INDEX

PAGE

Interest of the *Amici Curiae* 1

Reasons for Granting the Appeal 5

I. A. The Decision Below Violates PruneYard's Rights Under the Fifth and Fourteenth Amendments 5

B. The Decision Below Raises an Important Constitutional Question Which Has Not Been, but Should Be, Settled by This Court 8

C. Review by This Court Is Warranted to Resolve a Substantial Conflict Among the States 11

II. By Mandating That Private Property Be Open to Any Expressive Activity, the Decision Below Violates a Property Owner's First Amendment Rights 12

III. The Decision Below Impermissibly Denies Property Owners Rights Granted by Federal Law ... 13

Conclusion 14

Citations

Adderley v. Florida, 385 U. S. 39 (1966) 6, 8

Amalgamated Food Employees Union v. Logan Valley, 391 U. S. 308 (1968) 6, 11

Cameron v. Johnson, 390 U. S. 611 (1968) 8

Carpenters & Joiners Union v. Ritter's Cafe, 315 U. S. 722 (1942) 8

Central Hardware Co. v. N. L. R. B., 407 U. S. 539 (1975) 4, 5, 6, 13

Collin v. Smith, 578 F. 2d 1197 (7th Cir. 1978) 8

Cox v. Louisiana, 379 U. S. 559 (1965) 6, 8

Dellums v. Powell, 566 F. 2d 167 (D. C. Cir. 1977) 8

Diamond v. Bland, 3 Cal. 3d 653, 407 P. 2d 733 (1970), *cert. den. sub nom., Homart Development Co.* v. *Diamond,* 402 U. S. 988 (1971), *rehg. den.,* 404 U. S. 874 (1971), *jt. pet. reh. den.,* 405 U. S. 981 (1972), *rehg. den.,* 409 U. S. 897 (1972) 1, 11

Diamond v. Bland, 11 Cal. 3d 331, 521 P. 2d 460 (1974), *cert. den.,* 419 U. S. 885 (1974), *rehg. den.,* 419 U. S. 1097 (1974), *rehg. den.,* 421 U. S. 972 (1975) 2, 7, 11

Freeman v. Retail Clerks Union, 45 LRRM 2334 (Wash. Sup. Ct. 1959), *rev'd on preemption grnds,* 58 Wash. 2d 426, 363 P. 2d 803 (1961) 3

Greer v. Spock, 424 U. S. 828 (1976) 8

Homart Development Co. v. Fein, 110 R. I. 1372, 293 A. 2d 493 (1972) 2, 11

Hudgens v. N. L. R. B., 424 U. S. 507 (1976) 6, 9, 13

Jones v. North Carolina Prison Union, 433 U. S. 119 (1977) 8

Kern's Bakeries, 227 NLRB 1329 (1977) 13

Knights of the Ku Klux Klan v. East Baton Rouge School Board, 578 F. 2d 1122 (5th Cir. 1978) 8

Kovacs v. Cooper, 336 U. S. 77 (1949) 8

Lenrich Associates v. Heyda, 264 Or. 122, 504 P. 2d 112 (1972) 11

Lloyd Corp. v. Tanner, 407 U. S. 551 (1972) . . . 2, 5, 6, 7, 11

Lovell v. Griffin, 303 U. S. 444 (1938) 6

Machinists v. Wisconsin Employment Relations Commission, 427 U. S. 132 (1976) 13

Madison School District v. Wisconsin Employment Relations Board, 429 U. S. 167 (1967) 8

Marsh v. Alabama, 326 U. S. 501 (1946) 6

Miami Herald Publishing Co. v. Tornillo, 418 U. S. 241 (1974) 12

Moore v. East Cleveland, 431 U. S. 494 (1977) 10

Moore v. Newell, 548 F. 2d 671 (6th Cir. 1977) 9

N. L. R. B. v. Babcock & Wilcox Co., 351 U. S. 105 (1965) 8, 9, 13

N. L. R. B. v. Cities Service Oil Co., 122 F. 2d 149 (2nd Cir. 1941) 9

N. L. R. B. v. Weingarten, Inc., 420 U. S. 251 (1975) . . . 14

Nectow v. Cambridge, 277 U. S. 183 (1928) 10

Organization for a Better Austin v. Keefe, 402 U. S. 415 (1971) 8

People v. Goduto, 21 Ill. 2d 605, 174 N. E. 2d 385, *cert. den.*, 368 U. S. 927 (1961) 11

Pilot Freight Carriers, Inc., 223 NLRB 286 (1976) 13

Powe v. Miles, 407 F. 2d 73 (2nd Cir. 1968) 9

Republic Aviation Corp. v. N. L. R. B., 324 U. S. 793 (1945) 9

San Diego Building Trades Council v. Garmon, 359 U. S. 236 (1959) 14

Sears, Roebuck and Co. v. San Diego District Council of Carpenters, 436 U. S. 180 (1978) 4, 11, 13, 14

Sellers v. Regents of the University of California, 432 F. 2d 493 (9th Cir. 1970) 9

State v. Marley, 54 Haw. 450, 509 P. 2d 1095 (1973) . . . 11

State v. Miller, 280 Minn. 566, 159 N. W. 2d 895 (1968) (*per curiam*) 11

Sunnyland Packing, 227 NLRB 590 (1976) 13

Sutherland v. Southcenter Shopping Center, 3 Wash. App. 833, 478 P. 2d 792 (1970) 11

Taggart v. Weinacker's, 397 U. S. 223 (1970) 2, 3

Tinker v. Des Moines School Dist., 393 U. S. 503 (1969) 8

Valley of Euclid v. Ambler Realty Co., 272 U. S. 365 (1926) 10

West Virginia State Board of Education v. Barnette, 319 U. S. 624 (1943) 12

Wolin v. Port of New York Authority, 392 F. 2d 83 (2nd Cir. 1968) 9

Women Strike for Peace v. Hickel, 420 F. 2d 597 (D. C. Cir. 1969) 9

Wooley v. Maynard, 430 U. S. 705 (1977) 12

Wright v. Chief of Transit Police, 558 F. 2d 67 (2nd Cir. 1977) 8

Younger v. Harris, 401 U. S. 37 (1971) 8

CONSTITUTIONAL PROVISIONS AND STATUTES

First Amendment, United States Constitution....2, 6, 8, 11, 12

Fifth Amendment, United States Constitution......5, 6, 9, 11

Fourteenth Amendment, United States Constitution....5, 6, 11

National Labor Relations Act, 29 U. S. C. § 151 *et seq.*...9, 13

MISCELLANEOUS

Applebaum, *Consumption and the Geography of Retail Distribution in the United States,* Michigan State University Business Topics, Summer 1967.............. 3

How Shopping Malls Are Changing Life in the U. S., 74 U. S. News & World Report, pp. 43-46, June 18, 1973 9

King, *Supermarkets Hub of Suburbs,* New York Times, February 7, 1971, § 1 at p. 58, cols. 4-6............ 9

Note, *Owners' Fifth Amendment Property Rights Prevent a State Constitution from Providing Broader Free Speech Rights Than Provided by the First Amendment,* 86 Harv. L. Rev. 1592 (1973).......................... 10

Shopping Center World, January 1979............... 3

Weiss, *Shopping Center Malls: The Next Place for Teen-Age Riots,* Advertising Age, April 14, 1969, p. 106... 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-289

PRUNEYARD SHOPPING CENTER and FRED SAHADI,
Appellants,

vs.

MICHAEL ROBINS, *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

BRIEF AMICI CURIAE ON BEHALF OF HOMART DEVELOPMENT CO. AND SEARS, ROEBUCK AND CO. IN SUPPORT OF APPEAL

INTEREST OF THE AMICI CURIAE*

Homart Development Co. (hereafter "Homart") is the owner and operator of numerous private shopping centers located throughout the United States. Homart has been a party to three prior disputes involving the issue presented by the instant case.[1] Homart has also appeared as an *amicus curiae*

---

* This brief is being filed with the written consent of all parties. Pursuant to Supreme Court Rule 42(1), these consents are being filed simultaneously under separate cover with the Clerk of the Court.

1. In the first of those cases, *Diamond* v. *Bland,* 3 Cal. 3d 653, 407 P. 2d 733 (1970), *cert. den. sub nom., Homart Development*

(Footnote continued on next page.)

before this Court to argue related questions in *Taggart* v. *Weinacker's,* 397 U. S. 223 (1970); and *Lloyd Corp.* v. *Tanner,* 407 U. S. 551 (1972). The decision below, concluding that "the California constitution protect[s] speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned" (Sl. Op., p. 18), thus presents a recurrent question of substantial interest to Homart.

The issue involved in this case is not confined to only soliciting signatures on a petition to the government.[2] Nor is it restricted to shopping centers located in California. Moreover,

---

(Footnote continued from preceding page.)

Co. v. *Diamond,* 402 U. S. 988 (1971) (the Chief Justice and Mr. Justice Blackmun being of the opinion that certiorari should be granted), *rehg. den.,* 404 U. S. 874 (1971), *jt. pet. reh. den.,* 405 U. S. 981 (1972) (the Chief Justice and Mr. Justice Blackmun being of the opinion that certiorari should be granted), *rehg. den.* 409 U. S. 897 (1972) (hereafter *"Diamond I"*), the California Supreme Court held that, under the First Amendment to the United States Constitution, the plaintiffs had the right to solicit signatures on an initiative petition and to handbill in connection therewith at one of Homart's shopping centers. This holding was overturned in *Diamond* v. *Bland,* 11 Cal. 3rd 331, 521 P. 2d 460 (1974), *cert. den.,* 419 U. S. 885 (1974), *rehg. den.,* 419 U. S. 1097 (1974), *rehg. den.,* 421 U. S. 972 (1975) (hereafter *"Diamond II"*), where the California Supreme Court held that, by reason of this Court's subsequent decision in *Lloyd Corp.* v. *Tanner,* 407 U. S. 551 (1972), "the due process clause of the United States Constitution protects the property interests of the shopping center owner from infringement" under either the First Amendment or the California Constitution. 11 Cal. 3rd at 335, n. 4. *Diamond II,* in turn, was reversed by the majority of the California Supreme Court in the instant case. The third case in which Homart has been a party is *Homart Development Co.* v. *Fein,* 110 R. I. 1372, 293 A. 2d 493 (1972), a decision of the Rhode Island Supreme Court that the owner of a shopping center could bar political candidates from soliciting on its premises.

2. Although the narrow issue in the instant case involved the right to solicit signatures on a petition to the government, its holding will presumably apply to a wide variety of other "speech and petition rights" protected by the California Constitution. Sl. Op., pp. 17-18. The decision below, therefore, would apparently mandate that PruneYard must, "[i]rrespective of how controversial, offensive, distracting or extensive such conduct may be "(*Lloyd,* 407 U. S. at 564, n. 11), nevertheless grant an easement on its private premises for all such purposes.

a "shopping center" can be of practically any size, ranging from large regional centers like the Lloyd Center to local neighborhood centers like PruneYard Center with but a few independent stores,[3] as well as take various shapes.[4] A variety of ownership interests may also be at issue, ranging from joint venture arrangements to multiple ownership relationships where several facilities within the "shopping center" own their own premises

---

3. As one court observed:

> The term 'shopping center' can be applied to any number and variety of merchandising and service operations. What is a shopping center? Does a shopping center become such by reason of having seven, seventeen or seventy places of business? Does it become a shopping center because it is an outdoor operation? One of the reasons that the contention of the defendants cannot be a rule of law is because there is no legally acceptable definition of the phrase 'shopping center.'

Freeman v. *Retail Clerks Union,* 45 LRRM 2334, 2337 (Wash. Sup. Ct. 1959), *rev'd on preemption grnds,* 58 Wash. 2d 426, 363 P. 2d 803 (1961). Many of the "shopping centers" encompassed by the decision below are similar to that involved in *Taggart* v. *Weinacker's,* 397 U. S. 233 (1970), *viz.,* a single retail store containing a supermarket and a small drug department, all owned and operated by the same company, with an adjacent parking lot able to accommodate two rows of automobiles. *See Shopping Center World,* January 1979, pointing out that approximately 53% of "shopping center" sales result from centers with a gross leaseable area of *less than* 200,00 square feet.

4. For example, there are many single unit department stores or discount houses which offer not only their own merchandise but also the merchandise of others through leased departments or concessions and which have parking areas open to the public. As one commentator observed, such an enterprise "is essentially a shopping center by itself, under one roof." *Applebaum, Consumption and the Geography of Retail Distribution in the United States,* Michigan State University Business Topics, Summer 1967, p. 31, n. 4. In addition, there are also retail enterprises which, instead of being constructed on a horizontal plane, as in the case of many suburban shopping centers, are constructed on a vertical plane because of space limitations such as those which exist in downtown locations. Similarly situated also are those multiple stores, shops and offices located within a single building with a common entranceway, stairwells and corridors, or the multiple manufacturing or retail establishments located within industrial parks and connected only by means of a series of private roads fronting on a public artery. All such enterprises, regardless of size, shape or the terms used to describe them, provide the "public forums" sought here.

and parking lots while granting easements to adjacent stores. Thus, the decision in this case will have substantial consequences on many types of businesses, and will impact significantly on the future development of shopping centers. It is for this reason that Homart seeks to present its views.

Sears, Roebuck and Co. (hereafter "Sears") is the nation's largest retailer, employing more than 400,000 employees and maintaining over 2,500 retail stores located in every state, the District of Columbia, and Puerto Rico. Some of these stores are freestanding. Others are in shopping centers. Where the stores are located in shopping centers, Sears' position varies from that of the smallest mall tenant to that of the largest anchor department store. In many shopping centers, Sears owns the portion of the center where its store is located, as well as the surrounding parking areas. In these centers, as well as in the centers where Sears is not a landowner, Sears has easement rights in all areas open to the public for its own use and the use of its customers. In a substantial number of centers, Sears also has agreed to pay a portion of the financial burdens of the malls and parking areas in consideration for those areas being designed, used, and maintained in a manner conducive to commercial activity. If, by reason of the decision below, those areas can now be used for non-commercial purposes, and the Sears' easements can now be obstructed, Sears' property will be taken without just compensation.[5] If openness to the public is the touchstone for permitting access, as the decision below concluded, this justification "could be made with respect to almost every retail and service establishment in the country, regardless of size or location." *Central Hardware Co.* v. *N. L. R. B.*, 407 U. S. 539, 547 (1975). Such stores "are all open to the public in the sense that customers and potential customers are invited and encouraged to enter. In terms of being

5. Sears is currently litigating a related issue of access before the California Supreme Court in *Sears, Roebuck and Co.* v. *San Diego District Council of Carpenters* (No. LA 30562), on remand from this Court's decision at 436 U. S. 180 (1978)).

open to the public, there are differences only of degree—not of principle—between a free standing store and one located in a shopping center, between a small store and a large one, between a single store with some walls and [one with] . . . elaborate walls and interior landscaping." *Lloyd,* 407 U. S. at 565-566. Sears believes that in the instant case, as in *Central Hardware,* to accept such an argument "would . . . constitute an unwarranted infringement of private property rights protected by the Fifth and Fourteenth Amendments." *Central Hardware,* 407 U. S. at 547. The question presented by this case is thus a matter of substantial interest to Sears and other retailers.

REASONS FOR GRANTING THE APPEAL

I.

A. The Decision Below Violates PruneYard's Rights Under the Fifth and Fourteenth Amendments.

The State in this case has violated PruneYard's Fifth and Fourteenth Amendment rights by appropriating its property without compensation. The decision below would compel PruneYard to open its property to anyone who wishes to use it for free speech on its specially developed and expensively maintained commercial property. Such activities must be tolerated notwithstanding that, as in this case, they have no connection whatsoever with the views of the center's owners or occupants or with the conduct of their businesses. The property owner is thus required to provide, free of charge, its valuable facilities to be utilized in a manner that creates additional safety problems, increases the dangers of violence, and that may distract and even drive away those very customers it has attracted to its facility. Other customers will be enticed to devote their limited shopping time to a variety of competing uses. There will necessarily be a substantial adverse effect on normal commercial activities and, in effect, a subsidization by the property owner of a competing use of its property.

This appropriation of private property creates "a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country." *Hudgens* v. *N. L. R. B.*, 424 U. S. 507, at 517, quoting from *Logan Valley*, 391 U. S. at 333 (Black J., dissenting). This Court heretofore has recognized the importance of its responsibility to define the permissible scope of free speech activities on both private[6] as well as public property.[7] In *Lloyd*, for instance, certiorari was granted to determine whether permitting virtually identical activity on virtually identical premises "violates rights of private property protected by the Fifth and Fourteenth Amendments." That case then declared that, by reason of those Amendments, "this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only." 407 U. S. at 552-553 and 568. To the contrary, this Court has repeatedly stated that "the Fifth and Fourteenth Amendment rights of private property owners . . . must be respected and protected."[8]

The California Supreme Court in the present case has disregarded these pronouncements. It has sought, as the dissent

---

6. *See, e.g., Marsh* v. *Alabama*, 326 U. S. 501 (1946); *Amalgamated Food Employees Union* v. *Logan Valley, supra; Lloyd* v. *Tanner, supra.*

7. *See, e.g., Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Cox* v. *Louisiana*, 379 U. S. 559 (1965); *Adderley* v. *Florida*, 385 U. S. 39 (1966).

8. *See also Marsh* v. *Alabama*, 326 U. S. at 509 (1945) ("When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion . . ."); *Logan Valley*, 391 U. S. at 309 ("This case presents the question whether peaceful picketing of a business enterprise located within a shopping center can be enjoined on the ground that it constitutes an unconsented invasion of the property rights of the owners of the land on which the center is situated"); and *Central Hardware Co.* v. *N. L. R. B.*, 407 U. S. 539, 547 (1972) (to subject the owner of private property to the commands of the First Amendment, absent the assumption "to some significant degree of the functional attributes of public property devoted to public use . . . [would] constitute an unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments").

below observed, "to circumvent *Lloyd* by relying upon the 'liberty of speech clauses' of the California Constitution . . . [S]uch an analysis is clearly incorrect, because the owners of defendant Pruneyard Shopping Center possess *federally* protected property rights which do not depend upon the varying and shifting interpretations of state constitutional law for their safeguard and survival . . . *[S]upremacy principles would prevent [a state court] . . . from employing state constitutional provisions to defeat defendant's federal constitutional rights.*" Sl. Op. pp. 3-4 (dissenting opinion; emphasis the author's), quoting from *Diamond II,* 11 Cal. 3rd at 335, n. 4.

The substantial deprivation of a property owner's rights, which would result from the decision below, is not mitigated by the illusory adoption of "reasonable regulations" (Sl. Op., pp. 18-19) of time, place and manner. The State is requiring the property owner to assume "all of the attributes of a state-created municipality" (*Lloyd,* 407 U. S. at 569) to determine and enforce the appropriate time, place and manner for the speech activities; to provide the attendant maintenance and security services; and to assume the risk of any potential disruption or damage liability. The owner would be required to assume these nebulous obligations, and to absorb the concomitant loss of business that would result from permitting competing uses, even though there may be no means by which he can, through his own actions, remove the communicants' source of discontent. As long as the Respondents chose PruneYard Center as a desirable place to communicate their message, PruneYard's owners would be forced to suffer the substantial and expensive burdens imposed by that use.

Such a significant State confiscation of private property in derogation of paramount federal Constitutional rights raises an important issue which warrants review by this Court.

B. The Decision Below Raises an Important Constitutional Question Which Has Not Been, But Should Be, Settled by This Court.

This Court has "vigorously and forthrightly rejected" the concept that those "who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please."[9] The Respondents similarly have no constitutional right to require that PruneYard furnish them with a place to engage in their activities.

The desire to use private shopping center property for *unrelated* competing activities is one which, as here, occurs with almost daily frequency and variety. Homart, in fact, receives an average of three such requests each week. In today's prevailing social climate there is an expanding desire to propagandize an infinite variety of political, social, religious, commercial, charitable, and economic ideas. Evidence of these phenomena can be found, for example, in the recent litigation involving the exercise of various First Amendment activities at locations other than shopping centers.[10] The attractiveness of private shopping

9. *Adderley* v. *Florida,* 385 U. S. 39, 48 (1966), citing *Cox* v. *Louisiana,* 379 U. S. 536, 559 (1965). See also *Jones* v. *North Carolina Prison Union,* 433 U. S. 119 (1977); *Greer* v. *Spock,* 424 U. S. 828 (1976); *Younger* v. *Harris,* 401 U. S. 37 (1971); *Cameron* v. *Johnson,* 390 U. S. 611 (1968); *N. L. R. B.* v. *Babcock & Wilcox Co.,* 351 U. S. 105 (1965); *Kovacs* v. *Cooper,* 336 U. S. 77 (1949); and *Carpenters & Joiners Union* v. *Ritter's Cafe,* 315 U. S. 722 (1942).

10. *See, e.g., Jones* v. *North Carolina Prison Union, supra* (prison); *Greer* v. *Spock, supra,* (military base); *Madison School District* v. *Wisconsin Employment Relations Board,* 429 U. S. 167 (1967) (School Board meeting); *Organization for a Better Austin* v. *Keefe,* 402 U. S. 415 (1971) (private home); *Tinker* v. *Des Moines School Dist.,* 393 U. S. 503 (1969) (high school classroom); *Collin* v. *Smith,* 578 F. 2d 1197 (7th Cir. 1978) (public streets); *Knights of the KuKlux Klan* v. *East Baton Rouge School Board,* 578 F. 2d 1122 (5th Cir. 1978) (school gymnasium); *Dellums* v. *Powell,* 566 F. 2d 167 (D. C. Cir. 1977) (state capitol grounds); *Wright* v. *Chief of Transit Police,* 558 F. 2d 67 (2nd Cir. 1977) (subway

(Footnote continued on next page.)

centers, as a place of communication, both peaceful and otherwise, is apparent.[11] If PruneYard Center must be made available to Respondents for their desired use, others will obviously have the same right to appropriate such property either to disagree with Respondents or for a wide spectrum of other personal reasons.

The instant case presents a far different situation from that involved in cases where either a federal statute, such as the National Labor Relations Act, or public health and safety concerns, preclude a property owner from exercising an absolute right to utilize his property in any desired manner whatsoever. "It is not every interference with property rights that is within the Fifth Amendment . . . [I]nconvenience, or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining"[12] or other rights granted "by the same authority, the National Government, that preserves property rights."[13] Similarly, it is undisputed that

(Footnote continued from preceding page.)
system); *Moore* v. *Newell,* 548 F. 2d 671 (6th Cir. 1977) (retail store); *Sellers* v. *Regents of the University of California,* 432 F. 2d 493 (9th Cir. 1970) (university building); *Women Strike for Peace* v. *Hickel,* 420 F. 2d 597 (D. C. Cir. 1969) (national park); *Powe* v. *Miles,* 407 F. 2d 73 (2nd Cir. 1968) (university football field); and *Wolin* v. *Port of New York Authority,* 392 F. 2d 83 (2nd Cir. 1968) (bus terminal).

11. *See, e.g.,* Weiss, *Shopping Center Malls; The Next Place for Teen-Age Riots,* Advertising Age, April 14, 1969, p. 106, and King, *Supermarkets Hub of Suburbs,* N. Y. Times, Feb. 7, 1971, § 1 at p. 58, cols. 4-6; and *How Shopping Malls Are Changing Life In The U. S.,* 74 U. S. News & World Report, pp. 43-46, June 18, 1973.

12. *N. L. R. B.* v. *Cities Service Oil Co.,* 122 F. 2d 149, 152 (2nd Cir. 1941). *See, Republic Aviation Corp.* v. *N. L. R. B.,* 324 U. S. 793 (1945); *Babcock & Wilcox,* 351 U. S. at 113.

13. *Babcock & Wilcox,* 351 U. S. at 112. Even in this situation, "[a]ccommodation between [the two rights] must be obtained with as little destruction of one as is consistent with the maintenance of the other." *Ibid.* The locus of this accommodation, moreover, "may fall at different points along the spectrum depending on the nature and strength of the respective [statutory] rights and private property rights asserted in any given context." *Hudgens,* 424 U. S. at 526.

property rights may be required to yield to public health, safety, morals, or general welfare interests.[14] Here, however, the objective of the proposed use was neither sanctioned by federal law nor necessary to effectuate a compelling state interest. As in *Lloyd,* there was no relationship in this case between the purpose of the expressive activity and the business of the owner or tenants of PruneYard Center; nor was access essential in order to provide Respondents with a reasonable opportunity to convey their message. PruneYard Center was not found to be dedicated to public use or to constitute the "functional equivalent" of a municipality. No attempt was even made by the court below to evaluate or accommodate the competing interests. To find that, in such circumstances, there is an overriding public interest sufficient to appropriate private property, establishes, as the court below acknowledged (Sl. Op., pp. 10-11), a new definition of the power of the State to regulate private property. The present case is an appropriate vehicle for this Court to determine whether this new principle is compatible with the Federal Constitution.

---

14. *See, e.g., Valley of Euclid* v. *Ambler Realty Co.,* 272 U. S. 365 (1926). Even in such cases, of course, the relationship must be "substantial" and neither "arbitrary" or "unreasonable." *Id.* at 395. The public interests must be "promoted" by the intrusion upon private property rights (*Nectow* v. *Cambridge,* 277 U. S. 183, 188 (1928)), and the State may not "cut so deeply into a fundamental right normally associated with the ownership of residential property . . . [as to constitute] a taking of property without due process and without just compensation." *Moore* v. *East Cleveland,* 431 U. S. 494, 520 (1977) (Stevens, J., concurring). The diminution in the value of the property must also not be extensive and, even where it is substantial, compensation is still generally required where "government regulation involves actual physical invasion and use of the owner's land by the public." Note, *Owners' Fifth Amendment Property Rights Prevent A State Constitution From Providing Broader Free Speech Rights Than Provided By the First Amendment,* 86 Harv. L. Rev. 1592, 1602-1604 (1973). None of these findings were made in the opinion below. The lower court, at the least, was required to support its analogy to public interest situations (S1. Op., pp. 8-9) by evaluating "the character and extent of the infringement on property caused by the measure, compared with other valid police power regulations, to determine whether the impairment constituted a compensable taking under the fifth and fourteenth admendments." *Id.* at 1602.

C. Review by This Court Is Warranted to Resolve a Substantial Conflict Among the States.

Prior to the decision below, post-*Lloyd* decisions of other state courts had uniformly held, as the California Supreme Court itself had declared in *Diamond II,* that supremacy principles prevented state constitutional provisions from being used to defeat a property owner's federal constitutional rights. In *Lenrich Associates* v. *Heyda,* 264 Or. 122, 504 P. 2d 112 (1972), for example, a plurality of the Oregon Supreme Court read Lloyd to be founded upon the protection afforded a property owner by the Fifth and Fourteenth Amendments which prevailed over both asserted First Amendment rights as well as the rights of expression and religious freedom contained in the Oregon Constitution. 504 P. 2d at 114-116. See also *Homart Development Co.* v. *Fein, supra;* and *State* v. *Marley,* 54 Haw. 450, 509 P. 2d 1095 (1973).

This case thus presents a recurrent question which has occasioned a conflict among state courts. Such conflict is a repetition of the disharmony occasioned by both pre-*Lloyd* state court litigation seeking to interpret this Court's now rejected *Logan Valley* analysis[15] and pre-*Sears* state court decisions on the issue of whether peaceful union trespassory activity on private property was preempted.[16] Review by this Court to provide the requisite guidance for the state courts is similarly desirable here.

---

15. *Compare, e.g., Diamond I, supra, Sutherland* v. *Southcenter Shopping Center,* 3 Wash. App. 833, 478 P. 2d 792 (1970), and *State* v. *Miller,* 280 Minn. 566, 159 N. W. 2d 895 (1968) (*per curiam*) with *People* v. *Goduto,* 21 Ill. 2d 605, 174 N. E. 2d 385, *cert. den.,* 368 U. S. 927 (1961).

16. See the cases discussed in *Sears,* 98 S. Ct. at 1751, n. 7.

II.

BY MANDATING THAT PRIVATE PROPERTY BE OPEN TO ANY EXPRESSIVE ACTIVITY, THE DECISION BELOW VIOLATES A PROPERTY OWNER'S FIRST AMENDMENT RIGHTS.

By mandating "an enforceable right of access" to PruneYard Center's private property for the expressive activities of Respondents, the California Supreme Court has created "governmental coercion [which] . . . at once brings about a confrontation with the express provisions of the First Amendment." *Miami Herald Publishing Co.* v. *Tornillo,* 418 U. S. 241, 254 (1974). This Court has long recognized that "the right of freedom of thought protected by the First Amendment against state action includes . . . the right to refrain from speaking at all." *Wooley* v. *Maynard,* 430 U. S. 705, 714 (1977). Here, as in *Wooley,* the State may not "constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property." *Id.* at 713. In doing so, the State "transcends constitutional limitations on [its] power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 642 (1943).

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette,* 319 U. S. at 642. Here, too, the State, within its own constitutional proscriptions, cannot dictate to PruneYard Center's owners an enforceable right of access which that Center's owners would otherwise deny. By mandating that PruneYard permit its property be used for the dissemination of ideas and messages that its owners may not espouse, or wish to

disseminate, the State is denying PruneYard's owners their First Amendment rights.

III.

THE DECISION BELOW IMPERMISSIBLY DENIES PROPERTY OWNERS RIGHTS GRANTED BY FEDERAL LAW.

Under the National Labor Relations Act, as already noted (see notes 12 and 13, *supra*), employers, including shopping center owners and retail store operators, may exclude non-employee union activities on private property where adequate alternative channels of communication exist. *Hudgens* v. *N. L. R. B., supra; Central Hardware Company* v. *N. L. R. B., supra.* The employer may not, however, discriminate against a union by allowing others to engage in similar activity; such discrimination is forbidden by Section 8(a)(1) of the Labor Act.[17] The decision below, by requiring that PruneYard Center permit *non-union* speech and petitioning on its premises, has thereby concomitantly compelled the Center to surrender a federally protected right to exclude *union* speech and petitioning. This result impermissibly regulates conduct encompassed by the national labor law. As this Court noted in *Sears,* "there is a constitutional objection to state court interference with conduct actually protected by the [Labor] Act. Considerations of federal supremacy, therefore, are implicated . . ." 98 S. Ct. at 1759 (footnote omitted). See also, *Machinists* v. *Wisconsin Employment Relations Commission,* 427 U. S. 132 (1976).

It is this very potential of state interference with the federal labor scheme which the preemption doctrine was designed to prevent. The responsibility for determining whether a union has a right of access is a matter which "in the first instance is delegated to the [National Labor Relations] Board, as part of its 'responsibility to adapt the Act to changing patterns of indus-

17. *N. L. R. B.* v. *Babcock & Wilcox Co.,* 351 U. S. at 112. *See also, e.g., Kern's Bakeries,* 227 NLRB 1329 (1977); *Sunnyland Packing,* 227 NLRB 590 (1976); and *Pilot Freight Carriers, Inc.,* 223 NLRB 286 (1976).

trial life.' " *Sears,* 98 S. Ct. at 1765 (Blackmun, J., concurring), quoting from *N. L. R. B.* v. *Weingarten, Inc.,* 420 U. S. 251, 266 (1975). In these circumstances, "due regard for the federal enactment requires that state jurisdiction must yield." *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, 244 (1959).

CONCLUSION

For all of the foregoing reasons, as well as those set forth in the Jurisdictional Statement, the Appeal should be granted.

Respectfully submitted,

LAWRENCE M. COHEN
MARTIN K. DENIS
FOX AND GROVE
233 South Wacker Drive
Suite 7818
Chicago, Illinois 60606
(312) 876-0500
Attorneys for Homart Development Co. and Sears, Roebuck and Co.

Of Counsel:
ANN KANE SMITH
JONES, HALL AND ARKY
900 South Fremont Avenue
Alhambra, California 91802
(213) 576-4064

CHARLES H. MAY, II
HOMART DEVELOPMENT CO.
Sears Tower
Chicago, Illinois 60684
(312) 875-8255