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

BRIEF FOR UNITED STATES CHAMBER OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

KATE COMERFORD TODD
JANE E. HOLMAN
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062

WILLIS J. GOLDSMITH
Counsel of Record
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3939
wgoldsmith@jonesday.com

JACQUELINE M. HOLMES
JENNIFER BRADLEY LICHTER
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001

Counsel for Amicus Curiae

QUESTION PRESENTED

Whether California's Moscone Act (Cal. Civ. Proc. Code § 527.3) and Section 1138.1 of the California Labor Code violate the U.S. Constitution by forcing property owners to open private property to the expressive activities of others based on the content of theirspeech.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 5

I. THE CALIFORNIA SUPREME COURT'S DECISION PLAINLY CONTRADICTS THIS COURT'S DECISIONS FORBIDDING CONTENT-BASED SPEECH REGULATION 6

II. THE MOSCONE ACT'S SIMILARITY TO OTHER STATE STATUTES MAKES ITS PROPER INTERPRETATION A MATTER OF FUNDAMENTAL IMPORTANCE 13

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

CASES

Allred v. Harris,
14 Cal. App. 4th 1386 (Cal. Ct. App. 1993) 2

Anaconda Co. v. United Auto., Aerospace & Agric. Implement Workers of Am.,
382 A.2d 544 (Conn. Super. Ct. 1977) 18

Bhd. of R.R. Trainmen v. Chicago River & Ind. R.R. Co.,
353 U.S. 30 (1957) 18

Boys Markets, Inc. v. Retail Clerks Union,
398 U.S. 235 (1970) 18

Carey v. Brown,
447 U.S. 455 (1980) ..... *passim*

City of Watseka v. Ill. Pub. Action Council,
796 F.2d 1547 (7th Cir. 1986) 10

Greer v. Spock,
424 U.S. 828 (1976) 10

Hudgens v. NLRB,
424 U.S. 507 (1976) 7, 10

Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Assoc.,
457 U.S. 702 (1982) 15

Lechmere, Inc. v. NLRB,
502 U.S. 527 (1992) 9

Matson Nav. Co. v. Seafarers Int'l Union of N. Am.,
100 F. Supp. 730 (D. Md. 1951) 17

Nollan v. Cal. Coastal Comm'n,
483 U.S. 825 (1987) 10

TABLE OF AUTHORITIES
(continued)

Page(s)

Perry Education Association v. Perry Local Educators' Association,
460 U.S. 37, 55 (1983) 11

Police Dep't of Chicago v. Mosley,
408 U.S. 92 (1972) ..... *passim*

R.A.V. v. St. Paul,
505 U.S. 377 (1992) 8

Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8,
290 P.3d 1116 (Cal. 2012) ..... *passim*

Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters,
436 U.S. 180 (1978) 10

Senn v. Tile Layers Protective Union,
301 U.S. 468 (1937) 18

Sorrell v. IMS Health Inc.,
131 S. Ct. 2653 (2011) 9

Waremart Foods v. NLRB,
354 F.3d 870 (D.C. Cir. 2004) 5, 12, 17

Wooley v. Maynard,
430 U.S. 705 (1977) 9

STATUTES

59 Cal. Jur. 3d Trespass to Realty § 4..... 2

Ca. Civ. Prac. Real Property Litigation § 26:14..... 2

California Labor Code, Section 1138.1 ..... *passim*

Moscone Act, Cal. Civ. Proc. Code § 527.3 ..... *passim*

Norris-LaGuardia Act,
29 U.S.C. § 101 *et seq.*..... *passim*

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

75 Cong. Rec. 187 (1932) 15, 16

Douglas E. Ray, Christopher David Ruiz Cameron, William R. Corbett, *Labor-Mgmt Rel.: Strikes, Lockouts and Boycotts* (2d ed. 2004).....13, 14

S. Rep. No. 163 .....15, 16

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") respectfully submits this brief as *amicus curiae* in support of the Petition for Certiorari.

As the world's largest business federation, the Chamber of Commerce of the United States of America (the "Chamber") represents 300,000 direct members and indirectly represents an underlying membership of more than three million U.S. businesses and organizations of every size, in every business sector, and from every region of the country. An important function of the Chamber is to represent its members' interests in matters before Congress, the Executive Branch, and the courts, including this Court.

The Chamber has a direct and substantial interest in the important question presented in this case, namely, whether labor picketers may persist in demonstrating on the privately-owned property of a business, against the express wishes of the business owner and in contravention of the normally applicable law of trespass. The Chamber encourages this Court to clarify that content-based protections

---

[1] Pursuant to Rule 37.6, *amicus curiae* and its counsel state that none of the parties to this case nor their counsel authored this brief in whole or part, and that no person other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. *Amicus curiae* files this brief with the written consent of all parties, copies of which are on file in the Clerk's Office. All parties received timely notice of *amicus*'s intention to file this brief.

for labor speech are impermissible, and in doing so to protect the right of businesses to obtain injunctions against trespassory picketers, no matter the content of their complaints.

STATEMENT OF THE CASE

1. As explained in more detail in the Petition for Certiorari, Ralphs owns and operates a grocery store in Sacramento, California, called Foods Co, that was picketed by the United Food and Commercial Workers Union Local 8 ("the Union") for forty hours per week beginning shortly after the date it opened. After the Union protesters refused to abide by Ralphs' rules governing expressive activity on Foods Co premises, and law enforcement declined to intervene, Ralphs brought a trespass action in California state court seeking declaratory and injunctive relief.

2. Normally, persistent, disruptive presence on private property against the express wishes of the owner would unquestionably constitute a trespass under California law. *See* 59 Cal. Jur. 3d Trespass to Realty § 4 ("The essence of the cause of action for trespass is an unauthorized entry onto the land of another."); Cal. Civ. Prac. Real Property Litigation § 26:14 ("Trespass is an unauthorized or wrongful entry or intrusion onto land owned or occupied by another that disrupts the other's right to exclusive possession of the land.") And normally an injunction would issue in response to a store owner's complaint of trespass on its property. *See Allred v. Harris*, 14 Cal. App. 4th 1386, 1390 (Cal. Ct. App. 1993) ("An injunction is an appropriate remedy for a continuing

trespass.") [2] But in response to Ralphs' lawsuit, the Union argued that California's Moscone Act, [3] Cal.

---

[2] These principles apply with equal force to Foods Co because, as the California Supreme Court held, although it is open to public, Foods Co and the outdoor area adjacent to it do not constitute a public forum. *See Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8*, 290 P.3d 1116, 1121 (Cal. 2012).

[3] The Moscone Act states, in relevant part:

> (b) The acts enumerated in this subdivision, whether performed singly or in concert, *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, whether singly or in concert, from doing any of the following:
>
> (1) Giving publicity to, and obtaining or communicating information regarding the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, or by any other method not involving fraud, violence or breach of the peace.
>
> (2) Peaceful picketing or patrolling involving any labor dispute, whether engaged in singly or in numbers.
>
> (3) Assembling peaceably to do any of the acts specified in paragraphs (1) and (2) or to promote lawful interests.

(emphasis added).

It goes on to say that "[i]t 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." § 527.3(e).

Civ. Proc. Code § 527.3, and Section 1138.1 of the California Labor Code,[4] protected its labor picketing activity and barred the trial court from issuing an injunction. The key question in the litigation thus became whether these two state laws are valid.

The trial court held the Moscone Act unconstitutional, holding that the special protections it provides to speech related to labor disputes violates the First Amendment and the Equal Protection Clause of the U.S. Constitution. The trial court opined that Section 1138.1, too, violated the Constitution, but it could not rule accordingly because of a contrary binding decision of the California Court of Appeal. After an evidentiary hearing, it denied Ralphs' request for an injunction.

3. The Court of Appeal reversed the trial court's refusal to grant the injunction, holding both the Moscone Act and Section 1138.1 unconstitutional. It read this Court's decisions in *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972), and *Carey v. Brown*, 447 U.S. 455 (1980), to require that laws treating picketing differently based on the content of the picketers' message must be struck down. In reaching this result, the court expressly overruled its previous decision that had required the trial court to uphold Section 1138.1. The Court of Appeal remanded to the trial court with instructions that it grant the injunction.

---

[4] Section 1138.1 instructs that "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," unless and until certain specified procedural and evidentiary requirements have been met.

4. The California Supreme Court reversed the Court of Appeal's decision. Importantly, it first held that the area in front of Foods Co is not a public forum. Nonetheless, it applied the two statutes to shield labor-related picketing activity on private property from judicially-imposed injunction, holding that neither statute violated the First or Fourteenth Amendments. The court distinguished *Mosley* and *Carey* because, in its view, those decisions were inapplicable to speech that occurs on private property.

Justice Chin dissented from the majority's holding on the constitutionality of the Moscone Act and Section 1138.1. He aligned himself with the D.C. Circuit's 2004 decision *Waremart Foods v. NLRB*, 354 F.3d 870 (D.C. Cir. 2004), in which that court invoked *Mosley* and *Carey* to hold that the Moscone Act constituted unconstitutional content-based discrimination.

5. Ralphs timely filed a petition for a writ of certiorari in this Court on March 25, 2013. *Amicus* joins Ralphs in urging the Court to review this important case.

REASONS FOR GRANTING THE PETITION

The California Supreme Court's decision is both significant and incorrect. It is incorrect because it dismisses the core principle at the heart of *Mosley* and *Carey*: Not even the state's "commendable" interest in protecting labor picketers can justify content-based regulation of speech, as "even the most legitimate goal may not be advanced in a constitutionally impermissible manner." *Carey*, 447 U.S. at 464-65, 467. This Court should grant certiorari to clarify that states may not give special

protection to speech that would otherwise be unlawful, based solely on its content.

The California Supreme Court's incorrect decision may have far-reaching consequences. A number of states have enacted statutes similar to California's Moscone Act. (These statutes are sometimes called "Little Norris-LaGuardia Acts," because they are patterned after the federal Norris-LaGuardia Act, 29 U.S.C. §§ 104, 107.) If the California Supreme Court's decision stands, it will signal to state court interpreters of those other, similar, statutes that content discrimination is acceptable when organized labor is the beneficiary. To avoid widespread violations of the First Amendment and discourage other states from following California's lead, this Court should make clear that California's application of its version of the Norris-LaGuardia Act is not permitted under the Constitution.

I. THE CALIFORNIA SUPREME COURT'S DECISION PLAINLY CONTRADICTS THIS COURT'S DECISIONS FORBIDDING CONTENT-BASED SPEECH REGULATION.

The California Supreme Court was wrong to dismiss two decisions of this Court striking down state statutes that favored labor speech—*Mosley*, 408 U.S. 92, and *Carey*, 447 U.S. 455—as distinguishable. *See Ralphs Grocery Co. v. United Food & Comm. Workers Union Local 8*, 290 P.3d 1116, 1126-27 (Cal. 2012). To the contrary, as Ralphs has argued persuasively in its Petition, *Mosley* and *Carey* speak directly to the issues in this case.

The key driving principle behind both *Mosley* and *Carey* is that a government may not privilege labor speech over other types of speech. In both cases, a single law (i) forbade picketing in a certain place generally, and (ii) exempted labor-related picketing specifically. *See Mosley*, 408 U.S. at 93 (City of Chicago ordinance forbade picketing within 150 feet of a school, but exempted picketing at any school involved in a labor dispute); *Carey*, 447 U.S. at 457 (Illinois state statute forbade picketing of private residences, unless that residence is a place of employment involved in a labor dispute). And in both cases, this Court held the laws at issue unconstitutional. *See Mosley*, 408 U.S. at 102; *Carey*, 447 U.S. at 471. Both holdings rested on the Equal Protection Clause, but as Justice Stewart recognized in his *Carey* concurrence, "what was actually at stake" in the two cases "is the basic meaning of the constitutional protection of free speech[.] . . . '[W]hat a municipality may *not* do under the First and Fourteenth Amendments is to discriminate in the regulation of expression on the basis of the content of that expression.'" 447 U.S. at 471-72 (Stewart, J., concurring) (quoting *Hudgens v. NLRB*, 424 U.S. 507, 520 (1976)).

The California Supreme Court attempted to distinguish these cases on two bases. First, it explained that while *Mosley* and *Carey* invalidated restrictive laws, "invalidating here the Moscone Act and section 1138.1 would not remove any restrictions on speech or enhance any opportunities for peaceful picketing or protest anywhere." 290 P.3d at 1126. "This is because," said the court, "neither the Moscone Act nor section 1138.1 abridges speech." *Id.*

While this description is true as far as it goes, it betrays a myopic reading of this Court's cases that ignores the plain similarities between the government actions at issue in *Mosley* and *Carey* and those under consideration here. In *Mosley* and *Carey*, a single law forbade picketing under certain circumstances and then created a carve-out for labor. In California, the type of picketing in which the Union engaged at Ralphs' Foods Co store is forbidden by the common law of trespass; the challenged laws operate against that backdrop to exempt labor-related picketing from the general prohibition. The *form* of California's legal regime may differ from those struck down in *Mosley* and *Carey*, but the *function* of the Moscone Act, supported by Section 1138.1, is identical to the carve-outs for labor picketing held unconstitutional by this Court. And in any case, the First Amendment prohibits government regulation based on "favoritism" towards a particular message just as much as it prohibits regulations based on "hostility" to the content of regulated speech. *See R.A.V. v. St. Paul*, 505 U.S. 377, 386 (1992).

The second basis on which the California Supreme Court distinguished *Mosley* and *Carey* is that the picketing at issue here occurred on the privately-owned walkway in front of the Foods Co store, while "[t]he high court's decisions in *Mosley* and *Carey* both involved speech on public streets and sidewalks, which are public forums under the federal Constitution's First Amendment." 290 P.3d at 1126. For this reason, the court declared, "the holdings in *Mosley* and *Carey* do not apply." *Id.* at 1127.

Here, too, the California Supreme Court erred. Regardless of where the regulated activity takes place, the *state action* under review in each case is the same. This Court's description of the law it struck down in *Carey* applies equally here: "On its face, the Act accords preferential treatment to the expression of views on one particular subject". 447 U.S. at 460-61.

Moreover, in its haste to grasp at any basis on which to distinguish *Mosley* and *Carey*, the California Supreme Court has advanced a principle that is plainly wrong: It suggests that the state has *greater* authority to regulate speech based on content when the speech occurs on purely private property than when it takes place on public land. The equally faulty corollary to this principle is that private property owners must cede control of their property to the state when speech relating to certain state-valued topics is at issue. But that is simply not so. As this Court has declared, a State's interest in promoting an ideology, "no matter how acceptable to some, . . . cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *See Wooley v. Maynard*, 430 U.S. 705, 717 (1977); *see also Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2671 (2011) ("The State may not burden the speech of others in order to tilt public debate in a preferred direction.").

This Court has repeatedly affirmed, in a variety of contexts, that private property owners have a right to maintain control over the use of their property. *See, e.g.*, *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539-41 (1992) (NLRA does not confer a right on nonemployee organizers to trespass on

privately-owned store property, absent exceptional circumstances); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987) ("the right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property." (internal quotation marks and citation omitted)); *Greer v. Spock*, 424 U.S. 828, 836 (1976) ("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." (internal quotation marks and citation omitted) (emphasis added)); *Hudgens*, 424 U.S. at 521 (picketers had no First Amendment right to enter a shopping center for the purpose of advertising their strike against a retail tenant); *see also City of Watseka v. Ill. Pub. Action Council*, 796 F.2d 1547, 1570 (7th Cir. 1986) (Coffey, J., dissenting) (concluding, after reviewing this Court's cases dealing with speech on private property: "In sum, *the private property owner has an absolute right to deny entry to would-be speakers unless the private property is dedicated to public use*." (emphasis in original)). And, to point to an analogous situation, this Court has recognized that federal labor law operates under a presumption *against* allowing trespassory organizational soliciting by nonemployees; a union's burden in overcoming this presumption "is a heavy one." *See Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 205 (1978). Therefore, the fact that speech occurs on an objecting private property owner's property cannot justify Government content-discrimination that would be impermissible if it took place on public property.

The California Supreme Court offered no reasoned justification for this conclusion. It invoked

this Court's statement, in *Perry Education Association v. Perry Local Educators' Association*, that "[t]he key to [*Mosley* and *Carey*] was the presence of a public forum." 460 U.S. 37, 55 (1983) (cited in 290 P.3d at 1127). But the venue at issue in *Perry* was a public school mail facility, and the question for the *Perry* Court was whether *Mosley* and *Carey* controlled when regulated speech took place on "[p]ublic property which is not by tradition or designation a forum for public communication." 460 U.S. at 46. The Court said no, distinguishing *Mosley* and *Carey* because "all parties have a constitutional right of access" to a public forum, while "[c]onversely, on government property that has not been made a public forum, not all speech is equally situated, and the State may draw distinctions which relate to the special purpose for which the property is used." *Id.* at 55.

Here, by contrast, the venue in question is not government-owned property at all, but privately-owned property that does not constitute a public forum. *See* 290 P.3d at 1121. And, unlike in *Perry*, the question for the Court is not whether an excluded speaker has a right of access to that land, but whether its private owner may exclude unwanted speakers even when their topic is of particular interest to the state. The *Perry* Court itself buttressed its decision that the government may exclude some speakers from state-owned property that does not qualify as a public forum by comparing its rights to those of private property owners. 460 U.S. at 46 (repeating the familiar principle that "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.").

In short, although *Mosley* and *Carey* addressed activity occurring in a public forum, as contrasted to government property that is not a public forum, that difference is not dispositive here. Indeed, this distinction says nothing about *Mosley* and *Carey*'s applicability to a state act of content-discrimination that grants some speakers the right to intrude on privately-owned property against the owner's wishes.

The D.C. Circuit agrees with Petitioner regarding *Mosley*'s and *Carey*'s impact on the constitutional validity of the Moscone Act. *Waremart*, 354 F.3d 870. In *Waremart*, that court held that "under California law, union organizers have no right to distribute literature on a stand-alone grocery store's private property." *Id.* at 871. It recognized that a previous California Supreme Court plurality opinion had read the Moscone Act to confer a right to engage in labor picketing on the private property outside a stand-alone store, but determined that "*Mosley* and *Carey* . . . render unconstitutional the principle on which [that] plurality based its decision." *Id.* at 875. In short, the D.C. Circuit concluded that special protection for labor-related speech was no longer viable after *Mosley* and *Carey*.

In its decision in this case, the California Supreme Court dismissed *Waremart* as wrongly decided on the same two bases discussed above. *See* 290 P.3d at 1127. This was wrong. The principles of *Mosley* and *Carey* compel the conclusion that the Moscone Act and Section 1138.1 violate the Constitution by granting rights to speakers with

labor-related messages that are unavailable to other speakers.

II. THE MOSCONE ACT'S SIMILARITY TO OTHER STATE STATUTES MAKES ITS PROPER INTERPRETATION A MATTER OF FUNDAMENTAL IMPORTANCE.

If not corrected, the California Supreme Court's decision could have repercussions that reach far beyond California. Although the Moscone Act is unusual in one crucial way, it is not entirely so. The Act's similarity to a number of other state statutes—all patterned to varying degrees on the federal Norris-LaGuardia Act—increases the importance of resolving this case in a manner consistent with the Constitution.

The California legislature did not create the Moscone Act out of whole cloth. Instead, the legislature patterned the Moscone Act after the Norris-LaGuardia Act, a federal statute enacted by Congress in 1932. *See* 29 U.S.C. §§ 101-115; *Ralphs*, 290 P.3d at 1122. A number of other states have also enacted limitations on the powers of the judiciary to enjoin labor-related activity.[5] These so-called "little

[5] *See, e.g.*, Colo. Rev. Stat. §§ 3-2-109, 8-3-118, 8-3-119; Conn. Gen. Stat. §§ 31-112 to 31-119; Haw. Rev. Stat. §§ 380-1 to 380-14; Idaho Code §§ 77-701 to 77-713; 820 ILCS 5/1; Ind. Code §§ 22-6-1-1 to 22-6-1-12; Kan. Stat. Ann. §§ 60-904 to 60-906, and §§ 60-909 to 60-910; La. Rev. Stat. Ann. §§ 23:821, 23:841 to 23:849; Me. Rev. Stat. Ann. tit. 26, §§ 1-5 to 1-7; Md. Ann. Code art. 100, §§ 63-74; Mass. Gen. Laws ch. 149, §§ 20B, 20C, 20E, 24 and ch. 214, §§ 1, 6, 6A; Minn. Stat. §§ 185.01-185.20; N.J. Stat. Ann. 2A.15-51 to 2A.15-58; N.M. Stat. Ann. §§ 50-3-1 to 50-3-2; N.Y. Lab. Law §§ 807-808; N.D. Cent. Code §§ 34-09-01 to 34-09-12; Or. Rev. Stat. §§ 662.010-662.130; Pa. Stat. Ann. tit. 43, §§ 206A-206Q; R.I. Gen. Laws §§ 28-10-1 to

Norris-LaGuardia Acts" all take their inspiration from the federal Act.

A ruling by this Court on the constitutionality of the Moscone Act would not necessarily implicate the similar federal and state statutes. But the possibility that this Court could, by correcting the California Supreme Court's constitutionally improper application of the Moscone Act, possibly prevent other judicial interpreters of similar statutes from interpreting those statutes as the California Supreme Court did here provides a compelling reason for this Court to grant review. Although a ruling by this Court that California's application of the Moscone Act is incorrect is not likely to endanger the proper application of these other statutes, permitting California's ruling to stand could have significant consequences in those states that may follow California's unconstitutional lead.

To be clear, a rejection by this Court of California's unconstitutional application of its Moscone Act will not diminish the effectiveness of the federal Norris-LaGuardia Act. First, the Moscone Act differs from the Norris-LaGuardia Act and its more faithful imitators in at least one crucial respect: The Moscone Act, unlike the Norris-LaGuardia Act, includes the blanket mandate that certain acts—including trespassory picketing,

(continued…)

28-10-4; Utah Code Ann. §§ 34-19-1 to 34-19-13; Wash. Rev. Code §§ 49.32.011 to 49.32.110; Wis. Stat. §§ 103.51-103.62; Wyo. Stat. Ann. §§ 27-7-101 to 27-7-107. (cited in *Labor-Mgmt Rel: Strikes, Lockouts and Boycotts* § 7:3 n.10).

according to the California Supreme Court's reading of the statute—"shall be legal." *See* Cal. Civ. Proc. Code § 527.3(b). This provision extends the scope of the Moscone Act beyond that of the Norris-LaGuardia Act. Indeed, there is no evidence that the creation of special privileges for labor picketing was a goal of the federal Act when Congress passed it. To the contrary, the legislature that enacted the Norris-LaGuardia Act had a far broader purpose in mind; it intended to level a playing field that had been distorted by unbridled federal court intervention into labor disputes. To that end, Congressional supporters of its passage explained that the Act would, for example, bar the use of injunctions in labor disputes to forbid "the unions to pay any strike benefits to the strikers ... forbid attorneys to advise the strikers as to their rights even in proceedings to dispossess the strikers from their homes," and "prohibit[] the strikers from giving any publicity to the existence of the strike or the reasons for it or their justification of it." (S. Rep. No. 163.) "The legislative history is replete with criticisms of the ability of powerful employers to use federal judges as 'strike-breaking' agencies; by virtue of their almost unbridled 'equitable discretion,' federal judges could enter injunctions based on their disapproval of the employees' objectives, or on the theory that these objectives or actions, although lawful if pursued by a single employee, became unlawful when pursued through the 'conspiracy' of concerted activity." *Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Assoc.*, 457 U.S. 702, 716 (1982) (citing 75 Cong. Rec., at 4928-4938, 5466-5468, 5478-5481, 5487-5490).

In recommending that the Norris-LaGuardia Act become law, the Senate Committee on the Judiciary emphasized that, "[t]he primary object of the proposed legislation is to protect labor in the *lawful* and effective exercise of its conceded rights," not "to take away from the judicial power jurisdiction to restrain by injunctive process, *unlawful acts* or acts of fraud or violence."[6] (S. Rep. No. 163 (emphasis added).) In short, in declaring that otherwise unlawful activities "shall be lawful" when performed by labor demonstrators, the California legislature—as its action has been applied by the state Supreme Court—went a step beyond the Norris-LaGuardia Act. This Court's *correction* of California's overreaching would not *negatively* impact the constitutionality of the federal Norris-LaGuardia Act, or the state statutes that borrow its language.

Left uncorrected, however, California's application of the Moscone Act could encourage other states to adopt unconstitutional applications of their own similar acts in violation of property owners' constitutional rights. To the extent that a ruling from this Court *would* be relevant to the other Little Norris-LaGuardia Acts, such a ruling would be

---

[6] During debates on the Senate floor, Senator Norris, a key proponent of the legislation that came to carry his name, addressed concerns regarding its breadth: "The lawyers in different parts of America have under a misconception conveyed to the public at large a misunderstanding as to the bill. It is to the effect that the Senate is considering passing a bill the object of which is to prevent the courts from issuing injunctions for the protection of persons and property. Permit me to say that there is no such measure before this body." (75 Cong. Rec. 187 (1932)).

beneficial to the courts of other states with similar statutes by providing clear guidance regarding the constitutional limits on labor-protective anti-injunction acts.

Importantly, the Moscone Act's application to picketers like those at Foods Co is judicial, not legislative, in origin. The text of the Act itself does not speak to the question whether labor picketers have a right to demonstrate on Ralphs' property free from the threat of injunction, nor does it expressly bar courts from enjoining labor picketing occurring on privately-owned property. Its key provision holds that no court may enjoin any person from publicizing a labor dispute "whether by advertising, speaking, patrolling any public street or *any place where any person or persons may lawfully be*, or by any other method not involving fraud, violence or breach of the peace." Cal. Civ. Proc. § 527.3(b)(1) (emphasis added). The Moscone Act therefore could have been interpreted in a manner consistent with the Constitution if the California Supreme Court had read the lawfulness requirement for peaceful picketing in subdivision (b)(1) of the statute into the meaning of peaceful picketing as defined in subdivision (b)(2). *See Matson Nav. Co. v. Seafarers Int'l Union of N. Am.*, 100 F. Supp. 730, 737 (D. Md. 1951) (interpreting definition of "labor dispute" in Norris-LaGuardia Act and holding that "paragraphs [of the Act] must be considered together" to determine their meaning.). So interpreted, the Moscone Act would authorize peaceful picketing only in places where other forms of peaceful expressive activity are permitted. *See Waremart*, 354 F.3d at 875 ("[L]abor organizing activities may be conducted on private property only to the extent that California

permits other expressive activity to be conducted on private property.") Here, then, Ralphs would be entitled to injunctive relief because the Foods Co entrance area and apron are private property, and non-employee organizers are trespassers.

This construction would be entirely consistent with the interpretation that other courts to date have given the term "peaceful picketing." *See Senn v. Tile Layers Protective Union*, 301 U.S. 468, 479 (1937) (interpreting Wisconsin little Norris-LaGuardia Act's authorization of "peaceful" picketing as "impl[ying] not only absence of violence, but absence of any unlawful act."); *Anaconda Co. v. United Auto., Aerospace & Agric. Implement Workers of Am.*, 382 A.2d 544, 548 (Conn. Super. Ct. 1977) (granting injunctive relief against peaceful picketing where conduct of pickets interfered with business). It would also be consistent with this Court's interpretation of the Norris-LaGuardia Act as permitting injunctive relief when necessary to square its language and intent with the language and intent of other statutes or important concerns. *See, e.g.*, *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 251-53 (1970) (interpreting Norris-LaGuardia Act to permit injunctive relief against peaceful picketing where collective bargaining agreement contains mandatory arbitration procedure); *Bhd. of R.R. Trainmen v. Chicago River & Ind. R.R. Co.*, 353 U.S. 30, 39-40 (1957) (interpreting Act to permit injunctive relief against peaceful strike that violated statutory duty to arbitrate). This reading remains available to state court interpreters of statutes that, like the Moscone Act, take their inspiration from the Norris-LaGuardia Act.

By rejecting the California Supreme Court's unconstitutional application of the Moscone Act, this Court will give much-needed guidance to state courts faced with interpreting their own Little Norris-LaGuardia Acts. That clarification may prevent similarly overbroad interpretations of state statutes in the future.

CONCLUSION

For the reasons stated above, and for those stated in Ralph's petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

KATE COMERFORD TODD
JANE E. HOLMAN
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062

WILLIS J. GOLDSMITH
Counsel of Record
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3939
wgoldsmith@jonesday.com

JACQUELINE M. HOLMES
JENNIFER BRADLEY LICHTER
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001

April 24, 2013

Counsel for Amicus Curiae