of speech." (*Nat'l Endowment for the Arts v. Finley* (1998) 524 U.S. 569, 580 [emphasis added]; see also *id.* at p. 595 (Scalia, J. concurring); *Los Angeles Police Dept. v. United Reporting Publishing Corp.* (1999) 528 U.S. 32, 40 [private publishing company may not bring facial First Amendment challenge to statute that "is

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[1] Tellingly, other than the D.C. Circuit's cursory, advisory discussion of the Moscone Act in *Waremart Foods v. NLRB* (D.C. Cir. 2004) 354 F.3d 870 (see Pet., at p. 26 fn.13), Ralphs can point to no case striking down an exclusively speech-protective law as violating the First Amendment.

not an abridgement of anyone's right to engage in speech, be it commercial or otherwise"].) Ralphs can make no such showing.

Nor do the statutes involve any *governmental* abridgement of speech. They simply make it more difficult for *private parties* to get injunctions, including injunctions against trespass. But a private property owner's invocation of common law trespass is not state action under the First Amendment. (*Lloyd Corp. v. Tanner* (1972) 407 U.S. 551, 567; *Hudgens*, *supra*, 424 U.S. at pp. 519-20; see also *Golden Gateway*, *supra*, 26 Cal.4th at p. 1034 ["[J]udicial enforcement of injunctive relief does not, by itself, constitute state action for purposes of California's free speech clause."].) By contrast, *Mosley* and *Carey* involved governmental restrictions on speech in a public forum, which was critical to both decisions. (*Perry Education Ass'n v. Perry Local Educators' Ass'n* (1983) 460 U.S. 37, 54 ["The key to those decisions, however, was the presence of a public forum. In a public forum, by definition, all parties have a constitutional right of access and the state must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject."].)

The Third Appellate District recognized these fundamental differences between the statutes before it and the laws at issue in *Mosley* and *Carey*. (*Ralphs Grocery Co. v. UFCW Local 8* (2010) 186 Cal.App.4th 1078, 1095.) But in the absence of any governmental restriction on speech,

the court simply invented one *sua sponte*. It held that Labor Code § 1138.1 and the Moscone Act infringe on *Ralphs's* First Amendment right to exclude unwanted speech from its property. (*Ralphs*, *supra*, 186 Cal.App.4th at pp. 1083, 1095, 1101 ["Labor Code section 1138.1 abridges Ralphs's free speech rights by forcing it to host or accommodate speech with which it disagrees."].) This contradicts United States Supreme Court precedent expressly rejecting this view. (*PruneYard Shopping Ctr.*, *supra*, 447 U.S. at p. 87; *Forum for Academic & Institutional Rights*, *supra*, 547 U.S. at p. 65.)

In its brief, Ralphs does not address any of these deficiencies in the Third Appellate District's constitutional reasoning. This Court should grant review to correct the Third Appellate District's mistaken view of the First Amendment.

B. The Decision Below Threatens Many Uncontroversial State and Federal Statutes.

As Respondent's petition and the many letters urging review have explained, the Third Appellate District's constitutional reasoning calls into question a substantial amount of legislation. (Pet., at pp. 20-25.) Under the Third Appellate District's erroneous view, statutes that protect categories of speech on a less-than-universal basis are subject to strict scrutiny. (*Ralphs*, *supra*, 186 Cal.App.4th at p. 1098.)

But many California and federal statutes provide less-than-universal protection. Civil Code section 48a and 43.7 protect journalists and doctors, but not other speakers, from common-law defamation actions. This Court rejected an equal protection challenge to section 48a's targeted classification, but under the Third Appellate District's approach, that statute unconstitutionally "favors" a particular category of speech. (Compare *Ralphs*, 186 Cal.App.4th at p. 1095, with *Werner v. S. Cal. Assoc. Newspapers* (1950) 35 Cal.2d 121, 130-131.) The National Labor Relations Act requires employers to grant their employees worksite access in order to discuss unionization, but not other topics, and California's Agricultural Labor Relations Act requires that growers grant access to union representatives engaged in organizing but not other speech. (*Beth Israel Hosp. v. NLRB* (1978) 437 U.S. 483, 491; Lab. Code § 1152; Cal. Code Regs., tit. 8, § 20900; *Agricultural Labor Relations Bd. v. Super. Ct.* (1976) 16 Cal.3d 392, 400-411.)[2] Whistleblower statutes prohibit

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[2] Ralphs's claim that "[u]nder 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" is simply wrong. (See Answer, at p. 15.) The cases Ralphs cites involve access by non-employee union representatives. But the Supreme Court has held since 1945 that *employees* have a right under the NLRA to access a worksite during business hours to communicate about union matters, regardless of whether there are alternative means by which the employees could communicate with their co-workers. (See *Republic Aviation Corp. v. NLRB* (1945) 324 U.S. 793; see also *Lechmere, Inc. v. NLRB* (1992) 502 U.S. 527, 537 [explaining this distinction].)

employers from firing employees—common law employment-at-will notwithstanding—based upon the content of the employees' speech. (See, e.g., Lab. Code § 1102.5.) Many statutes that regulate court jurisdiction and procedures may be invoked to protect particular categories of speech, such as California's content-based evidentiary privileges (Evid. Code §§ 960 et seq.) and its anti-SLAPP law (Code Civ. Pro. § 425.16). (See Pet., at pp. 20-21.)

These statutes operate no differently from the Moscone Act and Labor Code § 1138.1.

The Third Appellate District's ruling contradicts the advice that this Court has given to other groups facing speech restrictions imposed by private entities. In *Golden Gateway*, *supra*, 26 Cal.4th at p. 1034, the Court held that tenants do not have a free speech right to distribute information in private apartment complexes. But the Court made clear that "tenants may always seek a legislative solution tailored to their particular concerns. Indeed, '[t]he common law and statutes are always sufficient if a state court has the desire and will to protect private rights from private infringement.'" (*Id.* at p. 1035 [internal citation omitted].) Civil Code § 1942.6 does just that—stating that a person entering onto private property for the "purpose of providing information regarding tenants' rights" is not liable for trespass. Under the Third Appellate District's view, however, this law is unconstitutional because it does not protect all other kinds of speech—

religious proselytizing, political door-knocking, commercial solicitation—from an apartment owner's trespass lawsuit.

Ralphs calls Respondent's warning about the radical scope of the decision below a "screed" and accuses the ACLU, the AFL-CIO, and other groups urging review of presenting "sky is falling diatribes." (Answer, at pp. 14, 16.) But Ralphs presents no legal argument to support this invective. Ralphs is silent on how the Third Appellate District's reasoning could be limited to Labor Code § 1138.1 and the Moscone Act, or why this Court should adopt a novel view of the First Amendment that would subject a large number of previously uncontroversial laws to strict scrutiny.

Ralphs does try to argue that the Norris-LaGuardia Act and other state Little Norris-LaGuardia Acts would not be invalid under the Third Appellate District's reasoning, but its argument falls flat. According to Ralphs, these laws are not implicated because this case is "about California's preferential treatment of labor speech on private property." (Answer, at p. 15.) But Labor Code § 1138.1, in particular, is drawn *verbatim* from the Norris-LaGuardia Act, and is identical to many states' Little Norris-LaGuardia Acts. (Compare Labor Code § 1138.1(a)(1), with 29 U.S.C. § 107.)[3] Like Labor Code § 1138.1, the Norris-LaGuardia Act

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[3] See also, e.g., Haw. Rev. Stat. § 380-7; Ind. Code § 22-6-1-6; Mass. Gen. Laws 214 § 6; Minn. Stat. § 185.13; Or. Rev. Stat. § 662.080; 43 Pa. Stat. § 206i; R.I. Gen. Laws § 28-10-2; Wash. Rev. Code § 49.32.072.

applies to injunctions sought against speech on private property.[4]

In any case, nothing in the Third Appellate District's reasoning would restrict its constitutional holding to statutes that limit injunctions against speech on private property. In fact, the cases to which the Third Appellate District analogized—*Mosley* and *Carey*—involved speech on public sidewalks. The Third Appellate District held that the First Amendment prohibits "preferential treatment of speech concerning labor disputes over speech about other issues." (*Ralphs*, 186 Cal.App.4th at p. 1095; see also *id.* at p. 1099.) This holding cannot be artificially limited to statutes protecting labor speech or involving speech on private property—if Labor Code § 1138.1 and the Moscone Act are unconstitutionally content-discriminatory, then so are the many other laws that target particular types of speech for protection.

This Court's intervention is necessary to correct the Third Appellate District's destabilizing view of the First Amendment.

C. The Sidewalks in a *Pruneyard*-type Shopping Center Are Public Fora.

Ralphs does not deny that it was unable to meet the requirements of Labor Code § 1138.1. (*Ralphs*, *supra*, 186 Cal.App.4th at p. 1089.) If this

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[4] See, e.g., *La. Chemical Equipment Co., Inc. v. Laborers Int'l Union of North America, Local 41* (N.D. Ind. 1987) 1987 WL 47729; *Kohler Co. v. Sheet Metal Workers Int'l Ass'n* (E.D. Tenn. 1979) 468 F.Supp. 1016, 1018.

Court were to agree that Labor Code § 1138.1 is constitutional, there would be no need to address the Third Appellate District's holding that the sidewalks abutting a retail store in a *Pruneyard*-type shopping center are non-public fora under California's free speech clause. (See *Ralphs*, *supra*, 186 Cal.App.4th at pp. 1090-91.)

Ralphs's discussion of the Third Appellate District's *Pruneyard* ruling, however, is misleading. Respondent will limit its discussion here to correcting Ralphs's several misrepresentations.

First, the Third Appellate District recognized that College Square itself is a public forum under *Pruneyard*, with "common areas and restaurants where outdoor seating was available[.]" (*Ralphs*, *supra*, 186 Cal.App.4th at p. 1091; see also *id.* at p. 1090 [characterizing the Foods Co store in College Square as "indistinguishable" from the retail stores in the *Pruneyard*-type shopping centers involved in *Van v. Target Corp.* (2007) 155 Cal.App.4th 1375].) Contrary to Ralphs's claim, the Third Appellate District did not "distinguish[] Foods Co's modest retail establishment from large shopping centers such as *Pruneyard* and *Fashion Valley*." (Cf. Answer, at p. 5.) Instead, like the court in *Van*, it held that even within a *Pruneyard*-type shopping center, only "common areas" and not private sidewalks abutting individual retail stores are "designed and presented to the public as public meeting places," and so such sidewalks are "not a public forum under the liberty of speech clause of the California

Constitution." (*Ralphs*, *supra*, 186 Cal.App.4th at p. 1091.) This holding—that "common areas" in *Pruneyard*-type shopping centers are public fora, but the sidewalks allowing visitors to access these areas are not public—discards *Pruneyard's* central analogy: that shopping centers like College Square are the functional equivalent of the "streets and sidewalks of the central business district." (See *Fashion Valley*, *supra*, 42 Cal.4th at p. 858.)

Ralphs lists a number of inapposite cases, arguing that its Foods Co store is a "stand-alone" retail establishment. (Answer, at p. 8.) But of the cases cited, only *Van* addressed the status of sidewalks abutting retail stores in admittedly *Pruneyard*-type shopping centers. "[T]his Court has never questioned" *Van* because no petition for review was filed in that case. (Cf. Answer, at p. 8.)

Second, Ralphs contends that the Third Appellate District "declined to follow" *Lane* and *Schwartz-Torrance* because neither of those cases "considered the First Amendment implications of *Carey* and *Mosley*." (Answer, at p. 6.) This is inaccurate. The Third Appellate District held that *Lane* and *Schwartz-Torrance* are "no longer independently viable" because they were originally based on a "now-discredited" view of the First Amendment's scope. (*Ralphs*, *supra*, 186 Cal.App.4th at pp. 1091-92.) But this ignores Fashion Valley's recognition that "[i]t has been the law since we decided *Schwartz-Torrance* in 1964, and remains the law, that a

privately owned shopping center must permit peaceful picketing of businesses in shopping centers" and that "citizens have a strengthened interest, not a diminished interest, in speech that presents a grievance against a particular business in a privately owned shopping center, including speech that advocates a boycott." (*Fashion Valley*, *supra*, 42 Cal.4th at p. 864.) Ralphs, like the court below, ignores this holding.

Finally, Ralphs suggests that the Third Appellate District "allow[ed] Foods Co to obtain injunctive relief compelling a union to follow Foods Co's reasonable time, place and manner rules for expressive activity." (Answer, at p. 1.) This is also incorrect. The Third Appellate District recognized that Ralphs's time, place and manner restrictions are unreasonable. (*Ralphs*, *supra*, 186 Cal.App.4th at p. 1090.) Since College Square's sidewalks are a public forum, Ralphs does not have a right to insist that Respondent or any other speaker follow these restrictions.

The Court should grant review to re-affirm *Schwartz-Torrance* and *Lane*, and to address the status of privately owned sidewalks that are located in *Pruneyard*-type shopping centers.

D. The Court Should Not Wait For the Fifth Appellate District.

Ralphs urges this Court to deny review and to wait for a decision from the Fifth Appellate District in a case involving the same parties. (Answer, at pp. 16-17.) The Court should decline this request. The Third

Appellate District's decision demands review, and there is no assurance that the Fifth Appellate District's opinion will present the same important issues.

It is unlikely that the Fifth Appellate District will issue any decision until after the time for ruling on this petition runs. (See Cal. Rules of Court, rule 8.512(b)(1).) Oral argument in that appeal has been tentatively set for November 2010.[5] Ralphs's counsel recently sent a letter requesting that the appellate court push the hearing back until December or January.[6]

When it does act, the Fifth Appellate District may well avoid ruling on the constitutionality of Labor Code § 1138.1 or the Moscone Act. For example, the Fifth Appellate might hold that regardless of the merits, Ralphs lacks standing to challenge either statute on content-discrimination grounds because Ralphs may not assert the rights of hypothetical, non-labor speakers who it believes are being discriminated against. (See *Rubio v. Super. Ct.* (1979) 24 Cal.3d 93, 103 ["'[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.' [Citations.]"; *People v. Garcia* (1999) 21 Cal.4th 1, 11-12 [defendant "lacks standing to assert the equal

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[5] See Exhibit A to this Reply Brief; Cal. Rules of Court, rule 8.504(e)(1)(B).

[6] See Exhibit B to this Reply Brief.

protection claims of hypothetical felons"]; *Los Angeles Police Dept., supra*, 528 U.S. at p. 40 [litigant raising First Amendment challenge that is not based on overbreadth "may not rely on the effect of the statute on parties not before the Court"]; see also *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 61 [no third-party standing unless there are genuine obstacles to the rights-holder bringing action].)

The Fifth Appellate District may also rule that the sidewalk in front of Ralphs's Fresno store is a *Pruneyard* forum and that the company's time, place and manner restrictions are unreasonable. If the Fifth Appellate District so holds, then there will be no need for it to address the constitutionality of Labor Code § 1138.1 or the Moscone Act. (Cf. *Ralphs, supra*, 186 Cal.App.4th at p. 1090.)

Or, the Fifth Appellate District might hold that Ralphs has failed to present evidence of irreparable harm necessary to support an injunction under traditional equitable standards, regardless of whether the heightened standards in Labor Code § 1138.1 and the Moscone Act apply.[7]

In any of these scenarios, there would be no ruling on the constitutionality of Labor Code § 1138.1 or the Moscone Act for this Court

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[7] Ralphs failed to present any evidence to the trial court of irreparable injury. The traditional equitable requirement of irreparable injury applies in trespass actions, even though damage to the property is not an element of the cause of action. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1352.)

to review, and the Third Appellate District's view on the issue would remain the law.

Ralphs makes the strange argument that if the Court grants this 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" while the Third Appellate District's decision is under review. (Answer, at pp. 16-17.) But the only effect of granting this petition would be that the decision below could not be cited as precedent and the State's trial courts would not be bound by it. (Cal. Rules of Court, rule 8.1105(e)(1).) Trial and appellate courts—including the Fifth Appellate District—would be guided by the law as it existed prior to the Third Appellate District's decision, pending this Court's ultimate resolution of the matter. This Court would still have the "benefit of another intermediate appellate court's views on this subject" (see Answer, at p. 17), as the Fifth Appellate District would almost certainly issue its opinion while the Third Appellate District's decision was before this Court.

Ralphs is really arguing that the Court's practice of de-publishing cases taken under review—and thereby preventing them from serving as precedent—is itself a basis for denying review, since such de-publication leaves lower courts "without any guidance" while this Court deliberates. This is a circular argument and would undermine the Court's ability to manage its docket.

Ralphs does not deny that the Third Appellate District's decision raises important constitutional issues that demand this Court's involvement. The Court should reject the proposal that it nonetheless deny this petition and wait to see what happens in a separate proceeding.

CONCLUSION

The Court should grant this petition for review and correct the Third Appellate District's de-stabilizing and far-reaching misapplication of the law.

Dated: September 24, 2010

Respectfully submitted,

DAVIS, COWELL & BOWE LLP

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

CERTIFICATE OF WORD COUNT

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 3,986 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: September 24, 2010

DAVIS, COWELL & BOWE, LLP

By: 

Paul L. More

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

EXHIBIT A

IN THE

ORIGINAL

Court of Appeal of the State of California

IN AND FOR THE

Fifth Appellate District

RALPHS GROCERY COMPANY,

Plaintiff and Appellant,

v.

UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 8,

Defendant and Respondent.

F058716

(Super. Ct. No. 09CECG00349)

ORDER CONTINUING ORAL ARGUMENT

BY THE COURT:

Oral argument in this matter is continued from October 2010 to November 2010, the date to be set by the Clerk of the Court.

Ardaiz, P.J.

EXHIBIT B

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September 20, 2010

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Re: *Ralphs Grocery Company v. United Food and Commercial Workers Union Local 8*,
Case No. F058716

Dear Ms. Rivera:

We represent Ralphs Grocery Company, Appellant in the above-referenced appeal. My colleague, Tritia Murata, spoke to you on Friday about our scheduling problems for oral argument.

I was the primary author of our appellate briefs, I am the attorney at my firm most knowledgeable about this appeal, and I will present Ralphs' oral argument. When the Court's on-line docket and a subsequent written notice to counsel reflected a range of October dates for oral argument, both the Union's lawyer (Elizabeth Lawrence) and I wrote to explain that we had conflicting court appearances and travel plans on all but two of the dates mentioned in the Court's notice. Last Friday, the on-line calendar noted a continuance to November (and what appears to be a possible November 10 date for oral argument).

MORRISON | FOERSTER

I am leaving for Japan on a pre-paid vacation on October 28 and will not return to the office until November 15, and Ms. Lawrence will be out of the country from December 16 to the end of the year. For this reason, Ms. Lawrence and I respectfully ask that the continuance be to early December 2010 or to any time in January 2011 — unless the Court wishes to hear oral argument on October 12 or 15, 2010, the two October dates that both counsel are available.

We very much appreciate your consideration.

Sincerely,

Miriam A. Vogel

cc: Per attached proof of service
(By fax and mail)

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.

I further declare that on September 20, 2010, I served a copy of:

LETTER DATED SEPTEMBER 20, 2010 FROM MIRIAM A. VOGEL TO CLERK JILL RIVERA, COURT OF APPEAL FIFTH APPELLATE DISTRICT REQUESTING CONTINUANCE OF ORAL ARGUMENT DATE

☒ **BY FACSIMILE [Code Civ. Proc sec. 1013(e)]** by sending a true copy from Morrison & Foerster LLP's facsimile transmission telephone number 213.892.5454 to the fax number(s) set forth below, or as stated on the attached service list. The transmission was reported as complete and without error. The transmission report was properly issued by the transmitting facsimile machine.

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☒ **BY U.S. MAIL [Code Civ. Proc sec. 1013(a)]** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as follows, for collection and mailing at Morrison & Foerster LLP, 555 West Fifth Street, Los Angeles, California 90013-1024 in accordance with Morrison & Foerster LLP's ordinary business practices.

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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 20th day of September, 2010.

C. BIBEAU
(typed)

_____
(signature)

PROOF OF SERVICE

Re: **Case Number: S185544**
Third Appellate No. C060413
Case Title: *Ralphs Grocery Company v. United Food Commercial Workers Union Local 8*

I hereby declare that I am a citizen of the United States, I am over 18 years of age, and I am not a party in the above-entitled action. I am employed in the County of San Francisco and my business address is 595 Market Street, Suite 1400, San Francisco, California 94105.

On September 24, 2010, I served the attached document described as a **PETITION FOR REVIEW REPLY BRIEF** on the parties in the above-named case. I did this by enclosing true copies of the document in sealed envelopes with postage fully prepaid thereon. I then placed the envelopes in a U.S. Postal Service mailbox in San Francisco, California addressed as follows:

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I, Miriam I. Tom, declare under penalty of perjury that the foregoing is true and correct.

Executed on September 24, 2010, at San Francisco, California.

Miriam I. Tom