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 BRIEF ON THE MERITS

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INTRODUCTION

This Court granted review to decide (i) whether the Court of Appeal "erred in concluding that the parking area and walkway in front of the entrance to [Foods Co's] retail store, *which is part of a larger shopping center,* do not constitute a public forum under *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899 and its progeny," and (ii) whether the Moscone Act and Labor Code section 1138.1 are constitutionally infirm because they afford preferential treatment to labor speech. (Italics added.)

We will explain in this brief that (i) contrary to the factual predicate for the first issue framed by this Court, Foods Co's Sacramento store is not "part of a larger shopping center" within the meaning of *Pruneyard* or otherwise; (ii) that even a retail store that *is* part of a shopping center has the right to bar First Amendment activities from the parking area and entrance to its stores; (iii) that the two statutes are facially unconstitutional; (iv) that, at a minimum, because the Union has reasonable, feasible and practical access to Foods Co's customers without entering onto Foods Co's private property, the Union has no right of entry; and (v) that, as Foods Co has claimed from the outset, it has the right to enforce its reasonable time, place and manner rules and regulations.[1]

Foods Co does not intend in this brief to exalt property rights over free speech rights, only to suggest that these constitutionally mandated

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[1] Ralphs Grocery Company, doing business in Sacramento as Foods Co, was the plaintiff in the trial court and the appellant in the Court of Appeal, Third Appellate District, where it prevailed. Our references to the Union are to the United Food & Commercial Workers Union Local 8 (defendant in the trial court, respondent in the Court of Appeal, and petitioner before this Court).

rights must coexist. The Union is not without recourse if it wants to urge a lawful boycott of Foods Co's Sacramento store or engage in other protected expressive activity — it may do so on the public streets surrounding Foods Co's store, or in any other public forum, or — if it follows Foods Co's rules — even on Foods Co's property. But if the Union insists on entering Foods Co's private property and flaunting the store's reasonable time, place and manner regulations, Foods Co should be entitled to injunctive relief prohibiting the Union's trespass —a remedy that will be available to Foods Co only if this Court affirms the Court of Appeal's decision invalidating the Moscone Act and Labor Code section 1138.

STATEMENT OF THE CASE

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

At this stage of this case, the only factual dispute is about how to characterize Foods Co's Sacramento store — as *part of a larger shopping center* or as a quintessential *modest retail establishment* that happens to be located in a strip mall. The difference matters — whatever continuing support there may be for the notion that a large mall is the substantive equivalent of an old-fashioned town square, the same cannot be said about a modest retail establishment.

In *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899 (*Pruneyard*), this Court emphasized that there, as in *Diamond v. Bland* (1970) 3 Cal.3d 653 (*Diamond I*), it was dealing not with the property or privacy rights of the proprietor of a modest retail establishment, but with a large shopping center of the type where, in response to the lure of a congenial environment, 25,000 or more people congregated *daily* to take

advantage of the numerous amenities offered by the shopping center. (*Id.* at pp. 910-911.) And as this Court noted in *Pruneyard,* it "'bears repeated emphasis that we do not have under consideration the property or privacy rights of an individual homeowner or the proprietor of a *modest retail establishment.*'" (*Id.* at p. 910, italics added.)[2]

In *PruneYard Shopping Center v. Robins* (1980) 447 U.S. 74 (*U.S. PruneYard*), the United States Supreme Court rejected a takings-claim challenge to this Court's *Pruneyard* decision, emphasizing the size of the mall — 21 acres, 5 for parking and 16 occupied by walkways, plazas, sidewalks, and buildings containing more than 65 specialty shops, 10 restaurants, and a movie theater. (*Id.* at p. 76.) The high court noted

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[2] *Diamond I* held that, absent undue interference with normal business operations, privately owned shopping centers open to the public must permit individuals and groups to exercise their First Amendment rights. (*Diamond I, supra*, 3 Cal.3d 653.) This Court revisited the issue in *Diamond v. Bland* (1974) 11 Cal.3d 331 (*Diamond II*) and followed *Lloyd Corp. Ltd. v. Tanner* (1972) 407 U.S. 551 (*Lloyd*), holding that the interests of property owners trumped those of the public, at least where the First Amendment activities could occur on the public streets and sidewalks in the surrounding community. (*Diamond II, supra*, 11 Cal.3d at p. 335, fn. 5.) Although *Pruneyard* expressly overruled *Diamond II* (*Pruneyard, supra*, 23 Cal.3d at p. 910), Justice Mosk's dissent in *Diamond II* lives on in the contemporary distinction between large shopping malls and modest retail establishments. As Justice Mosk put it, *Diamond II* was not about "the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment. As a result of advertising and the lure of a congenial environment, 25,000 persons are induced to congregate daily to take advantage of the numerous amenities offered by the Inland Center. A handful of additional orderly persons soliciting signatures and distributing handbills in connection therewith, under reasonable regulations adopted by defendant to assure that these activities do not interfere with normal business operations . . . would not markedly dilute defendant's property rights." (*Diamond II, supra*, 11 Cal.3d at p. 345, dissenting opn. of Mosk, J.)

this Court's distinction between a mall and a "modest retail establishment" (*id.* at p. 78), and held that the expressive activities at issue would not unreasonably impair the value of the mall because it was "a large commercial complex that cover[ed] several city blocks, contain[ed] numerous separate business establishments, and [was] open to the public at large," *and* because the owners of the property could restrict expressive activity "by adopting time, place, and manner regulations that will minimize any interference with its commercial functions." (*U.S. PruneYard*, 447 U.S. at p. 83.) And, said the Supreme Court, expressive activity could be limited "to the common areas of the shopping center." (*Id.* at pp. 83-84.)[3]

[3] The concurring opinions in *U.S. PruneYard* are based on the fact that the decision is "limited to shopping centers, which are already open to the general public" (*U.S. PruneYard*, *supra*, 447 U.S. at pp. 94-95, conc. opn. of Marshall, J.) and to "the type of shopping center involved in [that] case" (*id.* at p. 96, conc. opn. of Powell, J.). And Justice Powell specifically warned that "[s]ignificantly different questions would be presented if a State authorized strangers to picket or distribute leaflets in privately owned, freestanding stores and commercial premises." (*Ibid.*)

Now consider Foods Co's Sacramento store.

This isn't the PruneYard Shopping Center. It is a quintessential modest retail business located in College Square, a strip mall with a few small stores and some empty store-fronts. (JA 258, 368-375.) 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 to use the Foods Co store as a gathering place. (JA 41, 368-370.) It doesn't have 25,000 visitors a week, let alone in a day.

The Union's fanciful suggestion that this modest commercial development somehow resembles an old-fashioned town square is entirely imagined, not real. The three common courtyards are "courtyards" in name only and were not in any event used for expressive activities. (Slip Opn. 7.) As the Court of Appeal explained, the Union's 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. 14.)

Whatever issues there are in this case, they are issues related to modest retail establishments, not to giant shopping centers such as the PruneYard or those at issue in *Fashion Valley Mall, LLC v. National Labor Relations Bd.* (2007) 42 Cal.4th 850 (*Fashion Valley*) where there were six major department stores, an 18-theater movie complex, and nearly 200 shops, or *Snatchko v. Westfield LLC* (2010) 187 Cal.App.4th 469, involving Westfield's Galleria with more than a million square feet of retail space, and more than 130 tenants, including four major department stores.[4]

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

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[4] The following businesses are "modest retail establishments" within the meaning of *Pruneyard*: an 11,000 square foot specialty retail store (*Trader Joe's Co. v. Progressive Campaigns, Inc.* (1999) 73 Cal.App.4th 425, 438-439 (*Trader Joe's*)); a grocery store in a strip mall housing 10 retail stores, some restaurants and service buildings (*Albertson's, Inc. v. Young* (2003) 107 Cal.App.4th 106, 121-122 (*Albertson's*)); a stand-alone warehouse store (*Costco Companies v. Gallant* (2002) 96 Cal.App.4th 740, 755 (*Costco*)); a bank in a single-purpose two-story building (*Bank of Stockton v. Church of Soldiers* (1996) 44 Cal.App.4th 1623, 1630 (*Bank of Stockton*)); a 14,000 square foot medical office building with a slightly smaller adjoining medical building (*Allred v. Shawley* (1991) 232 Cal.App.3d 1489, 1494); a three-story medical building with six tenants (*Planned Parenthood v. Wilson* (1991) 234 Cal.App.3d 1662, 1671-1672 (*Planned Parenthood*)); a medical center with 19 tenants and three vacant suites (*Allred v. Harris* (1993) 14 Cal.App.4th 1386, 1388, 1391-1392); a two-story medical building with several tenants and a pharmacy (*Feminist Women's Health Center v. Blythe* (1995) 32 Cal.App.4th 1641, 1654).

B. The Union's boycott picketing.

When the Sacramento store opened in July 2007, Union picketers arrived to encourage people to shop elsewhere because Foods Co is not a union store. (Slip Opn. 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. 8), and Foods Co's customers had to walk around them to get in and out of the store (JA 41-43). The Union picketed five days each week, for about eight hours each day. (Slip Opn. 8.)[5]

In January 2008, Foods Co implemented new time, place and manner rules for expressive activities and gave copies of the rules to the Union, which the Union ignored. (Slip Opn. 8.)[6] Foods Co's customers complained that the picketers blocked their way and yelled at them (RT 13-

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[5] When the Union began picketing in July 2007, its dual purpose may have been to organize Foods Co's employees *and* encourage Foods Co's customers to shop elsewhere — but the only legitimate purpose for picketing beyond August 2007 was to inform Foods Co's customers that Foods Co is a non-union store, and to encourage the customers to shop elsewhere. (29 U.S.C. § 158(b)(7)(C) [absent permission from the NLRB, it is an unfair labor practice for a union to picket an employer for more than 30 days for the purpose of forcing the employer to recognize the union as the representative of the employees].) Organizational picketing is no longer permissible. (*NVE Constructors, Inc. v. NLRB* (9th Cir. 1991) 934 F.2d 1084, 1085 [organizational picketing may be conducted for more than 30 days only when specifically authorized by NLRB]; *NLRB v. Suffolk County Dist. Council of Carpenters* (2d Cir. 1967) 387 F.2d 170.)

[6] The rules (discussed in Part IV, *post*) 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. 8.)

14; JA 42-44) but law enforcement refused Foods Co's request to evict the picketers. (Slip Opn. 8-9.)

Although other organizations and individuals are allowed to engage in expressive activity on Foods Co's private property, 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, 32-33, 65.)

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),[7] 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,[8] which imposes Draconian burdens on applications for injunctive relief against labor activity, is similarly flawed but (3) nevertheless enforceable 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. 12.) Foods Co appealed.

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

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

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 forums, distinguished Foods Co's modest retail establishment from large shopping centers such as *Pruneyard* and *Fashion Valley* (Slip Opn. 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*, *supra*, 107 Cal.App.4th 106; *Costco*, *supra*, 96 Cal.App.4th 740; *Slevin v. Home Depot* (N.D.Cal. 2000) 120 F.Supp.2d 822 (*Slevin*); *Trader Joe's*, *supra*, 73 Cal.App.4th 425; *Van v. Target Corp.* (2007) 155 Cal.App.4th 1375 (*Target*).) 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. 14.)

Second, the Court of Appeal separately considered the constitutionality of the Moscone Act and section 1138.1. Relying on *Police Department of Chicago 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. 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. 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. 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*, *supra*, 87 Cal.App.4th 145, primarily because none of those cases considered the First Amendment implications of *Carey* and *Mosley.* (Slip Opn. 16, 23-24.)[9]

[9] An action virtually identical to this case — same Union, same size and type of Foods Co store, same picketing, same rules, same issues, same lawyers — is pending in the Fifth Appellate District and was argued on December 9, 2010. (*Ralphs Grocery Company v. United Food and Commercial Workers Union Local 8*, 5th Civ. No. F058716.)

LEGAL ARGUMENT

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

A. Foods Co's Sacramento store is the quintessential modest retail establishment contemplated by *Pruneyard*.

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*, *supra*, 23 Cal.3d 899 or *Fashion Valley*, *supra*, 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*, *supra*, 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 where people come only to shop, not to congregate, socialize or be entertained. (*Albertson's*, *supra*, 107 Cal.App.4th at p. 111.)

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.*, *supra*, 73 Cal.App.4th at p. 428 [affirming preliminary injunction barring signature solicitations at a stand-alone store]; *Costco*, *supra*, 96 Cal.App.4th 740 [stand-alone store sharing a parking lot with other

businesses may prohibit all expressive activity]; *Albertson's*, *supra*, 107 Cal.App.4th at p. 115 [affirming preliminary injunction barring expressive activity at store within small commercial center because, taken "as a whole, *Pruneyard* implies that smaller privately owned commercial establishments that do not assume the societal role of a town center may prohibit expressive activity unrelated to the business enterprise"];[10] *Slevin*, *supra*, 120 F.Supp.2d 822 [applying California law and holding that privately owned apron in front of store not transformed into public property by hot dog stand or modest seating area]; *Target*, *supra*, 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"].)[11]

For this reason, we respectfully submit that this Court's first issue (at least as framed in its news release and on its website) is mistaken insofar as

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[10] Foods Co's College Square store is located in a setting similar to Albertson's Fowler Center store in Nevada County: "Fowler Center is not a mall, and it does not contain any courtyards, plazas, picnic areas, gardens, educational facilities, health clubs, or gyms. All of the businesses are accessed from the large parking lot. The parking area and sidewalks in the center are available for the common use of the property owners, tenants, and customers for movement among the businesses at the center." (*Albertsons*, *supra*, 107 Cal.App.4th at p. 110.)

[11] And see *Golden Gateway Center v. Golden Gateway Tenants Assn.* (2001) 26 Cal.4th 1013, 1016, 1031-1033 [affirming a preliminary injunction prohibiting tenants' association from distributing newsletter in residential portion of retail apartment complex because the property was not freely and openly accessible to the public]; *Planned Parenthood*, *supra*, 234 Cal.App.3d 1662 [private parking area of medical center is not equivalent of traditional public forum]; *Allred v. Shawley* (1991) 232 Cal.App.3d 1489 [same]; *Allred v. Harris*, *supra*, 14 Cal.App.4th 1386 [same]; *Feminist Women's Health Center v. Blythe* (1995) 32 Cal.App.4th 1641 [same]; *Bank of Stockton*, *supra*, 44 Cal.App.4th 1623 [religious organization may not solicit on bank's private property].

it appears to assume that Foods Co's College Square store is located in a *Pruneyard*-type shopping center. As the evidence shows and as the Court of Appeal put it, our Sacramento store is indistinguishable from the stand-alone stores described in *Target* and *Albertson's*. (Slip Opn. 12.)

B. Foods Co has the right to prohibit all expressive activity on its premises.

Much of the Union's merits brief misses the point. Ignoring Foods Co's property rights, the Union rambles on about the Legislature's right to determine the grounds for equitable relief and the circumstances in which injunctions may be granted (OB 3-4), and concludes that Foods Co has no "constitutional right" to any particular remedy for "state-law torts." (OB 4-6.) The Union is wrong. When the government compels free public use of private property in a manner that interferes with the property owner's reasonable investment-backed expectations, that government action will constitute a taking of property prohibited by the Fifth Amendment of the United States Constitution. (*U.S. PruneYard*, *supra*, 447 U.S. at pp. 82-84 ["one of the essential sticks in the bundle of property rights is the right to exclude others," and that right is protected only if the owner is allowed to adopt time, place and manner rules to "minimize any interference with its commercial functions"].)

U.S. PruneYard rejected the takings claim because the PruneYard had all the attributes of a public forum, the interference was slight, and the mall had the right to require compliance with its reasonable time, place and manner regulations. In this case, Foods Co's Sacramento store has none of the attributes of a public forum, the interference is significant, and the trial court held that we do *not* have the right to enforce our rules against the Union.

Foods Co submits that the Union cannot compel the result it seeks — unrestricted access to private property — by asking the wrong question or by suggesting that labor activity as a societal goal outweighs every property owner's Fifth Amendment rights. (OB 4.) As we will show, the Moscone Act and section 1138.1 are not mere "[t]argeted procedural safeguards" as the Union contends (OB 5) — they are constitutionally infirm preferences for labor activities at the expense of all other First Amendment speech and, as the Union would have them enforced, they would deprive private property owners of the right to use their property as they see fit.

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

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 (independently making 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).)[12] In short, the Moscone Act immunizes labor-related speech on private property — and *only* labor-related speech — from California's trespass law, thereby permitting the

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[12] More specifically, section 527.3 provides: "(a) In order to promote the rights of workers to engage in concerted activities for the purpose of collective bargaining, picketing or other mutual aid or protection, and to prevent the evils which frequently occur when courts interfere with the normal processes of dispute resolution between employers and recognized employee organizations, the equity jurisdiction of the courts in cases involving or growing out of a labor dispute shall be no broader than as set forth in subdivision (b) of this section, and the provisions of subdivision (b) of this section shall be strictly construed in accordance with existing law governing labor disputes with the purpose of avoiding any unnecessary judicial interference in labor disputes. [¶] (b) ***The acts enumerated in this subdivision . . . shall be legal, and no court nor any judge nor judges thereof, shall have jurisdiction to issue any restraining order or preliminary or permanent injunction which, in specific or general terms, prohibits any person or persons . . . from doing any of the following:*** [¶] (1) Giving publicity to . . . any labor dispute . . . [¶] (2) Peaceful picketing or patrolling involving any labor dispute . . . [¶] (3) Assembling peaceably to do any of the acts specified in paragraphs (1) and (2) or to promote lawful interests. [¶] (4) '[L]abor dispute' is defined as follows: [¶] (i) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; . . . [¶] . . . [¶] (iii) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment regardless of whether or not the disputants stand in the proximate relation of employer and employee. [¶] . . . [¶] . . . [¶] . . . [¶] (e) It is not the intent of this section to permit conduct that is unlawful including breach of the peace, disorderly conduct, the unlawful blocking of access or egress to premises where a labor dispute exists, or other similar unlawful activity." (Emphasis added.)

Union to enter onto private property under circumstances in which all other forms of expressive activities could be prohibited and judicially enjoined.

In declaring the Moscone Act unconstitutional, the Court of Appeal (i) relied on two United States Supreme Court cases prohibiting content-based discrimination that favors labor unions (*Mosley*, *supra*, 408 U.S. 92 and *Carey*, *supra*, 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*, *supra*, 61 Cal.2d 766, *Lane*, *supra*, 71 Cal.2d 872, *Sears II*, *supra*, 25 Cal.3d 317, *Cal Waremart*, *supra*, 87 Cal.App.4th 145, and *M Restaurants*, *supra*, 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. 17-28.) The Court of Appeal reached the right result for the right reasons.

1. *Mosley* and *Carey*

Mosley. The Chicago ordinance before the United States Supreme Court in *Mosley*, *supra*, 408 U.S. at page 93, defined "disorderly conduct" to include a person who picketed within 150 feet of any school building while school was in session but expressly exempted "the peaceful picketing of any school involved in a labor dispute." Ed Mosley, who had for many months walked the streets around a high school carrying a sign accusing the school of racial discrimination, challenged the ordinance by a suit for declaratory relief. (*Ibid.*) The District Court dismissed the complaint but the Seventh Circuit reversed and that decision was affirmed by the United States Supreme Court on the ground that "the ordinance is unconstitutional because it makes 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.) Because the Moscone Act, like the ordinance in *Mosley*, "describes permissible picketing in terms of its subject matter" (*id.* at p. 95), the Moscone Act fails for precisely the same reason the Chicago ordinance failed. (*Id.* at p. 94 [a statute is unconstitutional if "it makes an impermissible distinction between labor picketing and other peaceful picketing"].)

Carey. Eight years after *Mosley*, the United States Supreme Court revisited the content-discrimination issue in *Carey*, *supra*, 447 U.S. 455, where the statute at issue prohibited picketing of residences but exempted "the peaceful picketing of a place of employment involved in a labor dispute." (*Id.* at p. 457.) Not surprisingly, the Court found this residential picketing statute "constitutionally indistinguishable from the ordinance invalidated in *Mosley*" (*id.* at p. 460) and concluded that it impermissibly "discriminated on the basis of "the content of the demonstrator's communication." (*Ibid.*) The Supreme Court rejected the appellant's claim that the state's interest in providing special protection for labor protests justified the discrimination, 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 [of concern to the picketers in this case]. We reject that proposition. . . . *While the State's motivation in protecting the First Amendment rights of employees involved in labor disputes is commendable, that factor, without*

more, cannot justify the labor picketing exemption." (*Id.* at pp. 466-467, emphasis added.)

The Moscone Act. 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. 21-22, italics added.)[13]

2. *Sears II, Lane,* and their 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.

In *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters* (1976) 17 Cal.3d 893 (*Sears I*), this Court held that the National

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[13] The Union's reliance on *Senn v. Tile Layers Protective Union* (1937) 301 U.S. 468 (OB 27, 30) is misplaced. In *Senn* — which predates *Mosley* and *Carey* by four decades — the United States Supreme 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. 26.)

Labor Relations Act (NLRA) deprived the superior court of jurisdiction to issue an injunction prohibiting picketing on Sears' private walkways and parking lot. The United States Supreme Court reversed, holding that the labor preemption doctrine did not apply to the trespassory aspects of union picketing. (*Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters* (1978) 436 U.S. 180, 198-208 (*Sears*).) On remand, this Court upheld the then newly enacted Moscone Act, finding that peaceful picketing on privately owned sidewalks outside the employer's store is not subject to injunctive relief. (*Sears II*, *supra*, 25 Cal.3d at pp. 332-333.)

The Court of Appeal found *Sears II* flawed because it did not consider the First Amendment issues decided by *Mosley* and *Carey*. (*Sears II*, *supra*, 25 Cal.3d at pp. 327-328, fn. 5; *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 same reason, the Court of Appeal correctly rejected *Lane*, *supra*, 71 Cal.2d 872,[14] *Schwartz-Torrance*, *supra*, 61 Cal.2d 766,[15] *M Restaurants*, *supra*, 124 Cal.App.3d

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[14] *Lane* holds that handbilling by a union representative on the private sidewalk of a stand-alone grocery store cannot be enjoined. (*Lane*, *supra*, 71 Cal.2d at p. 878.) *Lane* relied on *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.* (1968) 391 U.S. 308, 320, footnote 9 (*Logan Valley*), the United States Supreme Court's short-lived opinion holding that, for purposes of union picketing but not otherwise, a large shopping center is the functional equivalent of a public forum. Eight years later, the Supreme Court overruled *Logan Valley* in *Hudgens v. NLRB* (1976) 424 U.S. 507 (*Hudgens*), holding that the First Amendment protects only against government action and thus does not prevent the owner of a private shopping center from barring union members from picketing on its private property in violation of state trespass law. (*Id.* at pp. 518-521.)

[15] *Schwartz-Torrance*, *supra*, 61 Cal.2d 766, a shopping center's suit against a union picketing one of the center's tenants, was the precursor to

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666,[16] and its own decision in *Cal-Waremart*, *supra*, 87 Cal.App.4th 145. (Slip Opn. 29-31.)

3. *D. C. Waremart*

In a 2004 NLRB case, the D.C. Circuit 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*, *supra*, 354 F.3d at p. 871.) Relying on *Mosley* and *Carey,* the D.C. Circuit answered with a resounding "no," holding 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.) More specifically, the Court reasoned "that if the meaning of the Moscone Act came before the California Supreme Court again, it would either hold the statute unconstitutional or construe it to avoid unconstitutionality." (*Id.* at pp. 875-877 ["the *Sears II* plurality opinion cannot reflect current California law because the rule it embraces violates of the First Amendment to the Constitution"].)

Here, the Court of Appeal agreed with *D.C. Waremart*, correctly holding that the Moscone Act is substantively indistinguishable from the

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this Court's opinion in *Pruneyard.* (See also *In re Hoffman* (1967) 67 Cal.2d 845, 851 [a railroad station housing a restaurant, snack bar, cocktail lounge, and magazine stand is akin to a "public street or park"].)

[16] *M Restaurants* upholds the Moscone Act against due process and equal protection challenges but the Court did not consider or even mention the First Amendment issues raised by *Mosley* and *Carey*. (*M Restaurants*, *supra*, 124 Cal.App.3d 666.)

legislation condemned in *Mosley* and *Carey*.[17] 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*, *supra*, 408 U.S. at pp. 97-98; *Carey*, *supra*, 447 U.S. at p. 470; *D.C. Waremart*, *supra*, 354 F.3d 870.)[18]

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[17] *ARP Pharmacy Services, Inc. v. Gallagher Bassett Services, Inc.* (2006) 138 Cal.App.4th 1307 holds that Civil Code section 2527 (compelling prescription drug processing companies to create statistical reports for the benefit of pharmacies) violates the free speech rights of prescription drug claims processors, notwithstanding that the statute did not prohibit any kind of speech, thereby deflecting the Union's argument that the Moscone Act and section 1138.1 are safe from constitutional attack because they merely refuse to allow some speech to be enjoined rather than expressly restricting speech. Where, as here, the application of a statute provides greater advantage to one form of speech than another, it cannot withstand a First Amendment content-discrimination challenge. (*Sund v. City of Wichita Falls* (N.D.Tex. 2000) 121 F.Supp.2d 530, 549-550; and see *Vermont Society of Assn. Executives v. Milne* (2001) 172 Vt. 375 [statute that did not refer to speech but singled out lobbyists and their employers for tax could not withstand strict scrutiny under First Amendment]; *National Advertising Co. v. City of Orange* (9th Cir. 1988) 861 F.2d 246 [because exceptions to signage restriction were based on content, the restriction itself was based on content].)

[18] The NLRB treats *D.C. Waremart* as the definitive decision on California law. *Macerich Management Co.* (2005) 345 N.L.R.B. No. 34 (*Macerich*) involved a union's expressive activities at two California shopping centers and, more specifically, the validity of several time, place and manner regulations adopted by the shopping centers. The property owner, relying on one of the regulations, barred the union from picketing on exterior sidewalks which were on the shopping center's private property. The union sought relief from the NLRB, claiming that under *Sears II*, the

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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. 29-30.)[19]

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shopping center had no right under California law to exclude the union from the sidewalks. The NLRB disagreed, holding that *Sears II* could not "be relied on as controlling California precedent" (*Macerich Management Co.*, *supra*, 345 N.L.R.B. No. 34, p. 517) and that the "most . . . definitive statement of California law" was the D.C. Circuit's holding in *D.C. Waremart* — because the special protection for labor-related expressive activity embodied in *Sears II* constitutes impermissible content discrimination in violation of the First Amendment (and because no California case has disagreed with *D.C. Waremart's* analysis). (*Macerich Management Co.*, *supra*, 345 N.L.R.B. No. 34, p. 517, fn. 6.) Although the Ninth Circuit refused to enforce *Macerich* on the issue of union access to the shopping center's exterior sidewalks (*United Bhd. of Carpenters & Joiners v. NLRB* (9th Cir. 2008) 540 F.3d 957), the Circuit's opinion does not dispute the NLRB's conclusion that *Sears II* is no longer controlling California precedent.

[19] More specifically, subdivision (a) of section 1138.1 provides: "(a) No court of this state shall have authority to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, except after hearing the testimony of witnesses in open court, with opportunity for cross-examination, in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, of all of the following: [¶] (1) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued

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An injunction, of course, is the appropriate and traditional remedy for a continuing trespass (Slip Opn. 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. (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69-70; *Bank of Stockton, supra*, 44 Cal.App.4th at pp. 1625-1626; *Trader Joe's, supra*, 73 Cal.App.4th at pp. 429-430.)

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* (subd. (a)(1)), irreparable harm to the property itself (subd. (a)(2)), and the inability to obtain police protection (subd. (a)(5)) — thus using disparate treatment to accomplish the same impermissible end as the Moscone Act. (Slip Opn. 28-33.)[20]

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on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorized those acts. [¶] (2) That substantial and irreparable injury to complainant's property will follow. [¶] (3) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief. [¶] (4) That complainant has no adequate remedy at law. [¶] (5) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection."

[20] Section 1138.1 was enacted in 1999 and became effective on January 1, 2000. (*United Food and Commercial Workers Union v.*

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The Court of Appeal acknowledged its contrary decision in *Cal Waremart*, *supra*, 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. 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. 31.) It is unconstitutional.[21]

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Superior Court (2000) 83 Cal.App.4th 566, 571 (*Gigante*).) In a lawsuit filed before the effective date of the statute, a store (Gigante) sued two unions for injunctive relief, and the parties stipulated to a preliminary injunction limiting the number of picketers and their location vis-à-vis the store's entrance. (*Id.* at pp. 570-571.) In January 2000, the unions moved for summary judgment, claiming the store had not shown (and could not show) that law enforcement was unwilling or unable to furnish adequate protection within the meaning of subdivision (a)(5) of section 1138.1. (*Gigante*, *supra*, 83 Cal.App.4th at p. 572.) The trial court denied the motions but the Court of Appeal agreed with the Unions, construed the statute strictly, and issued a writ directing entry of summary judgment for the unions. (*Id.* at pp. 578-579, 582.) *Gigante* did not consider the First Amendment or any other constitutional challenge to the statute — and thus has no bearing on the issues at hand.

[21] In its discussion of the First Amendment generally and of section 1138.1 specifically, the Court of Appeal (citing *Hurley v. Irish-American Gay, Lesbian and Bi-Sexual Group of Boston* (1995) 515 U.S. 557, 575-576 (*Hurley*), and *Pacific Gas & Electric Co. v. Public Utilities Com.* (1986) 475 U.S. 1, 16 (*PG&E*) said that "[f]orcing a speaker to host or accommodate another speaker's message violates the host's free speech rights," and noted that the effect of section 1138.1 is to force a "private property owner to provide a forum for speech with which the owner disagrees and it bases that compulsion on the content of the speech." (Slip Opn. pp. 3, 31.) The Union makes much of this, claiming Foods Co has "no 'negative' First amendment right to exclude speech." (OB 46-51.) We never said we did. Our position is that the Moscone Act and section 1138.1

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C. Neither the Moscone Act nor section 1138.1 can survive strict scrutiny review.

In *Carey*, 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 — explaining 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." (*Carey*, *supra*, 447 U.S. at p. 466.) In no uncertain terms, the Supreme Court has declared that, "[w]hile the State's motivation in protecting the First Amendment rights of employees involved in labor disputes is commendable, that factor, without more, cannot justify the labor picketing exemption." (*Id.* at p. 467; and see *Christian Legal Society v. Martinez* (2010) __ U.S.___, 130 S.Ct. 2971, 2984, fn. 11 (*Christian Legal*) [when property that has not traditionally been regarded as a public forum is nevertheless opened up for that purpose, speech restrictions in such forums are subject to the same strict scrutiny as restrictions in a public forum].)

By depriving California's courts of "jurisdiction to issue any restraining order or preliminary or permanent injunction which . . . prohibits any person" from lawfully picketing, distributing leaflets, or doing any other peaceable act related to collective bargaining disputes (§ 527.3, subd. (b)), the Moscone Act is substantively indistinguishable

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are constitutionally infirm because they favor one form of speech over another, forcing us to allow labor-related expressive activities on our private property when we have the right to exclude all other expressive activities.

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 is forbidden to all other demonstrators (*Target Corp.*, *supra*, 155 Cal.App.4th 1375), 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*, *supra*, 408 U.S. at pp. 97-98; *Carey*, *supra*, 447 U.S. at p. 470.)[22]

And by depriving our courts of authority to grant injunctive relief "in any case involving or growing out of a labor dispute" except when an impossibly high hurdle is vaulted, section 1138.1 does precisely the same thing — it makes it more difficult to obtain injunctive relief against labor activities than for any other type of activity protected by the First Amendment. If this Court agrees that the Moscone Act is unconstitutional, section 1138.1 must fall with it — because the latter section would

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[22] Foods Co recognizes that California may afford greater free speech rights to the public than those guaranteed by the First Amendment (*Fashion Valley*, *supra*, 42 Cal.4th at pp. 857-858). The point is that, in doing so, state law must not violate the United States Constitution by providing special treatment for labor-related speech. (*Id.* at pp. 865-866 ["Prohibiting speech that advocates a boycott is not a [permissible] time, place, or manner restriction because it is not content neutral"].) Had *Fashion Valley* considered the Moscone Act or section 1138.1 (it did not), it would surely have declared them unconstitutional content-based "[r]estrictions upon speech 'that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed . . . ." (*Fashion Valley*, *supra*, 42 Cal.4th at pp. 865-866; and see *Arkansas v. Sullivan* (2001) 532 U.S. 769, 772 [state may not interpret federal Constitution more restrictively than interpretation given it by United States Supreme Court].)

otherwise prevent Foods Co and other similarly situated stores from obtaining the injunctive relief to which they are entitled. *Mosley* and *Carey* compel the conclusion that both the Moscone Act and section 1138.1 are facially unconstitutional.

It follows that, under California law, labor organizing activities may be conducted on private property only to the extent that California permits other expressive activity to be conducted on private property. (*D.C. Waremart*, *supra*, 354 F.3d at pp. 876-877.) Because California law does not extend the *Pruneyard* public forum rule to stand-alone stores or those located in commercial strip developments, it follows necessarily that the trial court had jurisdiction to grant Foods Co's motion for a preliminary injunction.

D. The sky is not falling.

The Union's argument — 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 purpose of the Moscone Act was *not* to give unions a special exemption from the trespass laws that govern all other types of picketing but rather to give them a level playing field by overriding the early 20th Century courts' hostility to union supporters as demonstrated by the routine issuance of injunctions condemning every collective labor activity as an unlawful restraint of trade. (*Sears II*, *supra*, 25 Cal.3d at pp. 323-324; and see *National Woodwork Manufacturers Assn. v. NLRB* (1967) 386 U.S. 612, 620; *Senn v. Tile Layers Protective Union*, *supra*, 301 U.S. at pp. 478-479; *United States v. Hutcheson* (1941) 312 U.S. 219, 235-237.)

The Norris-LaGuardia Act, adopted in 1932 primarily to prevent "powerful employers" from using "federal judges as 'strike-breaking' agencies" (*Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Assn.* (1982) 457 U.S. 702, 716), is not challenged in this case, but so what? If challenged on the same basis that Foods Co challenges the California statutes, the Norris-LaGuardia Act would have to be subjected to the same rigorous First Amendment analysis required here — because the Norris-LaGuardia Act, like the California statutes, favors labor speech over all other types of expressive activities.

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. 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. 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 (*Lechmere*); *Sears*, *supra*, 436 U.S. at p. 198; *Hudgens*, *supra*, 424 U.S. at pp. 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*, *supra*, 502 U.S. at p. 535; *NLRB v. Babcock & Wilcox Co.*, *supra*, 351 U.S. at p. 112; *Thornhill v. Alabama* (1940) 310 U.S. 88, 104-106 (*Thornhill*);

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* (1946) 326 U.S. 501 (*Marsh*) [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*, *supra*, 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*, *supra*, 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 diatribe is a distraction designed to divert this Court's attention from the crux of this case by injecting drama into the narrow, relevant issues raised by our facts. The Court of Appeal understood the issues before it, thoughtfully analyzed the law, and published a cogent decision. It should be affirmed. (*Mosley*, *supra*,

408 U.S. at p. 96 ["Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open'"].)[23]

III. BECAUSE THE UNION HAS REASONABLE, FEASIBLE, AND PRACTICAL ACCESS TO FOODS CO'S CUSTOMERS WITHOUT ENTERING ONTO FOODS CO'S PRIVATE PROPERTY, THE UNION HAS NO RIGHT OF ENTRY.

Although a state may have a legitimate and "commendable" interest in providing special protection for labor protests (*Carey*, *supra*, 447 U.S. at pp. 465-467), it must do so through the least restrictive means. (*Sable Communications of California v. FCC* (1989) 492 U.S. 115, 126; *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 952 [content-based regulation of noncommercial speech is valid under the First Amendment "only if it can withstand strict scrutiny, which requires that the regulation be narrowly

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[23] The Union's suggestion that the Moscone Act and section 1138.1 do not abridge any other protestors' right to speak (OB 34) simply misses the point — that the statutes give the Union a right to trespass onto private property to speak when no one else has a similar right. In a footnote (OB 34, fn. 7), the Union then suggests that, assuming an abridgement, Foods Co would not have standing to "enforce" the rights of speakers we want to bar from our property. Again, the Union misses the point — we already have the right to bar everyone except the Union, and we certainly have standing to challenge a statute that prohibits us from stopping a trespass on our property. (E.g., *Sears II*, *supra*, 25 Cal.3d 317 [the property owner challenged the then newly enacted Moscone Act]; *Trader Joe's*, *supra*, 73 Cal.App.4th 425 [the property owner was the plaintiff]; *Golden Gateway*, *supra*, 26 Cal.4th 1013 [the property owner was the plaintiff]; *Costco*, *supra*, 96 Cal.App.4th 740 [the property owner was the plaintiff]; *Albertson's*, *supra*, 107 Cal.App.4th 106 [the property owner was the plaintiff].)

tailored (that is, the least restrictive means) to promote a compelling government interest"].)

At a minimum, therefore, if this Court rejects Foods Co's contention that the Moscone Act and section 1138.1 are facially invalid and entirely unenforceable, it should find that the statutes are presumptively invalid content-based restrictions on expressive speech and conduct and, as such, enforceable only by the least restrictive means. (*Turner Broadcasting System v. FCC* (1994) 512 U.S. 622, 642 [courts must give "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content"]; *Carey*, 447 U.S. at pp. 461-462 [when a statute discriminates among speech-related activities, the legislation must be "finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized"].) As Foods Co will explain, the least restrictive interpretation of these statutes allows their application when, and only when, a union has no reasonable access to its intended audience without entering onto an employer's private property. And as the record shows (JA 62), the Union has reasonable access to Foods Co's customers from the public sidewalks adjacent to Foods Co's private property.

A. If not overruled, *Sears II* and *Lane* should be limited to cases where there is no reasonable, feasible or practical alternative to entry onto private property.

Although the rights of nonemployee union representatives to enter an employer's private property are based on state law (*Thunder Basin Coal Co. v. Reich* (1994) 510 U.S. 200, 217, fn. 21 (*Thunder Basin*)), a state's decision to allow labor-related activities on private property where other expressive activities are banned is constrained by federal strict scrutiny

requirements. Accordingly, even if this Court declines Foods Co's invitation to adopt *D.C. Waremart's* conclusions, it should at a minimum find that the survival of the Moscone Act and section 1138.1 depend on a narrow reading that would apply those statutes only when there is no other reasonable, practical or feasible means for a union to express its views to an employer's customers. In short, whatever viability the statutes may have in a company town or when applied to a factory on a hill, they do not apply to a store surrounded by public walkways. (*Carey, supra*, 447 U.S. at p. 465 ["though we might agree that certain state interests may be so compelling that where no adequate alternatives exist a content-based distinction — if narrowly drawn — would be a permissible way of furthering those objectives . . . , this is not such a case"].)

B. The issue is access.

The statute before the Supreme Court in *Thornhill, supra*, 310 U.S. at pages 91-92 forbade loitering or picketing "about the premises or place of business." Byron Thornhill was convicted of a violation of that statute for peacefully picketing around the Brown Wood Preserving Company "on Company property," on a private entrance for employees and not on a public road. (*Id.* at pp. 94-95.) It was undisputed that "practically all of the employees live[d] on Company property" and received their mail from a post office on Company property, and that the union held its meetings on Company property. (*Id.* at p. 94.)

In this context, the Supreme Court found the Alabama statute invalid on its face (*Thornhill v. Alabama, supra*, 310 U.S. at p. 101), observing that "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." (*Id.* at p. 102.) In the context of *Thornhill* — a company

town and a statute prohibiting "*nearly every practicable, effective means* whereby those interested — including the employees directly affected — may enlighten the public on the nature and causes of a labor dispute" (*id.* at p. 104, emphasis added) — it is hardly surprising that the Supreme Court considered it "without significance" that Mr. Thornhill was picketing on private property. (*Id.* at p. 106, fn. 23.)[24]

C. Location matters.

In the federal analog to California's *Pruneyard* cases, the United States Supreme Court has similarly emphasized the issue of access. In *Logan Valley*, *supra*, 391 U.S. 308, overruled in *Hudgens*, *supra*, 424 U.S. 507, the Supreme Court laid the groundwork for *Pruneyard*, holding that a large shopping center was the functional equivalent of a town square, and that the mere fact of the shopping center's private ownership did not justify an absolute ban against union picketing. *Logan Valley* rested in large part on the holding in *Marsh*, *supra*, 326 U.S. 501 — that *a company town could not ban all expressive activity from its business district*, notwithstanding that the property was privately owned.

In *Lloyd*, *supra*, 407 U.S. 551, the Supreme Court did not say it was overruling *Logan Valley* but held that a private shopping center could ban hand-billing unrelated to the center's businesses. According to *Lloyd*, the holding in *Logan Valley* did not turn on the fact that the shopping center

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[24] As noted above (fn. 5, *ante*), the Union's only legitimate purpose for picketing at Foods Co is to encourage a boycott by its customers (the time having long passed since it could legitimately picket to force Foods Co to recognize it — that is, for it to force Foods Co to become a union shop). (29 U.S.C. § 158 (b)(7)(C).) The rules applied to union organizing on private property apply *a fortiori* to a union boycott.

was the equivalent of public streets (*Id.* at p. 563) but rather on the fact that the picketing involved was directly related in its purpose to the use to which the shopping center was put, where the store was located within the center, and — most importantly — "that *no other reasonable opportunities for the pickets to convey their message to their intended audience were available.*" (*Ibid.*, italics added; and see *Hudgens*, *supra*, 424 U.S. at pp. 517-518; *NLRB v. Lake Superior Lumber Corp.*, *supra*, 167 F.2d 147 [logging camps]; *Alaska Barite Co.*, *supra*, 197 N.L.R.B. 1023 [mining camps]; *NLRB v. S & H Grossinger's, Inc.*, *supra*, 372 F.2d 26 [mountain resort hotel]; and see Emanuel, *Union Trespassers Roam the Corridors of California Hospitals: Is a Return to the Rule of Law Possible?* (2009) 30 Whittier L.Rev. 723, 725-726, 741-742.)

For the same reason, the NLRB rule is that it cannot order employers to grant non-employee union organizers access to company property absent a showing that onsite employees are otherwise *inaccessible through reasonable efforts*. (*NLRB v. Babcock & Wilcox Co.* (1956) 351 U.S. 105, 112 [employer is not required to permit use of its facilities for organization when other means are readily available, only when employees are otherwise inaccessible]; *Lechmere*, *supra*, 502 U.S. 527, 539 [the exception to the "no access" rule is a narrow one; it does not apply wherever nontrespassory access to employees may be "cumbersome or less-than-ideally effective," but only where the location of a plant and the employee living quarters place the employees beyond the reach of reasonable union efforts to communicate with them]; *First Healthcare Corp v. NLRB* (6th Cir. 2003) 344 F.3d 523, 529; and see *D.C. Waremart*, *supra*, 354 F.3d 870.)

D. Location should matter in California.

Although (as noted above) the right of employers to exclude union activity from their private property emanates from state common law (*Thunder Basin*, *supra*, 510 U.S. at p. 217, fn. 21), the United States Supreme Court has consistently expressed the view that uninvited public access to private property should be granted by the state only under limited circumstances. (*Ibid.*)

Lechmere, *supra*, 502 U.S. 527 is instructive. As part of its effort to unionize a retail store, a union distributed handbills in the parking lot serving the shopping center where the store was located. When the store barred the union from its property, the union complained to the NLRB and won but the Supreme Court reversed, explaining that a union's right to enter private property depends on the circumstances: "'Where it is *impossible or unreasonably difficult* for a union to distribute organizational literature to employees entirely off of the employer's premises, distribution on a nonworking area, such as the parking lot and the walkways between the parking lot and the gate may be warranted.'" (*Id.* at p. 533.) "As a rule," said the Court, "an employer cannot be compelled to allow distribution of union literature by nonemployee organizers on his property." (*Ibid.*) Like most rules, this one has exceptions: "*Where 'the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them,' . . .* employers' property rights may be 'required to yield to the extent needed to permit communication of information on the right to organize.'" (*Ibid.*, italics added.)

Thus, said the Supreme Court in *Lechmere*, an employer need not accommodate nonemployee organizers unless the employees are otherwise

inaccessible, and union organizers "cannot claim even a limited right of access to a nonconsenting employer's property until 'after the requisite need for access to the employer's property has been shown.'" (*Lechmere*, *supra*, 502 U.S. at p. 534; and see *Central Hardware Co. v. NLRB* (1972) 407 U.S. 539, 545 [same]; *Sears*, *supra*, 436 U.S. at p. 205 [although an employer may not always bar nonemployee union organizers from his property, his right to do so remains the general rule, and it is the union's burden to show "that no other reasonable means of communicating its organization message to the employees exists"].)[25]

The issue squarely presented by the case at bench is whether California law will recognize the rights of a private property owner where, as here, the union has not shown (and in light of the nearby public streets and sidewalks could not show) that it has no other reasonable means of communicating with Foods Co's customers — because there are no unique obstacles to such communication. Foods Co is not the functional equivalent of a shopping center or a company town, and there is no legitimate reason to compel Foods Co to allow the Union to picket on Foods Co's private property.

As summed up by *Lechmere*, "[t]o say that [the Supreme Court's] cases require accommodation between employees' and employers' rights is a true but incomplete statement, for the cases also go far in establishing the

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[25] *Lechmere* and *Sears* both address organizational activities (that is, where non-employee members of a union want access to employees to persuade them to unionize), and *Lechmere* gives greater rights to organizational activities by employees than by non-employees. (*Lechmere*, *supra*, 502 U.S. at p. 537; *Sears*, *supra*, 436 U.S. 180.) As explained above (fn. 5, *ante*), this case involves boycott picketing by non-employees, not organizational activities by anyone.

locus of that accommodation where nonemployee organizing is at issue. So long as nonemployee union organizers have *reasonable access* to employees outside an employer's property, the requisite accommodation has taken place. It is *only where such access is infeasible* that it becomes necessary and proper to take the accommodation inquiry to a second level, balancing the employees' and employers' rights . . . ." (*Lechmere*, *supra*, 502 U.S. at p. 538, some italics added; and see *Bank of Stockton*, *supra*, 44 Cal.App.4th at p. 1628 [where there are adequate alternative avenues of communication including public sidewalk, it is irrelevant that solicitation from public sidewalk would not be as lucrative as from bank's private sidewalk].)[26]

E. As the Court of Appeal held, Foods Co's motion for a preliminary injunction should have been granted.

Foods Co's Sacramento store is not a shopping center. To the contrary, it is essentially a stand-alone store in a modest commercial development, and its invitation to the public to enter onto its private property is limited to an invitation to shop, not to congregate, linger, or mingle. It is not the equivalent of a company town, a mining camp, or a mountain resort hotel. As a result, Foods Co may on its private property prohibit all forms of expressive speech and conduct unrelated to its

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[26] *Lechmere* actually goes even further, holding that access is not permitted simply because nontrespassory access might be "cumbersome or less-than-ideally effective, but only where '*the location of a plant and the living quarters of the employees* place the employees *beyond the reach* of reasonable union efforts to communicate with them' . . . . Classic examples include logging camps . . . , mining camps, . . . and mountain resort hotels . . . [that is,] employees who, by virtue of their employment, are isolated from the ordinary flow of information that characterizes our society." (*Lechmere*, *supra*, 502 U.S. at p. 539-540.)

business. With regard to related expressive activities, the Moscone Act and section 1138.1 are constitutionally infirm and unenforceable, leaving California's courts with their traditional jurisdiction to issue injunctive relief against union activities. Finally, on the facts of this case — where there is reasonable, feasible and practical access to Foods Co's customers from nearby public sidewalks without entry onto Foods Co's private property — the trial court should have granted Foods Co's motion for a preliminary injunction.[27]

IV. AT A MINIMUM, FOODS CO MAY ADOPT AND ENFORCE REASONABLE TIME, PLACE AND MANNER RULES AND REGULATIONS

A. Foods Co's rules for expressive activity.

In December 2007, Foods Co adopted the following time, place and manner rules for expressive activity:

> (1) No unauthorized requests for money or contributions or use of receptacles to solicit or receive money or contributions is permitted.
>
> (2) No unauthorized commercial activity or sales of products is permitted.
>
> (3) No distribution of commercial literature or advertisements is permitted.

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[27] In the trial court and in the Court of Appeal, the Union suggested that the remedy is to extend the benefit of the Moscone Act and section 1138.1 to the excluded groups. (JA 384-385.) As the Court of Appeal correctly held, judicial reformation of an unconstitutional statute is improper where, as here, the proposed change would be inconsistent with the Legislature's intent (which here was to protect only unions). (*In re Marriage Cases* (2008) 43 Cal.4th 757, 856; *Abbott Laboratories v. Franchise Tax Bd.* (2009) 175 Cal.App.4th 1346, 1360.)

(4) No one may block the doors, roadways or fire lanes.

(5) Physical contact with or verbal abuse or harassment of any person is prohibited.

(6) All litter resulting from any person's or group's presence must be picked up by that person or group.

(7) No more than two persons from any group or organization may solicit at one time. If more than two people seek to use the available space, people will be asked to leave in the reverse order of their arrival.

(8) To avoid congestion at store entrances, the following restrictions must be observed:

(a) Activity shall not occur within 20 feet of any store entrance or any store sponsored sales activity.

(b) Activity shall not occur during the following time periods: any day of the week that precedes the following holidays: Martin Luther King Day, President's Day, Easter, Memorial Day, Fourth of July, Labor Day and Halloween or on days when the store uses the area for sales activities.

(c) Activity shall not occur on Sunday through Friday between the hours of 11:00 a.m. and 1:30 p.m. or 4:00 p.m. and 7:00 p.m. Activity on Saturdays may occur between the hours of 9:00 a.m. until 6:00 p.m.

(9) No furniture, with the exception of a table and two chairs per group or organization, will be permitted.

(10) No loudspeaker or other sound amplification device shall be used.

(11) No sign or promotional or informational object may be larger than 2' x 3' or otherwise interfere with the ability of any person to see into or out of the store.

(12) No activity is permitted in the parking lots, particularly following customers to their cars or approaching customers exiting or entering vehicles.

(13) The Company is not responsible for any damage to any group or organization property or loss of funds. (JA 46-47.)

B. Foods Co has the right to enforce reasonable time, place and manner regulations.

Assuming this Court rejects Foods Co's assertion that the Union may be prohibited altogether from engaging in expressive activity on Foods Co's private property, it does not matter whether Foods Co is a *Pruneyard*-type shopping center or a stand-alone store, or whether the expressive activity at issue is related to Foods Co's business — because in all of these situations Foods Co has the right to adopt and enforce reasonable time, place and manner regulations governing expressive activities on its private property — to ensure that such activity is not "'calculated to disrupt normal business operations'" and does not obstruct or unduly interfere with normal business operations. (*Fashion Valley*, 42 Cal.4th at p. 864; and see *Pruneyard*, *supra*, 23 Cal.3d at p. 911 [reasonable time, place and manner regulations may be adopted to ensure that expressive activities do not interfere with normal business operations]; *Mosley*, *supra*, 408 U.S. at p. 98.) The Union refuses to comply with Foods Co's rules and regulations, specifically those rules discussed below (Part IV.B.2, *post*). (JA 41-44.)[28]

[28] In the trial court and in the Court of Appeal, the Union claimed that "Foods Co does not attempt to uniformly enforce" its rules for expressive activity. (JA 469-470, 546-547.) Not so. Foods Co enforces its rules to the best of its ability and does so uniformly. (RT 25, 32-33, 65.) Although its enforcement efforts may not be perfect — Foods Co is in the business of running a grocery store, not patrolling its private property to enforce compliance with its rules — the important point is that Foods Co does its best to ensure that everyone engaging in expressive activity on its property complies with its rules.

In *San Leandro Teachers Assn. v. Governing Bd. of San Leandro Unified School Dist.* (2009) 46 Cal.4th 822, 838 (*San Leandro*), where the District had placed limitations on the types of materials distributed in public school mailboxes, this Court explained that, because "the scope of permissible regulations of speech varies depending on the nature of the forum," the first step in any such analysis is to determine the forum. (*Id.* at p. 838.)

"Public property which is not by tradition or designation a forum for public communication is governed by different standards. We have recognized that the First Amendment does not guarantee access to property simply because it is owned or controlled by the government. [Citation.] In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. [Citation.] As we have stated on several occasions, *the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.* [Citations.]" (*Id.* at p. 839, internal quotation marks omitted, italics added; and see *International Society for Krishna Consciousness of California, Inc. v. City of Los Angeles* (2010) 48 Cal.4th 446, 455 ["Even in a public forum, the right of free speech may be restricted by reasonable restrictions on its time, place, or manner"].)[29]

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[29] As the United States Supreme Court explained in the union picketing context in *Logan Valley*, private property owners obligated to allow expressive activities on their property have the right to adopt reasonable regulations governing such activities and that right is "at the very least co-extensive with the powers possessed by States and municipalities" — which have the right to prevent activities that obstruct or

(Footnote continues on next page.)

Below, the Union offered a conclusory claim that Foods Co's rules and regulations are unreasonable and unconstitutional (JA 470-472), ignoring the fact that Foods Co has the power to preserve the property under its control for the use to which it is lawfully dedicated — in this instance, to sell food and other household items. Neither the trial court's order denying Foods Co's motion for a preliminary injunction (JA 639-640) nor the Court of Appeal's opinion address Foods Co's rules and regulations — a pity, since all Foods Co really wants in this case is the right to compel the Union, as it can with everyone else, to comply with its time, place and manner rules and regulations.[30]

Assuming this Court reaffirms its decision in *Lane*, *supra*, 71 Cal.2d 872 on the ground that private property rights in a store open to the public are not absolute but are subject to a balancing process in determining the right of access for expressive activities related to the particular business, Foods Co must be permitted to impose reasonable time, place and manner restrictions on those activities to ensure they do not interfere with the store's raison d'être — selling its wares to customers who are not persuaded by the boycott to shop elsewhere.

(Footnote continued from previous page.)

unreasonably interfere with free ingress or egress, and which will interfere with the normal use of the property by others with an equal right of access. (*Logan Valley*, *supra*, 391 U.S. at pp. 320-321.)

[30] The Union's suggestion that the Court of Appeal found the rules were "unreasonable" (OB 15-16) is quoted out of context. The Court of Appeal mentioned the rules only to explain that the trial court's express finding about them included an implied finding that Foods Co is a public forum. (Slip Opn. 12.)

1. The level of scrutiny.

The level of scrutiny with which the courts review rules regulating expressive conduct "depends upon whether it is a content-neutral regulation of the time, place, or manner of speech or restricts speech based upon its content. A content-neutral regulation of the time, place, or manner of speech is subjected to intermediate scrutiny to determine if it is '(i) narrowly tailored, (ii) serves a significant government interest, and (iii) leaves open ample alternative avenues of communication.' [Citation.] A content-based restriction is subjected to strict scrutiny." (*Fashion Valley, supra*, 42 Cal.4th at p. 865.)

Because Foods Co's time, place and manner regulations are content-neutral (they can be justified by legitimate concerns unrelated to any disagreement with the message conveyed by the speech, and without reference to the content of the regulated speech), they are subject only to intermediate scrutiny. (*Fashion Valley, supra*, 42 Cal.4th at p. 866; *Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 367 [expressive activity is content neutral and subject to intermediate scrutiny if it is justified without reference to the content of the regulated speech]; *Savage v. Trammell Crow Co.* (1990) 223 Cal.App.3d 1562, 1573 (*Savage*) [the principal inquiry in determining content neutrality is whether the regulation was adopted because of disagreement with the message it conveys, and a narrowly tailored regulation serving a legitimate purpose unrelated to content will be upheld]; *Costco, supra*, 96 Cal.App.4th at p. 750 [reasonableness of time, place or manner regulation depends on relation the regulation bears to the overall problem the property owner seeks to correct].)

And because a modest retail establishment is not by any reasonable definition the functional equivalent of a public street or park historically used for purposes of assembly and communication (*Hague v. C.I.O.* (1939) 307 U.S. 496, 515-516; *San Leandro*, *supra*, 46 Cal.4th at p. 838), Foods Co's time, place and manner regulations are (for this additional reason) subject only to intermediate scrutiny. (*International Society for Krishna Consciousness v. City of Los Angeles*, *supra*, 48 Cal.4th at p. 457.) "Intermediate scrutiny" is satisfied when a regulation is narrowly drawn so that the means of regulation must not be substantially broader than necessary to achieve its purpose — a determination made with "deference to the ... responsible decisionmakers" and without regard to whether the court reviewing the regulation might not view it as the "best" approach to promote the interest at issue. (*Id.* at pp. 457-458.)[31]

[31] Government owned public parks, streets, and town squares — the quintessential unqualified public forums — have by long tradition been used by the public for the free exchange of ideas. (*Clark v. Burleigh* (1992) 4 Cal.4th 474, 482-483.) Other public properties — airports (*International Society for Krishna Consciousness, Inc. v. Lee* (1992) 505 U.S. 672, 682-683), post offices (*United States v. Kokinda* (1990) 497 U.S. 720, 730, 732), and similar government properties designed to efficiently serve groups of people engaged in common tasks are typically referred to as "limited" or "quasi" public forums and are treated as places where expressive activities must be balanced against the government's countervailing interests as property owner. (*Cornelius v. NAACP Legal Defense & Education Fund* (1985) 473 U.S. 788, 800.) Put another way, it is one thing to say that a privately owned facility open to the public for a limited purpose must allow *some* expressive activity, but quite another to say that a private property owner will be held to the same standard as a government agency when it restricts those activities to times and places that will not interfere with the business's raison d'être.

2. Foods Co's regulations.

a. Designation of areas

Foods Co's Rules 4,[32] 8(a),[33] and 12,[34] all of which limit the areas in which expressive activity may occur, are reasonable area designations adopted to avoid congestion and traffic problems — and the fact that the Union wants to use these areas to gain greater and easier access to Foods Co's customers is legally irrelevant. "'[T]he adequacy of alternative channels is not measured by the fondest hopes of those who wish to disseminate ideas,'" and the alternative channel is adequate where, as here, it gives the Union "a realistic opportunity to reach [its] intended audience." (*Union of Needletrades, Etc. Employees v. Superior Court* (1997) 56 Cal.App.4th 996, 1012 (*UNITE*).)[35]

Undisputed evidence establishes that these rules were adopted to ensure Foods Co's customers free access to and from the store and to avoid

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[32] "No one may block the doors, roadways or fire lanes." (JA 46.)

[33] "Activity shall not occur within 20 feet of any store entrance or any store sponsored sales activity." (JA 46.)

[34] "No activity is permitted in the parking lots, particularly following customers to their cars or approaching customers exiting or entering vehicles." (JA 47.)

[35] *UNITE* arose out of a dispute between a union and a clothing store with shops in six *Pruneyard*-style shopping centers (Beverly Center, Westside Pavilion, Glendale Galleria, Del Amo Fashion Center, Sherman Oaks Fashion Square, and Century City Shopping Center); the union sued all six malls, challenging their expressive activity rules as unreasonable and burdensome. (*UNITE*, *supra*, 56 Cal.App.4th at p. 1001.) The trial court denied the union's motion for a preliminary injunction, and the Court of Appeal denied the union's mandate petition in which it raised the same issues. (*Id.* at p. 1000.)

congestion by the doors and in the parking lots. (JA 42, 259; *U.S PruneYard*, *supra*, 447 U.S. at pp. 83-84 [even large malls have the right to limit expressive activities to designated common areas]; *Fashion Valley*, *supra*, 42 Cal.4th at p. 864 [shopping center may prohibit conduct calculated to disrupt normal business operations or that would result in obstruction or undue interference with normal business operations]; *UNITE*, *supra*, 56 Cal.App.4th at pp. 1002-1003, 1009-1013 [approving rule prohibiting picketing that would block the flow of traffic into the store and create congestion near the exit]; *Savage*, *supra*, 223 Cal.App.3d at pp. 1570-1571, 1574 [in addition to being content-neutral, a parking lot ban is narrowly tailored to permit the free flow of traffic and ensure personal safety]; *Diamond I*, *supra*, 3 Cal.3d 665; *Lushbaugh v. Home Depot U.S.A., Inc.* (2001) 93 Cal.App.4th 1159, 1169-1170.)

b. Limitations on days

Foods Co's Rules 8(b)[36] and 8(c),[37] which prohibit all activity on the days preceding major holidays and during the shopping equivalent of rush hour, are content-neutral legitimate crowd-control regulations adopted for the safety of Foods Co's customers and to assure their convenience during peak hours and on peak shopping days. (JA 259; *Costco*, *supra*,

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[36] "Activity shall not occur during the following time periods: any day of the week that precedes the following holidays: Martin Luther King Day, President's Day, Easter, Memorial Day, Fourth of July, Labor Day and Halloween or on days when the store uses the area for sales activities." (JA 46.)

[37] "Activity shall not occur on Sunday through Friday between the hours of 11:00 a.m. and 1:30 p.m. or 4:00 p.m. and 7:00 p.m. Activity on Saturdays may occur between the hours of 9:00 a.m. until 6:00 p.m." (JA 46.)

96 Cal.App.4th at pp. 746, 753 [approving a regulation protecting the store's substantial interests in the smooth operation of its business on 34 of the busiest days of the year, and holding that courts must give some deference to the means chosen by a responsible decision-maker]; *UNITE*, *supra*, 56 Cal.App.4th at pp. 1004-1005, 1013-1014 [approving rules limiting number of consecutive days, prohibiting all expressive activities on 30 days during each year]; and see *International Society for Krishna Consciousness v. City of Los Angeles*, *supra*, 48 Cal.4th at pp. 457-458.)

c. Limitation on number of people.

Foods Co Rule 7,[38] a limitation on the number of people who may solicit at any one time, is a reasonable effort to protect Foods Co's customers from the congestion that would otherwise occur as they enter and leave the store. (JA 259.) This content-neutral regulation provides reasonable access to the Union, and no more is required. (*UNITE*, *supra*, 56 Cal.App.4th at p. 1012.)

[38] "No more than two persons from any group or organization may solicit at one time. If more than two people seek to use the available space, people will be asked to leave in the reverse order of their arrival." (JA 46.)

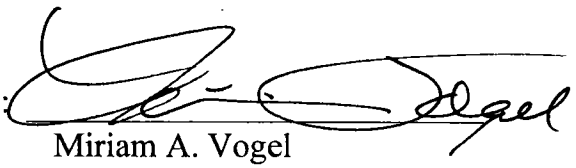
CONCLUSION

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

Dated: January 26, 2011

Respectfully submitted,

MORRISON & FOERSTER LLP

By: 
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CERTIFICATE OF COMPLIANCE

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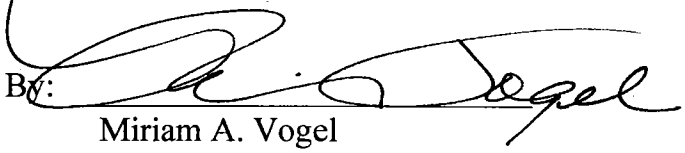
By: 

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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 28th day of January, 2010.

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