

MoFo Wins Major Victory for California Retailers

By Tsion Lencho

On July 19, 2010, the Third Appellate District filed its highly-publicized opinion in *Ralphs Grocery Company v. United Food and Commercial Workers Union, Local 8* (2010) __ Cal.App.4th __ (3rd Civ. No. C060413), invalidating two long-standing statutes on the ground that they impermissibly favor speech related to labor disputes over all other speech in violation of the First and Fourteenth Amendments.

The story begins on July 25, 2007, when Ralphs opened its Sacramento Foods Co store, a large, privately-owned warehouse grocery store located in a modest retail development. On that day, eight to ten union picketers showed up to encourage patrons to boycott the store because its employees had voted to remain non-union. The union picketers protested directly in front of Foods Co's doors and in its parking lot, and continued to do so—five days a week, eight hours a day—for almost nine months before Ralphs brought suit for injunctive relief.

In seeking a preliminary injunction to stop the union's picketing, Ralphs faced two seemingly insurmountable barriers—the Moscone Act (Code Civ. Proc., § 527.3), which deprives California courts of jurisdiction to enjoin lawful union picketing, and Labor Code section 1138.1, which imposes insurmountable obstacles to injunctive relief in cases involving labor disputes. Ralphs argued that the statutes are unconstitutional content-based discrimination because they provide special treatment for labor speech. The

trial court denied Ralphs' request for injunctive relief, and Ralphs appealed.

In a thorough and thoughtful opinion, the Court of Appeal reversed.

First, the Court rejected the Union's contention that the area in front of the Foods Co store is a public forum, distinguishing stand-alone retail stores, such as Foods Co, from the common areas of *Pruneyard* and *Fashion Valley* shopping centers.¹ Given that the area in front of the Foods Co store is not a public forum, Ralphs, "as a private property owner, could limit the speech allowed and could exclude anyone desiring to engage in prohibited speech. This remains true even though Ralphs granted the right to other groups to use the entrance and apron area of Foods Co for speech."

Second, the Court considered the constitutionality of the Moscone Act and Labor Code section 1138.1. Relying on two United States Supreme Court cases invalidating laws that favored labor speech over all other speech², the Court of Appeal concluded that both California statutes are invalid. The Moscone Act impermissibly "denies [owners of private property] involved in a protest over a labor dispute access to the equity jurisdiction of the courts even though it does not deny such access if the protest does not involve a labor dispute." Similarly, Labor Code section 1138.1 improperly "favors speech relating to labor disputes over speech relating to other matters," in that "[i]t adds requirements for obtaining an injunction against labor protestors that do not exist

when the protest, or other form of speech, is not labor related." Because there was no compelling state interest to justify the statutes' differential treatment of labor speech, neither statute could withstand the Court's strict scrutiny review. Given that the Moscone Act and section 1138.1 are invalid, the Court held that the union's continuing trespass on Ralphs' private property alone justifies issuance of the requested preliminary injunction—and remanded the case to the trial court with specific directions to grant Ralphs' motion for injunctive relief.

The case is a major win for California retailers, many of whom have been unable to remove or regulate picketers on their properties and have suffered a resulting loss of business. The union is expected to petition the California Supreme Court for review of the *Ralphs* decision.

Ralphs was represented by a team from Morrison & Foerster, including attorneys Miriam Vogel, Timothy Ryan and Tritia Murata.

¹ *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899 [large privately-owned shopping center is a public forum for the purpose of speech because owner had created a public forum]; *Fashion Valley Mall, LLC v. National Labor Relations Bd.* (2007) 42 Cal.4th 850, 858 [following *Pruneyard*].

² *Police Department v. Mosley* (1972) 408 U.S. 92; *Carey v. Brown* (1980) 447 U.S. 455.

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