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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-289

PRUNEYARD SHOPPING CENTER, *et al.*, *Appellants*,

v.

MICHAEL ROBINS, *et al.*, *Appellees*,

BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT ON BEHALF OF THE TAUBMAN COMPANY, INC. AND CALIFORNIA BUSINESS PROPERTIES ASSOCIATION

OPINIONS BELOW

The findings of fact, conclusions of law, and judgment of the Superior Court of California are unreported but are reprinted in Appendix A to the Jurisdictional Statement. The opinion of the Court of Appeal of California is also unreported but is reproduced in Appendix B to the Jurisdictional Statement. The opinion of the Supreme Court of California is reported at 23 Cal.3d 899, 592 P.2d 323, 153 Cal.Rptr. 836, and is reproduced in Appendix C to the Jurisdictional Statement. The order denying rehearing is reproduced in Appendix D to the Jurisdictional Statement.

JURISDICTION

A timely petition for rehearing from the judgment of the Supreme Court of California was denied by that court on 23 May 1979. Appellants' notice of appeal was filed on 30 May 1979. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

It may well be that jurisdiction should rather be invoked under 28 U.S.C. § 1257(3), because what is in issue is the denial of Appellants' rights under the Due Process Clause of the Fourteenth Amendment rather than the constitutionality of the California constitutional provision as interpreted and applied by the California Supreme Court. If so, however, this Court's jurisdiction is unaffected. 28 U.S.C. § 2103 provides:

> If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State, or of a United States court of appeals, in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken . . . .

QUESTION PRESENTED

May California compel the surrender of Appellants' property for use by strangers—relating to matters totally unconnected with Appellant landlord, its tenants, or the property—in direct conflict with this Court's determination in *Lloyd Corp.* v. *Tanner,* 407 U.S. 551 (1972), that not even the First Amendment (which is not invoked here) can justify such "an unwarranted infringement" of Appellant's Fourteenth Amendment "property rights," 407 U.S. at 567?

UNITED STATES AND CALIFORNIA CONSTITUTIONAL PROVISIONS

The Constitution of the United States, Amendment XIV, § 1 reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Constitution of the State of California, Art. I., § 2 reads:

> Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

INTEREST OF AMICI CURIAE

The Taubman Company, Inc., a Michigan corporation, is one of the largest developers and operators of shopping centers in the United States. It is involved in the operation of a total of eighteen regional retail shopping centers. Those centers are located in the states of California, Connecticut, Illinois, Maryland, Michigan, Nevada, New Jersey, New York and Wisconsin. The centers contain an aggregate of approximately 2,400 individual retail businesses occupying about 21,800,000 square feet of leasable area. The Taubman Company, Inc. has a continuing interest in the cause herein. It is presently connected with two actions in the State of

California involving the issue raised by the instant matter, and participated as amicus curiae in support of Appellants before the California Supreme Court.

California Business Properties Association ("CBPA"), a California non-profit corporation, was formed in 1972. Its membership is comprised of several hundred organizations representing commercial property owners, major retailers, developers, builders, financiers, real estate agents and professional service corporations. Members are involved in creating redevelopment projects, public and private buildings, and shopping and industrial centers. CBPA members operate nationwide as well as in California. Thirty-two states are represented among the interests and installations of members. CBPA serves as a clearinghouse for information affecting the rights and duties of members and frequently acts to articulate the view of its members, as determined by its Board of Directors. The diminution of the rights of members in their private property is an issue vitally affecting its membership.

LETTERS OF CONSENT

The Appellants and Appellees have consented to the filing of this brief *amicus curiae* and their letters of consent have been filed with the Office of the Clerk of this Court.

STATEMENT

The facts in this case and in *Lloyd Corp.* v. *Tanner,* 407 U.S. 551 (1972), are as close to being identical as to make no difference. Both cases involve a private shopping center. The Lloyd Center ("Lloyd") covers 50 acres and "is crossed in varying degrees by several other public streets." 407 U.S. at 553. The Pruneyard

Center ("the Center") occupies only 21 acres with no public streets crossing it. Both had adjacent public streets. Lloyd has about "60 commercial tenants" and an auditorium and skating rink. *Ibid.* The Center contains about 65 shops, a cinema, and restaurants. The Lloyd auditorium, but not its other facilities, was made available as a public forum for civic and charitable organizations and "presidential candidates of both parties." *Id.* at 555. The Center has consistently and without exception excluded all uses by political, civic, or charitable organizations or individuals.

Lloyd had a total ban on "distribution of handbills," because such activity "was considered likely to annoy customers, to create litter, potentially to create disorders, and generally to be incompatible with the purpose of the Center and the atmosphere sought to be preserved." *Id.* at 555-56. For the same reasons, the Center banned handbilling and solicitation on its premises.

In *Lloyd,* the respondents distributed handbills "to protest the draft and the Vietnam war." *Id.* at 556. They were "quiet and orderly, and there was no littering." *Ibid.* They were told by a security officer that they were "trespassing" and were requested to leave, that they would be arrested if they did not leave, and that they could continue their efforts on the public sidewalks adjacent to the Center, which they did. *Ibid.* Thereafter, the respondents in *Lloyd* filed suit for a declaratory judgment and an injunction to compel Lloyd to allow the use of its premises for their purposes.

In the instant case, the Appellees set up a table in the central courtyard of the Center, from which they

solicited signatures in support of petitions condemning Syria for preventing Jewish emigration and condemning the United Nations for its resolution on Zionism. As in *Lloyd,* the Center's security personnel informed the Appellees that their conduct was prohibited, requested them to leave, and suggested the possibility of using the public sidewalks adjacent to the Center. The Appellees left, but they did not engage in further activity on the public ways. They, too, however, subsequently brought action to compel the Center to make its premises available for their private uses.

In *Lloyd,* the respondents had rested their claim of right to use the shopping center for their political purposes on the First Amendment. Here, the Appellees—in an attempt to avoid the conclusion reached by this Court in *Lloyd* that a First Amendment claim afforded no basis for compelling Lloyd to surrender its property to a private use inconsistent with its function—rested not on the First Amendment, but on Article I, § 2, of the California Constitution. In both cases, the shopping center defendants relied on their property rights guaranteed by the Due Process Clause of the Fourteenth Amendment. In *Lloyd,* this Court held that the claimed rights of free speech could not justify the taking of the petitioner's property for respondents' private use. Here, reversing the rulings of the trial court and the intermediate appellate court, and overruling an earlier decision of its own, *Diamond* v. *Bland,* 11 Cal.3d 331, 335 n.4, 521 P.2d 460, 463 n.4 (1974), *cert. den.,* 419 U.S. 885 (1974), the California Supreme Court, divided four to three, held that the rights granted by Article I, § 2 of the California Constitution were superior to the rights presented by the Due Process Clause of the Fourteenth Amendment of

the Constitution of the United States. This appeal followed.

THE QUESTION PRESENTED IS A SUBSTANTIAL QUESTION OF CONSTITUTIONAL LAW

The decision below is in direct conflict with the decision of this court in *Lloyd Corp.* v. *Tanner,* 407 U.S. 551 (1972), with the judgment of the Supreme Court of Oregon in *Lenrich Associates* v. *Heyda,* 264 Ore. 122, 504 P.2d 112 (1972), and with numerous other decisions of state and federal courts. The issue is one of widespread importance, affecting as it does the conduct of business in almost every municipality and suburb in the United States.

To put the question in perspective, it should be made clear what this case is not about. First, the case is not at all concerned with Appellees' rights under the First Amendment. Even the Supreme Court of California concedes that the question of First Amendment rights of Appellees has been decided against them by this Court's decision in *Lloyd.* Indeed, the First Amendment rights that have been trampled on by the California Supreme Court are those of the Appellants in being compelled to use their property for the expression of political views that are not their own. Thus, as this Court recently decided in *Wooley* v. *Maynard,* 430 U.S. 705, 714-715 (1977):

> We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. . . . A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right

> to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind." . . . This is illustrated by the recent case of *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974), where we held unconstitutional a Florida statute placing an affirmative duty upon newspapers to publish the replies of political candidates whom they had criticized. . . .

Not the Appellees' but the Appellants' freedom of speech under the First Amendment is undermined by the judgment below.

Nor does this case involve the use of public property by those seeking to advance their personal ideologies, although even public property is not necessarily an appropriate forum for such expressions. See, *e.g., Greer* v. *Spock,* 424 U.S. 828 (1976); *Adderley* v. *Florida,* 385 U.S. 39 (1966); *Cox* v. *Louisiana,* 379 U.S. 559 (1965); *Vietnam Veterans Against the War* v. *Morton,* 506 F.2d 53 (D.C. Cir. 1974).

There is no question of a "First Amendment forum" involved here. For certainly if a city, in its "proprietary capacity", is free to limit access to its transit system's advertising space so as to exclude political advertising, it must be *a fortiori* true that a nongovernmental body which does not discriminate among, but totally excludes all, such proselytizing is not denying a "First Amendment forum". As this Court ruled in *Lehman* v. *City of Shaker Heights,* 418 U.S. 298, 304 (1974):

> No First Amendment forum is here to be found. The city consciously has limited access to its tran-

> sit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity. In these circumstances, there is no First or Fourteenth Amendment violation.

And the question here is not whether employees should have a right to express their views on their employer's premises. If that had been the question, the California Supreme Court would have no jurisdiction to decide it. That issue has been preempted for resolution by the National Labor Relations Board. See, *e.g., Central Hardware Co.* v. *N.L.R.B.,* 407 U.S. 539 (1972); *Hudgens* v. *N.L.R.B.,* 424 U.S. 507 (1976); *Eastex* v. *N.L.R.B.,* 437 U.S. 556 (1978); *Garcia* v. *Gray,* 507 F.2d 540 (10th Cir. 1974), *cert. den.,* 421 U.S. 971 (1974).

The question presented here is exactly that which was stated by Mr. Justice Powell for the Court in *Lloyd,* 407 U.S. at 552:

> This case presents the question reserved by the Court in *Amalgamated Food Employees Union* v. *Logan Valley Plaza,* 391 U.S. 308 (1968), as to the right of a privately owned shopping center to prohibit the distribution of handbills on its property when the handbilling is unrelated to the shopping center's operations.

Cf. *Associacion de Trabajadores, Etc.* v. *Green Giant Co.,* 518 F.2d 130, 135 (3d Cir. 1975). In *Lloyd,* the Court held that the shopping center did, indeed, have such a "right" of exclusion and that that right derived from the provisions of the Due Process Clause of the Fourteenth Amendment.

Indeed, it was long before *Lloyd* that this Court recognized the constitutional right of a property owner to preclude others from using its property for their own ends, even where the property owner was a public utility. *Delaware, L. & W. R. Co.* v. *Town of Morristown,* 276 U.S. 182 (1928); cf. *State of New Hampshire* v. *Linsky,* 379 A.2d 813, 821 (1977). And, as this Court noted in *Rowan* v. *Post Office Dept.,* 397 U.S. 728, 737 (1970):

> The Court has traditionally respected the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property. See *Martin* v. *Struthers* [319 U.S. 141, 147 (1943)]; cf. *Hall* v. *Commonwealth,* 188 Va. 72, 49 S.E. 2d 369, appeal dismissed, 335 U.S. 875 (1948) [apartment house complex].

The Supreme Court of California would have it that *Lloyd* did not decide the right of the property owner to exclude, but only that the would-be infringers on the Center's property had no basis under the First Amendment for asserting rights of free speech. It attempted the ploy that the California Constitution created a right higher even than the First Amendment and thus provided the license to trespass not provided by the First Amendment. It was exactly this position which was rejected by the Supreme Court of Oregon in *Lenrich Associates* v. *Heyda,* 264 Ore. 122, 129, 504 P.2d 112, 116 (1972):

> The issue in this case, as in *Tanner,* is the extent to which plaintiff's rights as a property owner can be infringed in favor of the rights of the public to free speech and freedom of expression. In the absence of any significant factual differences the decision in *Tanner* is controlling and requires that this case be reversed.

The Oregon Court recognized, as it had to, that *Lloyd* expressed not only the absence of the respondents' free speech rights, but also the supervailing property rights of the shopping center under the Due Process Clause of the Fourteenth Amendment. That the *Lloyd* case established the shopping center's Fourteenth Amendment right to exclude the proselytizers and to confine the use to which it would put its own property allows of no question, unless it is to be said that this Court, in the *Lloyd* case, did not mean what it said or did not say what it meant.

That the question was the scope of the property owner's Fourteenth Amendment rights is made clear from the question that was framed by this Court, 407 U.S. at 552: "This case presents the question reserved by the Court in *Amalgamated Food Employees Union* v. *Logan Valley Plaza,* 391 U.S. 308 (1968), as to the right of a privately owned shopping center to prohibit the distribution of handbills on its property when the handbilling is unrelated to the shopping center's operations."

"We granted certiorari," said this Court in *Lloyd,* "to consider petitioner's contention that the decision below violates rights of private property protected by the Fifth and Fourteenth Amendments. 404 U.S. 1037 (1972)." 407 U.S. at 552-553. This Court resolved that question in favor of the property owner's rights:

> [I]t must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on *state* action, not on action by the owner of private property used nondiscriminatorily for private purposes only. The Due Process Clauses of the Fifth and Fourteenth Amendments are also relevant to this

> case. They provide that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." There is the further proscription in the Fifth Amendment against the taking of "private property . . . for public use, without just compensation."
>
> Although accommodations between the values protected by these three Amendments are sometimes necessary, and the courts properly have shown a special solicitude for the guarantees of the First Amendment, 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. [*Id.* at 567-568.]
>
> We do say that the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected. The Framers of the Constitution certainly did not think these fundamental rights of a free society are incompatible with each other. There may be situations where accommodations between them, and the drawing of lines to assure due protection of both, are not easy. But on the facts presented in this case, the answer is clear. [*Id.* at 570.]

The facts of this case, as already noted, are exactly the same as those in *Lloyd*. Thus, the California court's judgment can be permitted to stand only if this Court's ruling in *Lloyd* establishing, or acknowledging, Appellants' Fourteenth Amendment property rights is to be discarded.

It takes a particularly brazen reading of *Lloyd* to suggest that this Court was not there concerned with the due process property rights of the shopping center. It was exactly these Fourteenth Amendment property

rights that justified the Court's conclusion there and which equally requires the reversal of the judgment below.

CONCLUSION

If the California Supreme Court has the authority to expand rights of freedom of expression vis á vis the State of California beyond those afforded by the First Amendment, it surely does not have the authority to diminish the constitutional rights of the Appellants under the Fourteenth Amendment, as so clearly pronounced by this Court. This Court should assert its jurisdiction over this case and summarily reverse the judgment below on the basis of the *Lloyd* decision.

Respectfully submitted,

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