No. 12-1162

In The
Supreme Court of the United States

RALPHS GROCERY COMPANY,

Petitioner,

v.

UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 8,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

AMICUS BRIEF OF THE CALIFORNIA GROCERS ASSOCIATION, CALIFORNIA HOSPITAL ASSOCIATION, CALIFORNIA ASSOCIATION OF HEALTH FACILITIES, ASSOCIATED BUILDERS AND CONTRACTORS, AND COALITION FOR A DEMOCRATIC WORKPLACE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATUTES

OTHER AUTHORITIES

The California Grocers Association, California Hospital Association, California Association of Health Facilities, Associated Builders and Contractors, and Coalition for a Democratic Workplace respectfully submit this brief as amici curiae in support of petitioners.[1]

INTEREST OF THE AMICI CURIAE

The California Grocers Association ("GCA") is a nonprofit trade association serving national, statewide and independent companies in the grocery industry throughout California. CGA's members range from the largest supermarkets to the smallest convenience stores, and include grocery manufacturers, wholesalers and suppliers. CGA has approximately 500 retail members operating more than 6,000 stores in the state, representing approximately 90 percent of the grocery business in California. CGA actively promotes the legislative and regulatory interests of the retail food industry.

[1] Pursuant to Rule 37.2(a), the parties' counsel of record were notified ten days prior to the due date of the intention to file this brief. Copies of letters consenting to the filing of this brief by the parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

The California Hospital Association ("CHA") represents the interests of hospitals, health systems and other healthcare providers in California. CHA includes over 400 hospital and health system members. CHA's mission is to improve healthcare quality, access and coverage, and create a legal and regulatory environment that supports high-quality, cost-effective healthcare services. Consistent with that mission, CHA consults on issues that affect the healthcare industry and advocates on behalf of hospitals, health systems and other healthcare providers.

The California Association of Health Facilities ("CAHF") is a nonprofit association representing approximately 1,600 licensed skilled nursing, intermediate care, intermediate care for developmental disabilities, institutes for mental health and subacute facilities in the State of California. CAHF's mission is to provide leadership, advocacy and education for long-term healthcare professionals who serve the needs of California residents. CAHF provides a statewide policy perspective on behalf of California's long-term care providers.

Associated Builders and Contractors ("ABC") is a national association that advances and defends the principles of the merit shop in the construction industry. ABC represents over 22,000 merit shop and construction-related firms nationwide, including five chapters in California with more than 1,200 members. ABC supports legislation in the areas of labor relations and employment that is fair for both employers and employees.

Coalition for a Democratic Workplace ("CDW") is a national coalition of more than 600 associations, employers and organizations. CDW represents numerous California employers and associations in the restaurant, hotel, retail, construction, manufacturing and hospital industries on traditional labor law issues. CDW advocates for its members on a number of labor issues including the protection of employers from union trespassing on their private property.

Accordingly, the amici, and their members, have a substantial interest in the outcome of this case.

SUMMARY OF ARGUMENT

This Court's review is urgently needed to resolve a conflict in the courts created by the erroneous decision of the California Supreme Court on an issue of great significance to the broad spectrum of industries represented by the amici.

The amici respectfully request that this Court grant the petition for writ of certiorari for two important reasons. First, review is necessary because the Moscone Act and Labor Code Section 1138.1 violate the First and Fourteenth Amendments by distinguishing between labor picketing and other types of picketing on private property. The California Supreme Court's decision conflicts with decisions of this Court, and a D.C. Circuit decision, regarding the constitutionality of the California statutes at issue in this case.

Second, the California Supreme Court's decision, and the Moscone Act and Labor Code Section 1138.1, infringe on constitutionally protected property rights by making it impossible for private property owners to place any restrictions on labor related speech.

ARGUMENT

I. THE PETITION SHOULD BE GRANTED TO RESOLVE A CONFLICT IN THE COURTS ON AN ISSUE OF GREAT PUBLIC IMPORTANCE TO MANY DIFFERENT INDUSTRIES.

The decision of the California Supreme Court significantly impacts not only thousands of grocery stores and other retail businesses, but also healthcare facilities, hotels, restaurants, construction companies, and other California employers. Absent review and reversal by this Court, the decision will allow labor unions to ignore the common law of trespass applicable to all other individuals and organizations in the state. Under the laws upheld by the California Supreme Court, injunctive relief is unavailable to employers against union agents trespassing on their private property. Furthermore, labor unions successfully carved out exemptions from the criminal statutes, which permit them to trespass on private

property with impunity, and immunize them from law enforcement by the police.[2]

As a result of this privileged status, union picketers, handbillers and organizers have become extremely aggressive about invading private property to engage in their activities. They ignore security officer warnings and, if not impeded by physical barriers, treat the property of employers – including the interior premises of healthcare facilities – as public property they can roam at will. Moreover, when strikes occur in the grocery business, union picketers and demonstrators invade the store's property in large numbers, harass customers as they arrive, erect human barricades in front of store entrances, stand in front of large trucks to block ingress and back up traffic in the streets. Similar disruptive tactics impinge on the ability of the other industries represented by the amici to do business, including hospitals, hotels, and construction firms. The police believe they are unable to prevent this conduct and provide no protection.[3]

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[2] See Cal. Pen. Code §§552.1-555.5, 602, 602.1 (West 2011). The California criminal trespass statutes are not at issue in this case.

[3] For instance, the Los Angeles Police Department Manual addresses labor activities. Section 460.30, "Enforcement of Laws at Labor Disputes," states that " . . . individual unlawful acts, properly the subject of law enforcement response may not necessarily warrant stopping an ongoing labor related activity." Los Angeles Police Department, *LAPD Manual*, Volume 1, Section 460.30, *available at* http://www.lapdonline.org/lapd_manual/.

In virtually any other state, courts would easily enjoin this egregious conduct. Due to California's discrimination in favor of expressive activities by labor unions, as demonstrated by this case, courts routinely deny injunctive relief. This state-sponsored discrimination conflicts with the jurisprudence of this Court and the D.C. Circuit. Granting of the petition is urgently requested of this Court to remedy the onerous effects of the California court's decision, for the reasons further explained below. In addition, this relief is needed to prevent California's discriminatory approach from spreading to other states.

II. REVIEW IS NECESSARY BECAUSE THE MOSCONE ACT AND LABOR CODE SECTION 1138.1 VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Shortly after Ralphs opened its grocery store in Sacramento, California, United Food and Commercial Workers Union Local 8 ("Union" or "Respondent") began picketing at the store's entrance. The picketing continued for several years, five days a week, eight hours a day. The California Supreme Court held that the apron area in front of the store's entrance was private property, rather than a public forum, and, therefore, the California Constitution does not compel Ralphs to allow expressive activities in that area.

However, that Court held that the union's picketing on the employer's private property enjoyed

California statutory protection. The Court reasoned that two California state statutes, the Moscone Act, and California Labor Code Section 1138.1, protect the Union's expressive activity on private property because the content of the expressive picketing was labor related. Cal. Code Civ. Pro. §527.3 and Cal. Labor Code §1138.1 (West 2011). Although Ralph's could legally exclude all other kinds of expressive activities, including political, religious and social activities, the Court held that the statutory exclusion of labor related activities did not violate the U.S. Constitution.

This California Supreme Court decision conflicts with a D.C. Circuit decision. In *Waremart Foods*, the D.C. Circuit found California's Moscone Act unconstitutional because it gave the union special protection to engage in expressive activities on a stand-alone store's private property. *Waremart Foods v. NLRB*, 354 F.3d 870 (D.C. Cir. 2004). This conflict between the California Supreme Court and the D.C. Circuit raises the issue of whether California's Moscone Act and California Labor Code Section 1138.1 violate the federal Constitution. This decision puts "California on a collision course with the federal courts" that "only the United States Supreme Court can definitively resolve." *Ralphs v. United Food & Commercial Workers Local 8*, 55 Cal.4th 1083, 1123 (2012) (Chin, C.J., dissenting).

A. California Law Generally Restricts Picketing on Private Property and Provides Injunctive Relief Against Persons Who Invade Private Property to Engage in Picketing.

The law of trespass is generally available to private property owners in California. Under the common law of California, an unauthorized entry onto private property is a tort of trespass. This invasion is an intentional tort, regardless of the person's motivation or unlawful intent. *Miller v. National Broadcasting Co.*, 187 Cal.App.3d 1463, 1480-1481 (2nd Dist. 1986); *Bauman v. Beaujean*, 244 Cal.App.2d 384, 389 (5th Dist. 1966).[4]

California restricts the exercise of free speech on private property by allowing the owner to exclude other persons from trespassing on its property. This right to exclude other persons is a fundamental aspect of private property ownership in California. *Allred v. Harris*, 14 Cal.App.4th 1386, 1390 (4th Dist. 1993). Injunctive relief is the appropriate remedy against continuing trespass or threatened repeated

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[4] An exception to this general rule applies in the case of expressive activities on the private property of a shopping center that possesses the characteristics of a public forum. *Robins v. PruneYard Shopping Center*, 23 Cal.3d 899 (1979) affd. sub nom. *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). However, to be a public forum, "an area within a shopping center must be designed and furnished in a way that induces shoppers to congregate for purposes of entertainment, relaxation, or conversation." *Ralphs*, 55 Cal.4th at 1096.

acts of trespass. *Allred*, 14 Cal.App.4th at 1390; *Uptown Enterprises v. Strand*, 195 Cal.App.2d 45, 52 (4th Dist. 1961). In the case of intentional trespass, a court cannot deny a mandatory injunction and has no right to balance the convenience of the parties. *Strodel v. Wilcox*, 137 Cal.App.2d 781, 785 (2nd Dist. 1955).

Accordingly, California courts routinely grant injunctions to prevent expressive activities, such as solicitation of signatures or donations, on private property. *Albertson's, Inc. v. Young*, 107 Cal.App.4th 106 (3rd Dist. 2003); *Trader Joe's Co. v. Progressive Campaigns, Inc.*, 73 Cal.App.4th 425 (1st Dist. 1999); *Bank of Stockton v. Church of Soldiers of the Cross*, 44 Cal.App.4th 1623 (3rd Dist. 1996) rev'd in part on other grounds, 107 Cal.App.4th 106, 124. Injunctions are also routinely granted when picketing occurs on private property. *Allred*, 14 Cal.App.4th at 1393; *Feminist Women's Health Center v. Blythe*, 32 Cal.App.4th 1641 (3rd Dist. 1995); *Allred v. Shawley*, 232 Cal.App.3d 1489 (4th Dist. 1991); *Planned Parenthood v. Wilson*, 234 Cal.App.3d 1662 (4th Dist. 1991).

B. California's Statutes Discriminatorily Distinguish Between Labor Picketing and Other Picketing on Private Property.

Despite making general trespass laws available to private property owners, California carves out an exception for labor disputes. The Moscone Act provides

that "[p]eaceful picketing or patrolling involving any labor dispute" shall be legal. Cal. Code Civ. Proc. §527.3(b). The courts retain no jurisdiction to "issue any restraining order or preliminary or permanent injunction" prohibiting peaceful labor dispute picketing on private property. *Ibid.* The Moscone Act protects labor related speech on private property and precludes property owners from seeking injunctive relief based solely on the content of the picketers' speech.

Similarly, California Labor Code Section 1138.1 effectively prevents courts from granting injunctive relief "in any case involving or growing out of a labor dispute." A court may issue an injunction in a labor-related dispute only after holding a hearing, hearing live testimony, and making specific findings. Cal. Labor Code §1138.1(a).[5] Those findings must include that unlawful acts, other than trespass, have been threatened, the complainant's property will suffer substantial and irreparable injury, and the police are unable or unwilling to furnish adequate protection. Cal. Labor Code §1138.1(a)(1),(2),(5). California only imposes these additional procedural requirements on

[5] The restrictions imposed by this statute are not limited to Section 1138.1. Sections 1138.2 and 1138.3 impose additional requirements on an employer seeking injunctive relief against union trespassing and Section 1138 provides special protection against a remedy for union officers and members. See Ca. Labor Code §§1138, 1138.1, 1138.2, 1138.3 (West 2011). The entire statute is unconstitutional in its application to trespassing by labor unions on private property.

injunctions regarding labor disputes. The additional hurdles are an "impediment designed to prevent the owner . . . of real property from obtaining an injunction in a labor dispute" and forces a private property owner to provide a forum for speech with which the owner disagrees. *Ralphs*, 186 Cal.App.4th at 1100.

C. The California Supreme Court's Decision Conflicts with this Court's Determination that a Government May Not Distinguish Between Labor Picketing and Picketing for Other Purposes.

This Court has repeatedly and unambiguously declared that a state government may not distinguish between labor picketing and picketing for other purposes. In the realm of private speech or expression, government regulation may not favor one speaker over another. The government must abstain from regulating speech when the specific motivating ideology forms the rationale for the restriction. Discrimination against speech because of its message is presumed to be unconstitutional. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) (citations omitted).

This prohibition extends to regulations favoring labor related speech. In *Mosley*, this Court held that a city ordinance prohibiting all picketing within 150 feet of a school, but exempting peaceful labor dispute picketing of a school, violated both the First Amendment and the Equal Protection Clause of the Fourteenth

Amendment. U.S. CONST. amend. I, XIV; *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972).

This Court found the ordinance unconstitutional because it "makes an impermissible distinction between labor picketing and other peaceful picketing." 408 U.S. at 94. The Court concluded that the central problem with the ordinance was that it described permissible picketing in terms of its subject matter. " . . . [U]nder the Equal Protection Clause, not to mention the First Amendment itself, 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 96.

In *Carey v. Brown*, this Court found an Illinois statute that prohibited picketing of residences or dwellings, but exempted peaceful labor dispute picketing at a place of employment, unconstitutional. *Carey v. Brown*, 447 U.S. 455 (1980). This statute was "constitutionally indistinguishable from the ordinance invalidated in *Mosley*." It "discriminates between lawful and unlawful conduct based upon the content of the demonstrator's communication." *Id.* at 460. Accordingly, the Court ruled the statute was unconstitutional under the First and Fourteenth Amendments.

The State of Illinois argued that an exemption for labor picketing was justified by the state's interest in providing protection for labor protests. The Court

concluded this argument was flawed because the central tenet was 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." *Id.* at 466.

The *Mosley* and *Carey* decisions reflect the general hostility to content based regulations by this Court. See also *R.A.V. v. St. Paul*, 505 U.S. 377, 386 (1992); *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622, 642 (1984). In *Waremart Foods*, the D.C. Circuit relied on *Mosley* and *Carey* to find that the Moscone Act's discriminatory protection of labor speech violated the U.S. Constitution. 354 F.3d 870. This decision conflicts with the California Supreme Court's decision in this case.

The California Supreme Court decision, and the California statutes, create unconstitutional content based regulation of speech by permitting labor unions to picket on private property while prohibiting the same type of picketing by advocates of economic, social and political causes. California law makes private property available for labor union activities, but not for political groups soliciting signatures, war protesters, environmental advocates, abortion protestors, religious groups soliciting donations, or any other individual in California. In making this distinction, California discriminates in favor of labor picketing because it "presupposes that labor picketing is more deserving of First Amendment protection than are public protests over other issues." *Carey*, 447 U.S. at 464. This decision creates a conflict between

federal and state decisions that only this Court can resolve.

The California Supreme Court also noted that Labor Code Section 1138.1 was consistent with the federal Norris-LaGuardia Act. *Ralphs*, 55 Cal.4th at 1102. However, the decision mischaracterizes the nature of the Norris-LaGuardia statute. The purpose of the statute was to protect the rights of unions to engage in expressive activity to the same extent as all other citizens, not to grant labor unions an exclusive forum for picketing on private property. See legislative history discussion in *National Woodwork Manufacturers Assn. v. NLRB*, 386 U.S. 612, 620 (1967).

III. THE CALIFORNIA SUPREME COURT DECISION, AND THE MOSCONE ACT AND LABOR CODE SECTION 1138.1, INFRINGE ON CONSTITUTIONALLY PROTECTED PROPERTY RIGHTS.

As the petitioner points out, the California Supreme Court's decision "eviscerates Ralph's constitutionally protected right to exclude others from its private property and to refuse to host expressive activity with which it disagrees." The Moscone Act infringes on property rights protected by the Fifth and Fourteenth Amendments to the United States Constitution. U.S. CONST. amend. V, XIV. In addition, California Labor Code Section 1138.1, which protects union picketing on private property by making it almost impossible to obtain an injunction against

labor activity, also infringes on these constitutional property rights.

In *Lloyd Corp. v. Tanner*, this Court decided that the Fifth and Fourteenth Amendment rights of shopping center owners outweighed the First Amendment rights of all citizens. *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972). The Court noted the importance of the Fifth Amendment, which provides that "no person shall . . . be deprived of life, liberty, or property, without due process of law." The Fifth amendment also includes a proscription against the taking of "private property . . . for public use, without just compensation." *Id.* at 567.

Requiring a private property owner to yield to the First Amendment, when other avenues of communication exist, would be an "unwarranted infringement" of property rights. *Ibid.* Property does not lose its private character merely because the public is generally invited for designated purposes. "Few would argue that a free-standing store, with abutting parking spaces for customers, assumes significant public attributes merely because the public is invited to shop there." *Id.* at 569-570.

In a companion case, *Central Hardware Co. v. NLRB*, this Court held that the First Amendment did not protect solicitation by union organizers on private property of a retail store. *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972). The Court rejected an argument that the parking lots acquired the characteristics of a public municipal facility because they

were open to the public. This argument "could be made with respect to almost every retail and service establishment in the country, regardless of size or location" and constitutes an unwarranted infringement of constitutionally protected private property rights. *Id.* at 547.

In *Hudgens*, this Court held that the First Amendment did not require union access to a shopping center. Requiring store owners to supply picketing areas for pickets to drive customers away completely disregarded the constitutional basis of private property ownership. *Hudgens v. NLRB*, 424 U.S. 507, 517 (1976).

These property rights are not absolute. In *PruneYard*, this Court found that the California Constitution could create a broader free speech right than the federal Constitution. *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). However, the Court limited its decision to the specific facts of that case. The shopping center was a large commercial complex that covered several city blocks, contained 75 separate business establishments and was open to the public at large. 25,000 people a day congregated daily at the shopping center. *Id.* at 78.

Accordingly, *PruneYard* did not overrule the precedent established by *Lloyd*, *Central Hardware* and *Hudgens*. The precedent established by these cases recognizes the long settled private property rights protected by the Fifth and Fourteenth Amendments. That precedent remains in effect and has never been

questioned by this Court. No decision of this Court suggests that this precedent is inapplicable to an individual retail store, such as the stand alone grocery store in this case.

Furthermore, the economic impact of the union's picketing of Ralphs far exceeded the expressive activity in *PruneYard*. *PruneYard* involved occasional peaceful collection of signatures on petitions. More importantly, the collection of signatures never directly impacted business at one store.

In Ralphs' case, the union picketed only one store with the express intent of persuading customers to not shop at that store. The picketing continued most days of the week for several years. The picketing took place on the private apron in front of the store's entrance and interfered with customer access to that store. This expressive activity varies greatly from gathering occasional signatures at a single table in a common area servicing 75 stores. This picketing was "designed to convey information with respect to the operation of the store that was being picketed" and constitutes an unwarranted infringement on property rights. *Id.* at 90 (Marshall, J., concurring).

The California Supreme Court correctly determined that the apron area in front of Ralphs' store was private property. *Ralphs*, 55 Cal.4th at 1096. However, the Court concluded that California law protects the right to engage in labor speech on private land in front of a business subject to a labor dispute. The decision labels Ralphs' entrance apron area

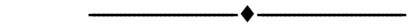
private property, but gives it all the free speech attributes of public property.

The decision restricts the individual property owner's rights more than those of the large shopping center. Although large shopping centers possess a semi-public nature, they may "restrict expressive activity by adopting time, *place*, and manner regulations that will minimize any interference with its commercial functions." *PruneYard*, 447 U.S. at 83.

Ralphs attempted to apply its picketing prohibitions and restrictions to the union activities on its private property. The Supreme Court's decision, which held that the Moscone Act and Section 1138.1 bar injunctive relief for labor activities, makes it practically impossible for the private property owner to apply **any** restrictions on labor related speech. However, this decision forces "the 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." *Ralphs v. United Food & Commercial Workers Local 8*, 186 Cal.App.4th 1078, 1100 (3rd Dist. 2010) (citations omitted).

PruneYard does not stand as a "blanket approval for state efforts to transform privately owned commercial property into public forums. Any such state action would raise substantial federal constitutional questions . . . " *PruneYard*, 447 U.S. at 101 (Powell, J., White, J., concurring). This California Supreme Court decision effectively transforms private, standalone California businesses into a public forum

for labor activities, with less protection than large shopping centers taking on the characteristics of a public forum. Therefore, the Moscone Act, and California Labor Code Section 1138.1, constitute unwarranted infringements on private property rights protected by the Fifth and Fourteenth Amendments to the United States Constitution.[6]



[6] The California Supreme Court concluded that the Moscone Act and Labor Code Section 1138.1 were not preempted by the National Labor Relations Act ("NLRA"), but it applied the wrong preemption standard under the NLRA. 29 U.S.C. §§151-169 (West 2012). The California statutes are preempted under the *Machinists* doctrine because California has withdrawn the protection of the state trespass laws from employers in a labor dispute. *Machinists Lodge 76 v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 140 (1976); *Lividas v. Bradshaw*, 512 U.S. 107, 119, n. 13 (1994); *Rum Creek Coal Sales v. Caperton*, 31 F.3d 169 (4th Cir. 1994). See also *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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