Filed 1/27/11

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

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| RALPHS GROCERY COMPANY,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 8,<br><br>Defendant and Respondent. | F058716<br><br>(Super. Ct. No. 09CECG00349)<br><br>**OPINION** |

APPEAL from a judgment of the Superior Court of Fresno County. Donald R. Franson, Jr., Judge.

Morrison & Foerster, Miriam A. Vogel, Timothy F. Ryan, and Tritia M. Murata for Plaintiff and Appellant.

Littler Mendelson, William J. Emanuel, Natalie Rainforth for Employers Group, California Grocers Association, and California Hospital Association as Amici Curiae on behalf of Plaintiff and Appellant.

Davis, Cowell & Bowe, Elizabeth A. Lawrence, Andrew J. Kahn, Sarah Grossman-Swenson and Paul L. More for Defendant and Respondent.

Edmund G. Brown, Jr., Attorney General, Manuel M. Medeiros, Solicitor General, J. Matthew Rodriguez, Chief Assistant Attorney General, Louis Verdugo, Jr., Assistant Attorney General, Angela Sierra and Antonette Benita Cordero, Deputy Attorneys

**SEE CONCURRING AND DISSENTING OPINIONS**

General, for Attorney General Edmund G. Brown, Jr., as Amicus Curiae on behalf of Defendant and Respondent.

Altshuler Berzon, Stephen P. Berzon, Scott A. Kronland, and P. Casey Pitts for Service Employees International Union as Amicus Curiae on behalf of Defendant and Respondent.

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This is an appeal from an order denying appellant's request for a preliminary injunction. An order denying a preliminary injunction is appealable. (Code Civ. Proc., § 904.1, subd. (a)(6); see *Right Site Coalition v. Los Angeles Unified School Dist.* (2008) 160 Cal.App.4th 336, 338, fn. 1.) Appellant, plaintiff Ralphs Grocery Company, contends two California laws protecting labor picketing violate constitutional protections of free speech. We agree. Accordingly, we reverse the order of the trial court and remand the matter for further proceedings on appellant's motion for preliminary injunction.

## FACTS AND PROCEDURAL HISTORY

Appellant operates a large grocery store in Fresno under the name Foods Co. The store is in a commercial shopping center and the store entrance is separated from the center's parking lot by a narrow sidewalk. The employees of the Fresno Foods Co store are not employed under a union contract.

Beginning in October 2008, non-employee representatives of respondent, defendant United Food and Commercial Workers Union Local 8, began an informational picket line in front of the Foods Co store. Although the record is not fully developed on this point, it appears the picketing involves carrying placards, distributing leaflets, and attempting to engage Foods Co shoppers in conversations to inform them that Foods Co workers do not receive the benefits they would under a union contract. In addition, there are allegations of confrontations between picketers and store employees and of

occasional aggressive efforts by picketers to give handbills to customers who are not willing to receive them.[1]

Alleging that the picketers refused to obey the rules appellant had established for presence on the property, and alleging that the police department was unwilling to remove the picketers from the property, appellant filed a complaint in February 2009 for declaratory and injunctive relief and for damages arising from respondent's picketers' continued presence. Appellant sought a preliminary injunction to prevent respondent from "directly or indirectly using Foods Co private property for any expressive activity at a time or place or in a manner prohibited by Foods Co's Rules." After submission of declarations and other evidence in support of and in opposition to the motion, and after hearing on the motion, the trial court concluded that two statutes, Code of Civil Procedure section 527.3 and Labor Code section 1138.1, precluded it from issuing a preliminary injunction. Appellant filed a timely notice of appeal.

**DISCUSSION**

Section 527.3 of the Code of Civil Procedure, enacted in 1975 and known as the Moscone Act, limits the equity jurisdiction of California courts in cases involving a "labor dispute." (See *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters* (1979) 25 Cal.3d 317, 322-323 (*Sears*).) The prohibition on injunctions applies to, inter alia, picketing and otherwise giving publicity to the existence of a labor dispute. (Code Civ. Proc., § 527.3, subd. (b).) The Moscone Act declares that the

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[1] Based on the trial court's view of the relevant precedent, the court did not reach various factual issues presented by the parties in support of and in opposition to the motion. Thus, factual issues concerning appellant's rules governing use of its sidewalk and parking lot (which may or may not have permitted some of respondent's activities), appellant's tacit permission for vendors and solicitors to operate in front of the store (appellant denies it gave such permission), and the conduct of picketers and store employees were not resolved. Those issues are not germane to the appeal before us and no purpose would be served by setting out the details of the parties' evidence.

described labor activity "shall be legal, and no court … shall have jurisdiction to issue any restraining order or … injunction" prohibiting such activity. (*Ibid*.)

Labor Code section 1138.1, subdivision (a), enacted 24 years after the Moscone Act, provides, in part: "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 …." The statute also contains other procedural requirements and substantive prerequisites for any such injunction.

Neither statute limits its protection to activity based on where the activity occurs. The protection applies whether the labor activity occurs on public or private property.

In 1979, the California Supreme Court upheld the Moscone Act, rejecting the constitutional arguments that were raised by Sears, Roebuck & Company, which sought to enjoin union picketing on the private sidewalk outside its retail store. (See *Sears, supra,* 25 Cal.3d at pp. 331-332.) The court rejected a Fifth Amendment challenge to the Moscone Act under the rational basis standard, finding that "the elimination of unnecessary judicial intervention into labor disputes" bore a reasonable relationship to legitimate state objectives. (*Sears, supra,* at p. 332.) The court declined, however, to express an opinion on whether the California Constitution protected the picketing at issue. (*Sears, supra,* at p. 327.) It rested its ultimate decision on the terms of the statute. (*Ibid*.) After *Sears*, the constitutionality of the Moscone Act went largely unchallenged in California courts until recently.[2]

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[2] Such a challenge was not timely raised in *Waremart Foods v. United Food & Commercial Workers Union* (2001) 87 Cal.App.4th 145, 157, and for purposes of that appeal the court "assume[d] Code of Civil Procedure section 527.3 is constitutionally valid." (*Ibid*.) Considering Labor Code section 1138.1 in light of a presumed-valid Moscone Act, the *Waremart* court rejected the employer's Fifth Amendment challenge to

The Supreme Court in *Sears* did not consider the constitutional implications of the Moscone Act's establishment of a statutory preference for labor picketing over all other free speech. Such a challenge is the focus of the case as presented to us and in light of applicable United States Supreme Court cases and California Supreme Court precedent, we determine that the Moscone Act and Labor Code section 1138.1 are unconstitutional under article I, section 2 of the California Constitution: The two statutes make an impermissible distinction between labor picketing and other peaceful picketing. (See *Police Department of Chicago v. Mosley* (1972) 408 U.S. 92 (*Mosley*); *Carey v. Brown* (1980) 447 U.S. 455 [applying similar analysis under federal First Amendment].)

In the present case, appellant does not assert a First Amendment right to be free from union picketing in front of its store, nor does such picketing violate its constitutionally protected property rights. (*Sears, supra,* 25 Cal.3d at p. 331.) Appellant instead contends that the statutes, by allowing labor picketing on private property such as theirs, constitute impermissible content-based discrimination prohibited by the First Amendment.

Respondent does not assert its labor picketing on appellant's property is protected by the First Amendment. Respondent asserts its activity is a statutory right prescribed by the Moscone Act and Labor Code section 1138.1.

Respondent contends the statutes do not prohibit constitutionally protected speech in any way and are not subject to First Amendment content-discrimination analysis.

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Labor Code section 1138.1 on the basis that Labor Code section 1138.1's procedural requirements did not constitute a "taking" of the employer's property. (*Waremart, supra,* 87 Cal.App.4th at p. 157.)

The Third District Court of Appeal recently declared unconstitutional both the Moscone Act and Labor Code section 1138.1. (See *Ralphs v. United Food & Commercial Workers Union* (2010) 186 Cal.App.4th 1078.) A petition for review in *Ralphs* was granted by the Supreme Court on September 29, 2010, and the case is pending before that court as case No. S185544.)

Respondent further contends appellant is not entitled to assert a deficiency in the Moscone Act; in particular, appellant has no standing to raise the free speech rights of picketers or petition gatherers with non-labor messages whose rights are not protected by that statute.

We believe a different principle is paramount in the present case, however. Our concern here is with the state establishing a priority for particular speech based on its content. The point is not that labor speech is undeserving of legislative protection but, instead, that there is no compelling reason for the state to single it out as the *only* form of speech that can be exercised despite the objection of the owner of private property upon which the speech activity occurs.

Under California law, a case normally must present an actual controversy between the parties before the courts will entertain it. (*Golden Gate Bridge & Highway Dist. v. Felt* (1931) 214 Cal. 308, 316; see generally 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 21, p. 84.) This requirement, though, is to be distinguished from the rigid "case or controversy" requirement of article III of the federal Constitution pursuant to which a litigant must have "standing" to request the adjudication of a particular issue. (3 Witkin, *supra*, § 22, p. 86.) In California, the "refusal to decide a case lacking in actual controversy is usually regarded as an exercise of discretion. [Citation.] Hence, a court will occasionally depart from its practice in order to decide a matter of public interest." (*Id.* at § 29, p. 95.) We choose this latter course for the following reasons: First, the constitutionality of these statutes is a matter of public interest. Second, in this instance, appellant's assertion of its own interests as a property owner and its assertion of a public interest in nondiscriminatory legislation are sufficiently congruous that appellant has the necessary interest and resources "to assure that all of the relevant facts and issues will be adequately presented" (*California Water & Tel. Co. v. Los Angeles* (1967) 253 Cal.App.2d 16, 23) in opposition to respondent's defense of the legislation. Third,

respondent's position would deprive appellant and all other employers of any means of judicial resolution of the dispute between the parties. Accordingly, we reject respondent's contention that the case is inappropriate for consideration by the court and will address the merits of the appeal.

Three preliminary legal principles should be noted. Respondent and its picketers have no First Amendment right to engage in expressive activities on appellant's private property. (*Hudgens v. NLRB* (1976) 424 U.S. 507, 513, 521 (*Hudgens*).) A state is permitted to establish by statutory or constitutional provision expressive rights that exceed those rights protected by the First Amendment. (*Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, 910; *PruneYard Shopping Center v. Robins* (1980) 447 U.S. 74, 81.) Finally, the California Supreme Court has expressly held that the same strict-scrutiny analysis applied to content discrimination in the First Amendment context is applicable to rights protected only under the state Constitution's free speech provisions. (*Fashion Valley Mall, LLC v. National Labor Relations Bd.* (2007) 42 Cal.4th 850, 865.)

With these three preliminary points firmly established by the United States Supreme Court and the California Supreme Court, the question that confronts us is this: When a statutory right of speech is created by the Legislature, not by the state or federal Constitution, is strict-scrutiny analysis applied to content discrimination inherent in the state legislation?[3]

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[3] Even when a form of speech is itself not constitutionally protected (such as "fighting words"), content-based discrimination against such speech can violate constitutional strictures. (See *R.A.V. v. City of St. Paul* (1992) 505 U.S. 377, 391.) In *R.A.V.*, the court held unconstitutional under the First Amendment an ordinance that prohibited displaying "on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender," even though such

In *Hudgens, supra,* 424 U.S. at p. 521, striking employees were asked to leave property located near their employer's store under threat of arrest for trespass. The union filed an unfair labor practice charge against Hudgens. The Supreme Court held that the First Amendment did not provide a right to engage in informational picketing at a privately owned shopping center during a strike: "[T]he constitutional guarantee of free expression has no part to play in a case such as this," which involves solely labor law, not constitutional law. (*Hudgens, supra,* 424 U.S. at p. 521.) The court instructed the National Labor Relations Board to "seek a proper accommodation" between the statutory speech rights of the picketers and the property rights of the center's owner. *Hudgens, supra,* 424 U.S. 507, arose from proceedings before the National Labor Relations Board, which had jurisdiction to adjudicate the labor dispute before it under a comprehensive set of federal laws regulating labor relations.

Unlike the federal statute in *Hudgens,* the Moscone Act and Labor Code section 1138.1 are not an incidental part of a broader scheme of regulation of labor relations.[4]

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"fighting words" generally are considered unprotected by the First Amendment: "Displays containing abusive invective, no matter how vicious or severe, are permissible [under the ordinance] unless they are addressed to one of the specified disfavored topics. Those who wish to use 'fighting words' in connection with other ideas -- to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality -- are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." (*R.A.V. v. City of St. Paul, supra,* 505 U.S. at p. 391.) In the present case, we need not determine whether the Moscone Act and Labor Code section 1138.1 violate the First Amendment under the *R.A.V.* analysis. Because the speech rights in question were created under state law, we look to the California Constitution for guidance.

[4] Although Labor Code section 1138.1 is, obviously, in the Labor Code, it is not a part of comprehensive legislation governing collective bargaining. The legislative intent expressed in the Moscone Act is to "promote the rights of workers to engage in concerted activities for the purpose of collective bargaining, picketing or other mutual aid or protection" because "[u]nder prevailing economic conditions[,] the individual unorganized worker is commonly helpless to exercise actual liberty of contract."

They evince no legislative intent to supplant the courts' constitutional jurisdiction with administrative-agency jurisdiction. Instead, the Moscone Act and Labor Code section 1138.1 appear to be isolated and singular attempts to expand to private forums the state constitutional free speech rights established for public forums under *Robins v. Pruneyard Center, supra,* 23 Cal.3d 899 and to do so only for speech involving labor disputes. Because the statutes are related to speech and only speech and clearly discriminate on the content (that is, the subject matter) of the speech, we believe the statutes must be measured according to the standards traditionally applied to free speech discrimination.

The actual impact of the statutes is to discriminate: to provide a forum on both public and private property ("any place where any person or persons may lawfully be" (Code Civ. Proc. § 527.3, subd. (b)(1))) for speech related to labor disputes (including speech on the private property of business owners whose employees have no interest in joining the picketing union) while not providing the same forum (for example) for speech relating to the right not to be discriminated against based on race, sex, ethnicity, or sexual orientation; or for speech relating to the collection of signatures to generate change through the initiative, referendum, and recall process; or for speech relating to the exercise of the freedom of religion, each of which is also of significant importance to the public discourse of a free society. It is that issue that concerns us: The statutes select which views the state is willing to have discussed or debated. As noted above, this discriminatory effect of the statutes in question apparently was not presented to, and clearly was not resolved by, the Supreme Court in *Sears, supra,* 25 Cal.3d 317.

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(Stats. 1975, ch. 1156, § 1, p. 2855.) The Moscone Act does not, however, in any way address concerted-labor activities generally, collective bargaining, or mutual aid and protection. Instead, it addresses only speech and expressive activities. (§ 527.3, subd. (b).)

Laws which prohibit speech based on its content--or, in this case, based on the failure of the speech to address a "labor dispute"--are presumptively invalid. (*Simon & Shuster, Inc. v. Members of N.Y. State Crime Victims Bd.* (1991) 502 U.S. 105, 116.) Such laws are permitted only if they serve a compelling state interest and are narrowly drawn to accomplish that interest. (*Mosley, supra,* 408 U.S. 92, 95.) The desire to provide the broadest forum for expression in labor disputes is not a compelling state interest. (*Carey v. Brown, supra,* 447 U.S. 455, 466.)

We conclude the state may not act to selectively create a free speech right applicable only to the few, while excluding all others, in the absence of a compelling state interest. As a result, we hold that the Moscone Act and Labor Code section 1138.1 contravene the free speech provisions of California Constitution article I, section 2, by discriminatorily conferring speech rights on some, but not all, Californians without a compelling state interest.

Respondent also contends that even if the Moscone Act and Labor Code section 1138.1 are unconstitutional, appellant still has not met the traditional requirements for issuance of a preliminary injunction. In particular, respondent contends appellant has not established that a preliminary injunction is necessary to preserve the status quo, since the current state of affairs has respondent's agents picketing at the Foods Co property. In addition, respondent contends appellant has failed to offer any evidence to support a claim of irreparability of its potential injury from respondent's picketing activities.

These issues, as well as the various issues involved in issuing a permanent injunction, were not addressed by the trial court, which only determined that appellant had not established its right to an injunction under Labor Code section 1138.1. It is appropriate to remand this matter for further hearing, at which the trial court will consider the requirements generally applicable to injunctions against allegations of continuing trespass.

## DISPOSITION

The order denying appellant's motion for preliminary injunction is reversed. The matter is remanded for further proceedings as stated in the Discussion section above. Appellant is awarded costs on appeal.

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DETJEN, J.

I CONCUR:

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KANE, J.

**KANE, J.**

I concur in the reasoning and decision of the majority opinion. I write separately to address the matter of *standing*, which I regard as a nonissue in this case.

It needs to be emphasized at the outset that the question of whether appellant has legal standing to bring this action is entirely separate from the question of who should prevail on the merits.

While the standing of a plaintiff to bring suit can be raised at any time during the proceedings (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 438), it is telling that respondent did not challenge appellant's standing in the trial court and most (if not all) of the appellate opinions that respondent relies upon do not raise, question or analyze the standing of the property owner to challenge picketing-related activities on its private property. An obvious conclusion emerges: a private property owner necessarily has legal standing to contest the claim by others that they have a right to use property they do not own.

As the owner of the private property on which these picketing activities occurred, appellant has clearly met the legal standard for "standing" in this case.

> "'The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a … court, and not on the issues he wishes to have adjudicated.' (*Flast v. Cohen* [(1968) 392 U.S. 83,] 99.) A party enjoys standing to bring his complaint into court if his stake in the resolution of that complaint assumes the proportions necessary to ensure that he will vigorously present his case. (*Baker v. Carr* (1962) 369 U.S. 186, 204.) As Professor Jaffe has stated, we must determine standing by a measure of the 'intensity of the plaintiff's claim to justice.' (*Jaffe*, [*Standing to Secure Judicial Review: Private Actions* (1961) 75 Harv. L.Rev. 255,] 304.)" (*Harman v. City and County of San Francisco* (1972) 7 Cal.3d 150, 159.)

It cannot be seriously argued that appellant has no stake in the outcome of this case or that it will not vigorously present its case. Indeed, appellant is the only one with legal standing to object to respondent's alleged violation of *its private property rights*.

The law has always recognized the importance of private property ownership rights. These rights have constitutional, statutory and common law roots. While private property rights are not absolute, they are included among our state's inalienable rights. Article I, section 1 of the California Constitution states: "All people … have inalienable rights. Among these are … acquiring, possessing, and protecting property …." The Legislature has enacted statutes designed to protect private property rights. (E.g., Pen. Code, § 602 [trespass]; Code Civ. Proc., § 1159 et. seq. [summary proceedings for obtaining possession of real property].) State common law also recognizes certain rights of landowners to exclude union organizers from private property. (*Thunder Basin Coal Co. v. Reich* (1994) 510 U.S. 200, 217, fn. 21.)

This case requires judicial resolution of the conflicts that arise when free speech rights clash with private property rights. Neither set of rights is absolute. Each must be weighed and considered in relation to the other's rights. (*Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union* (1964) 61 Cal.2d 766, 771 [union's right to picket *not outweighed* by shopping center's *right to possession and enjoyment of private property*]; *Hudgens v. NLRB* (1976) 424 U.S. 507, 517 ["'To hold that store owners are compelled by law to supply picketing areas for pickets to drive store customers away is to create a court-made law wholly disregarding the *constitutional basis on which private ownership of property rests in this country*'" (italics added)]; *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, 911 [compelling shopping center to permit solicitation of signatures and distribution of handbills "'would not markedly dilute defendant's property rights'"]; *Fashion Valley Mall, LLC v. National Labor Relations Bd.* (2007) 42 Cal.4th 850, 869 [shopping mall's purpose to maximize profits not compelling *compared* to right to free expression].) Just as the union's interests are at stake when the property owner seeks to enjoin the picketers from picketing on its property, the property owner's interests are at stake when the picketers insist on using private property for their own purposes.

Respondent's belated contention that appellant lacks legal standing to challenge the validity of the Moscone Act (Code Civ. Proc., § 527.3) and Labor Code section 1138.1 because appellant's free speech is not being restricted misses the point entirely. Appellant's standing emanates from its own private property rights, not from its own free speech rights.

Respondent argues that unconstitutional discrimination can only be raised by the person who is a member of the class of persons discriminated against. While that statement reflects the general rule, it has no application here. *Buchanan v. Warley* (1917) 245 U.S. 60 is instructive on this point. In an action for specific performance of a real estate contract, the plaintiff, a white man, alleged that the defendant, a "colored person," breached a written contract to buy real property. The defense relied upon a city ordinance that precluded a colored man from owning the property. The plaintiff countered by arguing that the ordinance violated the Fourteenth Amendment of the California Constitution. The lower courts upheld the ordinance and ruled for the defendant. In a unanimous opinion the Supreme Court reversed, holding that the ordinance was unconstitutional. Pertinent to the issue of standing, the court stated:

> "The objection is made that this writ of error should be dismissed because the alleged denial of constitutional rights involves only the rights of colored persons, and the plaintiff in error is a white person. This court has frequently held that while an unconstitutional act is no law, attacks upon the validity of laws can only be entertained when made by those whose rights are directly affected by the law or ordinance in question. Only such persons, it has been settled, can be heard to attack the constitutionality of the law or ordinance. But this case does not run counter to that principle.
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> "The property here involved was sold by the plaintiff in error, a white man, on the terms stated, to a colored man; the action for specific performance was entertained in the court below, and in both courts the plaintiff's right to have the contract enforced was denied solely because of the effect of the ordinance making it illegal for a colored person to occupy the lot sold.… This case does not come within the class wherein this court has held that where one seeks to avoid the enforcement of a law or ordinance he must present a grievance of his own, and not rest the attack

> upon the alleged violation of another's rights. *In this case the property rights of the plaintiff in error are directly and necessarily involved*. See *Truax v. Raich* [(1915)] 239 U. S. 33, 38." (*Buchanan v. Warley*, *supra*, 245 U.S. at pp. 72-73, italics added.)

Thus, it is not true, as respondent contends, that in all cases only a member of the class of persons discriminated against has standing to assert that the law is discriminatory, or in the First Amendment context, only a member of the class of persons whose free speech is affected has standing to assert that the law violates the First Amendment.

It is ludicrous for respondent to argue that appellant is precluded from challenging the validity of the very statutes that respondent brandished (and the lower court relied upon) in opposing its request for injunctive relief. Appellant's objection to these statutes is defensive, not offensive, in nature. It is being asserted as a shield, not as a sword. If due process means anything it means having the opportunity to fully defend against the assertions of fact and law made by one's opponent (and relied upon by the lower court). Here, respondent convinced the lower court to deny the request for injunctive relief on the authority of these statutes. Just as in *Buchanan v. Warley*, *supra*, 245 U.S. 60, the lower court order directly and necessarily impacts appellant's property rights. This gives appellant standing to challenge the legal and/or factual basis of that denial order, including, when applicable, arguing that the statutes relied upon by the lower court are void as being contrary to the federal or state Constitutions.

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KANE, J.

**WISEMAN, ACTING P.J., Dissenting.**

I agree with the majority's implicit conclusion that the shopping center in this case is not governed by the California Supreme Court's opinion in *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899 (*Robins v. Pruneyard*). As several Court of Appeal opinions have concluded (*Trader Joe's Co. v. Progressive Campaigns, Inc.* (1999) 73 Cal.App.4th 425, 434*; Costco Companies v. Gallant* (2002) 96 Cal.App.4th 740, 755-756; *Albertson's, Inc. v. Young* (2003) 107 Cal.App.4th 106, 110; *Van v. Target Corp.* (2007) 155 Cal.App.4th 1375, 1382), stand-alone stores and stores located in small shopping centers do not fall within the constitutional rule announced in *Robins v. Pruneyard*. The Foods Co store in this case is comparable to the stores at issue in those cases. As a result, I would hold that respondent has no state constitutional right to speak on appellant's property. It is at this point that I part company with my colleagues.

In my view, the next question is whether the union, lacking *Pruneyard* rights, still has a statutory right to picket on the property under the Moscone Act (Code Civ. Proc., § 527.7) (Moscone Act) and Labor Code section 1138.1. Appellant's only argument that it does not is that these statutes violate the free-speech guarantees of the California and federal Constitutions. Therefore, if the statutes are constitutionally valid, the union has a *statutory* right to picket on the property and does not need a constitutional right to do so.

I would conclude that appellant lacks standing to raise a constitutional free-speech claim because it does not (and cannot) contend that its own freedom of speech is burdened. At oral argument, appellant's counsel conceded that appellant is not asserting any constitutional free-speech rights of its own. Despite multiple opportunities during briefing and oral argument, appellant has pointedly (and with good reason) *not* argued that its rights against compelled speech and association are implicated. Its argument by necessity is based on the constitutional rights of hypothetical speakers who might like to speak on private, non-*Pruneyard* property but cannot because the two statutes do not

apply to them. Even the hypothetical speakers whose constitutional rights are affected, if successful, would receive no relief, as their speech would still be enjoined if the statutes are invalidated. The only benefit they would receive is the knowledge that similarly situated labor disputants would also be enjoined. Under California Supreme Court precedent, this means appellant lacks standing: "'[O]ne will not be heard to attack a statute on grounds that are not shown to be applicable to himself ….'" (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1095.)

Appellant's position is very different from that of the parties in *Police Department of Chicago v. Mosley* (1972) 408 U.S. 92 and *Carey v. Brown* (1980) 447 U.S. 455, the United States Supreme Court cases upon which appellant primarily relies. In those cases, the court vindicated the free-speech rights of parties to the case who were criminally prosecuted for speech. In the present case, by contrast, no party's right to speak has been burdened.

Confronted with these difficulties at oral argument, appellant's counsel suggested that appellant really intended to assert property rights under the Fifth Amendment: perhaps the two challenged statutes effectuate a taking without just compensation. Appellant's briefs contain no organized presentation of this notion, however, and cite no authority that would support it. Counsel's reference to the Fifth Amendment appears to be only an effort to mask the fact that appellant's constitutional rights are not implicated in this case.

Respondent's counsel appeared to concede at oral argument that the issue of standing was not raised in the trial court. This would not, however, bar us from basing our ruling on standing grounds. "'[T]he issue of standing is so fundamental that it need not even be raised below—let alone decided—as a prerequisite to our consideration.'" (*Matrixx Initiatives, Inc. v. Doe* (2006) 138 Cal.App.4th 872, 877.) Even if there is some doubt about whether this is a universal rule (see *People v. Dasilva* (1989) 207 Cal.App.3d

43, 47), it applies here. The reason for the general principle that appellate courts should not address issues raised for the first time on appeal is that it is usually unfair to the trial court and the adverse party to take advantage of an error on appeal which could have been corrected during the trial. (*People v. Saunders* (1993) 5 Cal.4th 580, 590; *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184-185, fn. 1.) There is nothing plaintiff could have done in the trial court, however, to correct its lack of standing to assert the constitutional free-speech rights of hypothetical third parties. Further, there is no question but that appellant had the opportunity to brief the issue on appeal. Respondent raised the issue in its supplemental brief filed on September 7, 2010. Appellant had the opportunity to file, and did file, a responsive supplemental brief.

Although there are limited exceptional circumstances in which a litigant may assert a constitutional claim on behalf of third parties (see *Powers v. Ohio* (1991) 499 U.S. 400, 410-411), this is not such a case. For a court to recognize a litigant's claim asserted on behalf of third parties, three criteria must be satisfied: "The litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute [citation]; the litigant must have a close relation to the third party [citation]; and there must exist some hindrance to the third party's ability to protect his or her own interests. [Citations.]" (*Id.* at p. 411.) California courts have applied the United States Supreme Court's doctrine on this issue to state-court proceedings. (See *Selinger v. City Council* (1989) 216 Cal.App.3d 259, 270-271.) Here, appellant cannot satisfy the second criterion because it does not claim a close relation to, or even any interest in common with, any third party whose free speech rights are burdened. (Cf. *Craig v. Boren* (1976) 429 U.S. 190 [beer vendor had standing to invoke rights of 18-to-20-year-old male beer buyers]; *Eisenstadt v. Baird* (1972) 405 U.S. 438 [distributor of contraceptives had standing to invoke rights of unmarried contraceptives users].) To the contrary, one imagines that hypothetical third-party speakers' interests

would be to enforce their rights to free speech to speak on appellant's property, but appellant's interest would be to enjoin them by invoking its property rights. Invalidation of the two statutes here at issue would not advance the third parties' interests in any way.

In one early case, *Buchanan v. Warley* (1917) 245 U.S. 60, the Supreme Court held that a White plaintiff suing to enforce against a Black defendant a contract for sale of real property had standing to challenge a local ordinance under which Black people were forbidden to own the property at issue. The court rejected the argument that the White plaintiff lacked standing to assert that the ordinance was invalid because it violated the rights of Black people under the federal Constitution and federal statutes. (*Buchanan, supra,* at pp. 72-73.) The court did not consider, however, whether the three elements required for third-party standing had been established, since those elements had not yet been formulated by the court in 1917. "It is axiomatic that cases are not authority for propositions not considered." (*People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10.) Further, the case does not support appellant's standing here in any event. In *Buchanan*, the White plaintiff's interests were assuredly aligned with the interests of Black people subject to the ordinance (if not the interests of the particular defendant in the case): His interest, like theirs, was to invalidate the racist law. Appellant's interests in this case are, by contrast, antithetical to those of the hypothetical third-party speakers whose rights it asserts, as I have said.

A holding based on the lack of standing I have described—a lack of standing to *assert third parties' rights*—would not deprive appellant of a judicial forum. Ralphs does not lack standing to *bring this lawsuit*, for it has an interest in asserting the right to exclude people from the area in front of its store, assuming it has that right under its lease. The merits of its nonconstitutional claims should have been, and were, addressed in the trial court. The result of the determination of those claims on their merits was that the Moscone Act and Labor Code section 1138.1 prevent the issuance of an injunction.

To hold that Ralphs lacks standing to challenge the validity of those statutes by asserting the constitutional rights of third parties with whom it has no connection would deprive Ralphs only of an *argument*, and would do so on the basis of well-established legal principles.

Although I believe appellant lacks standing, I will address the merits of appellant's claim, which overlap substantially with issues relating to standing. Appellant expresses the frustration that many California property owners must feel when required by California law to allow peaceful labor speech—speech they obviously oppose—on their own property. Justice Chin gave voice to this feeling, in a different legal context, in his dissent in *Fashion Valley Mall, LLC v. National Labor Relations Bd.* (2007) 42 Cal.4th 850, 871 (*Fashion Valley Mall*), where he urged the overruling of *Robins v. Pruneyard*: "It is *wrong* to compel a private property owner to allow an activity that contravenes the property's purpose." (Italics added.) As I will explain, however, we are not in a position to relieve this frustration in this case because appellant has not shown that the Moscone Act and Labor Code section 1138.1 are unconstitutional.

The majority opinion essentially concludes that, unless state law allows state courts to enjoin either *all speech* or *no speech* on private property at the owner's request, then the constitutional right to free expression of someone is being violated. This contention is not supported by existing constitutional principles. The challenged statutes do not burden anyone's speech. To the contrary, the effect of the statutes on the speakers at whom they are aimed, i.e., people involved in "labor disputes," is to *prevent* the suppression of their speech by injunction. The majority opinion apparently accepts appellant's view that there is no difference between a statute that selectively suppresses speech and a statute that selectively protects it—that this is the difference between "six in one hand" and "half a dozen in the other," as appellant's reply brief puts it. In my view, this position does not work. The state and federal Constitutions condemn the *suppression*

of speech, not the *protection* of it. The hypothetical trespassing nonlabor speakers whose rights appellant is asserting would be silenced by laws relating to trespass and laws allowing the issuance of injunctions, not by the Moscone Act or Labor Code section 1138.1. The majority's position is, in effect, that *the law as a whole* discriminatorily burdens the hypothetical speakers' speech and that the proper remedy is not to refuse application of the burdensome laws in a case involving a burdened party, but to strike down the protective laws in a case not involving a burdened party.

This approach is an extension of existing constitutional law. Only a single brief paragraph containing little analysis in *Waremart Foods v. N.L.R.B.* (D.C.Cir. 2004) 354 F.3d 870, 876 (*Waremart Foods)*, supports it, and that opinion is not binding on us. The United States and California Supreme Courts may choose to expand existing constitutional doctrine, but mid-level appellate courts generally uphold statutes unless they conflict with existing authority.[1]

Under existing constitutional analysis, the two statutes are valid. A statute is unconstitutional *as applied* if the actual application of it to the challenging party impermissibly burdens a constitutional right of that party. (See *Tobe v. City of Santa Ana, supra*, 9 Cal.4th at p. 1089.) There is no as-applied invalidity here because the two statutes do not burden appellant's free-speech rights at all. A statute is *facially* invalid if there are no circumstances under which it could be validly applied—that is, no circumstances under which its application would not impermissibly burden someone's constitutional rights. (*United States v. Salerno* (1987) 481 U.S. 739, 745.) There is no

[1]I am aware, of course, that in another case involving the parties before us here, a panel of the Third District Court of Appeal has agreed with the D.C. Circuit's opinion in *Waremart Foods* and that our Supreme Court has granted review. (*Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8* (2010) 186 Cal.App.4th 1078, review granted Sept. 29, 2010, S185544.)

facial invalidity here because countless applications of the challenged statutes—in fact, their normal applications—protect expression and place no burden on it.

Unlike other kinds of laws, a statute burdening speech is also subject to a facial challenge where the statute is shown to be substantially *overbroad*, even if some valid applications of it exist. A statute is substantially overbroad if, in addition to regulating some speech properly, it also operates to suppress or chill a substantial amount of other, protected speech. (*City Council v. Taxpayers for Vincent* (1984) 466 U.S. 789, 798-801.) There is no overbreadth here because the challenged statutes do not suppress or chill any speech. Since appellant's free-speech argument does not show that the Moscone Act and Labor Code section 1138.1 are invalid as applied, facially invalid, or invalid due to overbreadth, appellant cannot show the statutes are unconstitutional.

For whatever reason, the California Legislature has decided to allow peaceful labor speech on private property over the owner's objection. Laws that protect expression by limiting courts' jurisdiction to enjoin labor activity, such as the federal Norris-LaGuardia Act and state laws patterned after it, came into existence many years ago because courts were excessively zealous in granting injunctions against labor activity. If the pendulum has swung too far the other way and now enables labor unions to intimidate business owners, it is the responsibility of the Legislature to change the law. The fact that the Legislature may not be responsive does not mean the courts should step in and determine that the statutes are invalid absent a convincing argument that they are violating anyone's constitutional rights. Doing so simply is not our role. Unlike in *Robins v. Pruneyard, supra*, 23 Cal.3d 899, and *Fashion Valley Mall, supra*, 42 Cal.4th 850, in which the outcome depended only on the Supreme Court's interpretation of the state Constitution, here there is a legislative judgment which requires deference unless binding authority compels its invalidation. There simply is no binding authority compelling invalidation of the statutes challenged here.

The majority's approach attempts to drive the square peg of an invasion of property rights into the round hole of a constitutional free-speech violation. In doing so, the majority adjudicates the rights of nonparties where their interests are not at issue, establishes a new constitutional analysis, and, whether or not it intends to, exceeds its proper authority by circumventing the Legislature and establishing new constitutional law without legal necessity. For these reasons, I respectfully dissent.

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WISEMAN, ACTING P.J.