California Issues Important Ruling on Labor Speech Rights of Unions on Private Property

Ralphs Grocery Could Lead to a Review of the Issue by the U.S. Supreme Court

By Linda Auerbach Allderdice

The California Supreme Court recently issued its decision in Ralphs Grocery Company v. United Food and Commercial Workers Union Local 8. Although the ruling resolved a long-standing dispute between a supermarket owner and the labor union that picketed on private property in front of the only customer entrance to the store, the decision has wide-ranging implications for retail store owners and other commercial property interests.

While the decision in Ralphs Grocery ultimately allowed labor-related picketing and handbilling on private property under authority of specific California statutes, the court rejected the union's argument that it was picketing at a "public forum" and, therefore, should be allowed on the private property. The standard for a "public forum" was established in the court's landmark decision issued over thirty years ago in Robins v. Pruneyard Shopping Center, in which the court noted that the "public is invited to visit for the purpose of patronizing the many businesses" spread out over 16 acres of "walkways, plazas, and buildings that contain 65 shops, 10 restaurants and a cinema." As the court held in Pruneyard, "The California Constitution broadly proclaims speech and petition rights. Shopping centers to which the public is invited can provide an essential and invaluable forum for exercising those rights." In Ralphs Grocery, the court declined to adopt an expansive interpretation of a "public forum," finding that the privately-owned, single-purpose, stand alone retail store was not a "public forum" such that the property owner could not exclude persons from its premises.

By ultimately allowing the picketing, the court's opinion seemingly provides greater protections for labor-related speech under the California statutes. That said, Ralphs Grocery also suggests that commercial property owners may be able to limit expressive activity as long as the site where the activity takes place does not otherwise meet the test of a "public forum" and the expressive activity does not deal with labor union disputes or economic action by labor unions. Given the court's heightened protection of "labor speech," this California case may be ripe for review by the U.S. Supreme Court.

Ralphs' Dispute with the Union

Ralphs Grocery Company owned and operated a warehouse-style grocery store in Sacramento, California under the name Foods Co. that was located in a retail development with restaurants and other stores. Customers entered Foods Co. only through one entrance that was accessible from a 15-foot-wide paved walkway extending outward from the store. The walkway ended at a driving lane that bordered a public parking lot used by customers of Foods Co. and the other retail stores.

In 2007, when Foods Co. first opened for business, union agents from the United Food and Commercial Workers Union, Local 8 picketed the store because of its labor dispute with Foods Co. Although picketing was conducted by four to eight agents five days a week and eight hours a day, customers could freely access the store. In January 2008, Ralphs informed the union about its regulations governing speech activities at its Foods Co. stores. The regulations excluded such activities within 20 feet of the store's entrance, restricted it to certain times and days, and barred union distribution of literature or signs larger than a certain size. The union ignored the regulations and...
continued to picket within the restricted area. Ralphs asked the Sacramento Police Department to remove the agents but the police declined to intervene without a court order.

**Ralphs Files for Injunctive Relief**

In April 2008, Ralphs filed a complaint in the Sacramento Superior Court alleging that the union trespassed on its private property by using the 15-foot walkway as a forum for expressive activity without complying with the store’s speech regulations. Ralphs sought injunctive relief to stop the union's conduct. The union responded with a two-prong argument. First, that California's Moscone Act, Code of Civil Procedure section 527.3, permitted peaceful picketing on a privately-owned walkway in front of a retail store during a labor dispute. Second, that Ralphs had failed to meet the strict procedural requirements for injunctions against union picketing under Labor Code section 1138.1.

The trial court ruled that California's Moscone Act violated the First and Fourteenth Amendments to the U.S. Constitution because the Act favored union speech over other types of speech. After an evidentiary hearing, however, the trial court declined to issue an injunction. It found that Ralphs had failed to meet the stringent requirements of Labor Code section 1138.1, which the trial court applied under California precedent, and that Ralphs had failed to establish that its speech regulations were "reasonable time, place and manner restriction" under guidelines that had traditionally been applied to public forum shopping centers.

Reversing the trial court, the California Court of Appeals directed the lower court to issue a preliminary injunction. First, the court determined that Ralphs’ speech regulations were appropriate because the "entrance area and apron" of Foods Co. did not meet the test for a "public forum" under the California Constitution. Accordingly, Ralphs could not only limit what speech was allowed in front of its store, but also could "exclude anyone desiring to engage in prohibited speech." Next, the Court of Appeals decided that because the Moscone Act and Section 1138.1 provided greater protections to "labor speech" than other speech, both violated the First and Fourteenth Amendments to the U.S. Constitution. The California Supreme Court then granted the union's petition for review.

**The California Supreme Court Ruling**

1. The "Public Forum" Test is Upheld, but Allows Unions to Picket and Handbill on Private Property under the California Statutes

In the 1979 landmark case Robins v. Pruneyard Shopping Center ("Pruneyard"), the California Supreme Court ruled that portions of a privately owned shopping center could constitute a "public forum" in which individuals were entitled to engages in speech and other expressive activity. Because of the "public character of the shopping center," allowing speech rights under reasonable regulations would not significantly interfere with the mall owner's normal enjoyment of its private property rights. Pruneyard distinguished common areas in a shopping center from the areas outside individual store's customer entrances and exits, finding that the latter were not the same as a public forum. Ralphs Grocery continued this doctrine, finding that in order for an area within a shopping center to constitute a public forum, it "must be designed and furnished in a way that induces shoppers to congregate for purposes of entertainment, relaxation, or conversation, and not merely to walk to or from a parking area, or to walk from one store to another, or to view a store's merchandise and advertising displays."

The favorable ruling upholding Pruneyard standards for "public forum" speech protections, finding that Foods Co. did not meet that test, did not end the court's analysis, as it found that the Union's conduct was still protected by California's statutes.

2. The Moscone Act and Section 1138.1 Protect Union Speech on Private Property and Withstand Scrutiny under the Constitution

The Moscone Act, which was patterned after federal labor law, was passed in 1975 in order to promote collective bargaining and other peaceful concerted activities, and to prevent courts from issuing injunctive relief against labor
organizations for communicating information about a labor dispute, engaging in peaceful picking or assembling peaceably to further such goals. Section 1138.1, passed in 1999, established stringent requirements for the issuance of an injunction against labor picketing handbilling or other expressive activity by a union. A property owner seeking an injunction against labor activity must prove a threat of unlawful acts by the union; substantial and irreparable injury to its property; that the property owner will suffer greater damage if the injunction is not granted than the union will suffer if it is; that no adequate remedy at law exists; and, finally, that law enforcement is "unable or unwilling to furnish" adequate protection. The courts strictly enforce these requirements, making it virtually impossible to obtain injunctive relief to stop labor activity.

In its Ralphs Grocery ruling, the California Supreme Court construed the Moscone Act and Section 1138.1 as applying only to labor disputes and concluded that they shielded peaceful union picketing from judicial interference in labor disputes. It further ruled that, because the laws did not restrict speech by entities other than unions and the union's speech did not occur in a public forum, the laws did not violate federal constitutional protections for free speech.

The court then focused on whether the content-based distinction between labor-related speech and other speech was "justified" by "legitimate concerns that are unrelated to any 'disagreement with the message' conveyed by the speech." Here, the court said the distinction made by the state statutes were so justified. The court found that

The state law under which employees and labor unions are entitled to picket on the privately owned area outside the entrance to a shopping center supermarket is justified by the state's interest in promoting collective bargaining to resolve labor disputes, the recognition that the union picketing is a component of the collective bargaining process, and the understanding that the area outside the entrance of the targeted business often is "the most effective point of persuasion."

The court further found that the Moscone Act and Section 1138.1 were justified as laws protecting labor-related speech in the context of a statutory system of economic regulation of labor relations. As such, they did not violate the federal Constitution by singling out labor-related speech for "particular protection or regulation." Accordingly, the court reversed the Appellate Court and held that the state laws afford both substantive and procedural protections to peaceful union picketing on a private sidewalk outside a targeted retail store during a labor dispute, and such union picketing may not be enjoined on the ground that it constitutes a trespass. The Moscone Act and section 1138.1 do not violate the federal Constitution's free speech or equal protection guarantees on the ground that they give speech regarding a labor dispute greater protection than speech on other subjects.

A Glimpse of Future Battles

The majority opinion by Justice Kennard was joined by five other Justices, while Chief Justice Cantil-Sakauye and Justice Liu issued separate concurring opinions. In her concurring opinion, the Chief Justice expressly noted that "labor activity with an objective other than communicating labor's grievances and persuading listeners exceeds the right to engage in peaceful picketing within the meaning of the Moscone Act." But she expanded her definition of labor activities that should lose protection beyond acts of violence or intimidation, noting that "[s]peech or conduct directed toward interference with a business's position also falls outside the rights enunciated in the law."

For example, the Chief Justice would allow labor to conduct its otherwise statutorily protected activities "at the entrance of a business but not to enter a business to do so" and that labor could not use outsized signs or excessive noise to interfere with a business at the entrance.
Justice Liu was of the opinion that the Moscone Act and section 1138.1 were not as much speech regulations as they were economic regulations, and sought to curb judicial practices that unfairly limited labor speech as opposed to favoring labor speech over other types of expressive conduct.

Finally, Justice Chin issued a concurring and dissenting opinion, agreeing that the privately owned walkway was not a "public forum" and disagreeing with the majority's view that labor speech could be given greater rights or protection than other speech. He noted that the majority opinion set up the potential situation whereby labor picketers would have the right to picket on private property at a store entrance while other persons engaged in speech activities that did not fall within the protection of the Moscone Act could not. Justice Chin warned that "Today's opinion places California on a collision course with federal courts," noting that only the U.S. Supreme Court can definitively resolve the disagreement" between the California decision and clear federal precedent finding content-based speech restrictions to violate the federal Constitution.

Implications for Private Owners of Commercial Property

First, given the strong diverging opinions, and the invitation by dissenting Justice Chin to seek Supreme Court review, it is entirely possible that the decision will be reviewed by the nation's highest court. At a minimum, future litigation will shape the contours of the labor speech rights of unions on private property. Unions will undoubtedly press the envelope in asserting rights to picket and handbill on private property.

Second, not only may there be a direct challenge to the decision, there may also be challenges under federal labor laws. This is especially true in light of the numerous references to federal labor laws as providing the standards for assessing the conduct. It does not appear that a direct challenge to the court's jurisdiction was made by way of an argument that the National Labor Relations Board had primary jurisdiction over the dispute, or that National Labor Relations Act would preempt state regulations. For example, the NLRB recently ruled in favor of unions unfurling large banners outside entrances or parading around with inflatable rafts, although both practices were called into question by the California Chief Justice's concurring opinion.

Finally, it is clear those issuing the majority and concurring opinions in Ralphs Grocery limited their rulings to speech that involves collective bargaining rights and labor disputes. The ruling steered clear of any other form of expressive speech activity. In fact, dissenting Justice Chin noted that "labor picketers, but no one else, have the right to engage in speech activities on that property." Accordingly — at least for now — private commercial property owners apparently can restrict non-labor union speech on sidewalks adjacent to their facilities and on any other property that is not "designed and furnished in a way that induces shoppers to congregate for purposes of entertainment, relaxation, or conversation," but rather is merely intended to allow shoppers "to walk to or from a parking area, or to walk from one store to another, or to view a store's merchandise and advertising displays."

Linda Auerbach Allderdice is a partner with the Los Angeles office of Holland & Knight LLP.