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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 79-289

PRUNEYARD SHOPPING CENTER and FRED SAHADI,
Appellants,

vs.

MICHAEL ROBINS, et al.,
Appellees.

**On Appeal From The
California Supreme Court**

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

INTEREST OF AMICUS

Pursuant to Supreme Court Rule 42, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of appellants PruneYard Shopping Center, *et al.* Consent to the filing of the brief has been granted by counsel for all parties. Copies of these letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for PLF is established by an independent Board of Trustees com-

posed of concerned citizens, the majority of whom are attorneys.

Of particular concern to PLF, its members, supporters, and contributors is the conflict between the California Supreme Court's decision in *PruneYard* and the most recent decisions rendered by this Court defining the parameters of First Amendment free speech rights vis-à-vis Fifth and Fourteenth Amendment private property rights.

In both *Lloyd Corporation v. Tanner,* 407 U.S. 551 (1972), and *Hudgens v. National Labor Relations Board,* 424 U.S. 507 (1976), this Court considered the extent to which First Amendment rights attach to private property. In considering this issue, this Court observed that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on *state* actions, not on action by the owner of private property used nondiscriminatorily and only for private purposes. This Court concluded that First Amendment rights can be exercised on private property *only* when such property assumes all of the characteristics and attributes of a municipality.

The California Supreme Court has chosen to reject this criterion, notwithstanding federally guaranteed property rights, and has instead adopted its own standard—when private property is opened to the public for commercial purposes, free speech rights attach. The ultimate effect of the California Supreme Court's decision is clear. Under the guise of the state's free speech provisions (Cal. Const. art. I, §§ 2 and 3), it impermissibly attempts to overrule this Court's statements in *Lloyd* and *Hudgens* regarding the

protection of private property, thereby circumventing the protection previously accorded by this Court under the Fifth and Fourteenth Amendments.

The standard adopted by the California Supreme Court has been specifically rejected by this Court. In *Lloyd* the respondents argued that the property of a large shopping center " 'is open to the public' " and "serves the same purposes as a 'business district' of a municipality." It was then asserted that "all members of the public . . . have the same right of free speech as they would have on the similar public facilities in the streets of a city or town." *Lloyd,* 407 U.S. at 569. This Court concluded in response to such argument that it "reaches too far." *Id.* This Court stated "[t]he Constitution by no means requires such an attenuated doctrine of dedication of private property to public use." *Id.*

The ramifications of the Court's opinion in *PruneYard* are ominous. Any time property in a modern shopping center is opened to the public, no matter how limited the invitation, the Court's opinion in *PruneYard* converts its essentially private character to one dedicated to public use. The opinion renders the Fifth and Fourteenth Amendment due process guarantees subservient to article I, sections 2 and 3 of the California Constitution. Such a sweeping repudiation of Fifth and Fourteenth Amendment guarantees has never been sanctioned by this Court. This Court stated in *Lloyd* that while

> "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." *Lloyd,* 407 U.S. at 568.

PLF adopts the position of this Court in *Lloyd* where this Court stated:

> "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." *Lloyd,* 407 U.S. at 570.

It is the interests of the property owner who must contend with the imbalance created by the California Supreme Court's decision in *PruneYard* which amicus seeks to represent. PLF agrees that there may be need in certain situations for accommodation between First, Fifth, and Fourteenth Amendment rights and for "the drawing of lines to ensure due protection of both," but the *PruneYard* case does not present that situation. The California Supreme Court unnecessarily places these rights on a collision course.

PLF therefore respectfully submits that notice of probable jurisdiction and review are essential in this case so that there may be established throughout the country a consistent and uniform recognition of the rights of private property owners in relation to the attempted exercise of speech and speech related activities on private property.

OPINION BELOW

The opinion of the California Supreme Court is reported at 23 Cal. 3d 899 (1979).

QUESTION PRESENTED

Whether the owner of a private shopping center, which is not the equivalent of a municipality and is open to the public solely for the designated purpose of commercial enterprise, is protected under the Fifth and Fourteenth Amendments to the Constitution of the United States from an assertion under the California Constitution of the rights of freedom of speech and petitioning by individuals, when there exists adequate, effective channels of communication other than soliciting on the private property.

ARGUMENT

I

THE PRUNEYARD OPINION VIOLATES PRINCIPLES CAREFULLY EVOLVED BY THIS COURT WHICH INSURE THE COMPATIBILITY OF FREE SPEECH AND PRIVATE PROPERTY RIGHTS

The nonconsensual use of privately owned property by the public as a forum for the exercise of First Amendment rights is an issue that has been the subject of four major United States Supreme Court decisions in the past 33 years. While the first two decisions upheld the right of free speech against attempted assertions of private property rights, the latter two cases were resolved by a recognition that the First Amendment only proscribes *governmental* infringement on free speech and does not prohibit limitations on free speech by owners of private property.

The first of these four cases, *Marsh v. Alabama,* 326 U.S. 501 (1946), involved a company town, which although privately owned, had

> "all the characteristics of any other American town. . . . In short, the town and its shopping district are accessible to and freely used by the public . . . and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation." *Id.* at 502-03.

After refusing a request to stop the distribution of religious literature on the sidewalk without a permit, appellant Marsh was arrested and convicted of criminal trespass. On appeal to the United States Supreme Court, appellant contended that her First Amendment rights to freedom of speech and religion had been violated. She argued that the company town was tantamount to a municipality. *Id.* at 506-08. This Court reversed appellant's conviction and extended First Amendment protection to privately owned property which, in essence, had assumed all of the characteristics of a municipality. In extending free speech protection to the private arena, this Court adopted a "sliding scale" to determine when private property became "quasi-public"—

> "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by . . . those who use it." *Id.* at 506.

Thus, the Court expanded First Amendment rights beyond their traditional scope by upholding those rights against attempted constraints not by the state, but instead by private citizens on privately owned property.

Twenty-two years later, this Court decided the case of *Amalgamated Food Employees Union Local 590 v. Logan*

Valley Plaza, 391 U.S. 308 (1968), in which the *Marsh* rationale was extended to a privately owned shopping center by upholding the right of a union to picket in the parking lot of a supermarket located in Logan Valley Plaza. The key to the decision was a determination that the shopping center was the functional equivalent of the business district discussed in *Marsh*. This Court focused its attention on the nature of the area picketed, rather than on its ownership. A major consideration was a desire to preserve traditional First Amendment forums from destruction by economic and social changes. The holding in *Logan Valley* was heavily influenced by the facts. The holding was limited to the exercise of First Amendment rights in those situations where the manner and purpose is generally consonant with the actual use of the property and where no alternative means of communication exist. The Court expressly reserved the question of whether *Logan Valley* would extend to speech which is unrelated to the use of the property.

Four years later the Court was faced with this very issue in *Lloyd Corporation v. Tanner, supra. Lloyd* involved an enclosed shopping center in Portland, Oregon, consisting of 60 stores. The shopping center management adhered to a policy prohibiting the distribution of leaflets and handbills on its property. Anti-war activists who were asked to leave the mall on threat of arrest sought declaratory and injunctive relief to restrain the enforcement of the center's policy. The Court in *Lloyd* preserved the private property rights of a shopping center owner by stating that a privately owned shopping center may prohibit the exercise of First Amendment activity which is unrelated to the operation of the

center. This Court rejected the *Marsh* "sliding scale" test, distinguished *Logan Valley,* and held that *Marsh* was not intended to extend First Amendment rights to private property until it had acquired *all* of the attributes of a municipality.

In a related case, *Central Hardware Co. v. National Labor Relations Board,* 407 U.S. 539 (1972), this Court decided that the parking lots surrounding a single, free-standing store, not located in a mall, need not be made available for the exercise of free speech rights because the lots were not the functional equivalent of public property devoted to public use. The Court stated that to hold otherwise would "constitute an unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments." *Id.* at 547.

Hudgens v. National Labor Relations Board, 424 U.S. 507 (1976), is the latest of the shopping center cases. In this case a store located in an enclosed shopping mall was picketed by off-site warehouse employees. The mall owners threatened the picketers with arrest if they did not leave. The union then filed an unfair labor practice action against the mall owners. Highlighting the inconsistency between *Logan Valley* and *Lloyd,* this Court expressly overruled the former, rejected the concept that a shopping center should be treated as public property for First Amendment purposes, and limited *Marsh* to its specific facts. In returning to more traditional notions of First Amendment rights, this Court observed that free speech is only to be guaranteed against infringement by the *state or federal government,* and it reiterated the holding in *Lloyd* that private property

becomes public for First Amendment purposes *only* when it assumes all of the characteristics of property normally devoted to public use.

The state of the law in the post-*Hudgens* period with respect to the exercise of free speech rights by the public on privately owned property may be summarized as follows:

1. Private property will only be considered as public and therefore a proper forum for the exercise of First Amendment rights if such private property assumes *all* of the characteristics of a municipality. The fact that a shopping center has become the central business district of a community is not enough. An ordinary shopping center is not the equivalent of a town. The *Marsh* "sliding scale" of private, quasi-public, and public property has been rejected.

2. First Amendment rights will continue to be protected against infringement by governmental activity on most, but not all, public property. *E.g., Greer v. Spock,* 424 U.S. 828 (1976) (military reservation not generally open to public for First Amendment purposes); *Adderley v. Florida,* 385 U.S. 39 (1966) (grounds of jailhouse); *Cox v. Louisiana,* 379 U.S. 559 (1965) (courthouse); *Frend v. United States,* 100 F.2d 691 (D.C. Cir.), *cert. denied,* 306 U.S. 640 (1939) (foreign embassy). *See Brown v. Louisiana,* 383 U.S. 131, 157 (1966) (Black, J., dissenting) ("[L]ibraries, schoolhouses, fire departments, courthouses, and executive mansions are maintained to perform certain specific and vital functions. Order and tranquility of a sort entirely unknown to the public streets are essential to their normal operation").

First Amendment activity will not be protected against infringement by private individuals on privately owned property.

The California Supreme Court's decision in *PruneYard* thus violates principles which have been established by this Court insuring the compatibility of First, Fifth, and Fourteenth Amendment rights and must be reversed.

II

THE PRUNEYARD OPINION IMPERMISSIBLY CONFLICTS WITH THIS COURT'S DECISIONS IN LLOYD AND HUDGENS

The *Hudgens* case makes it clear that, in an attempted assertion of First Amendment rights on private property, the federally guaranteed rights of the property owner will prevail unless the private property has assumed all the characteristics of a municipality. In *PruneYard,* the appellee has claimed below, and the California Supreme Court has adopted as part of its holding, that the California Constitution grants broader rights of speech and petitioning than does its federal counterpart, thus establishing the basis for the exercise of free speech and petitioning rights on private property. However, what the California Supreme Court has effectively done is to use the state guaranteed right of free expression to defeat a property owner's Fifth Amendment property rights. While it is no doubt true that "states are free to establish greater rights under their constitutions than those guaranteed by the federal Constitution," *PruneYard,* 23 Cal. 3d at 903-04, it is not true that states may use their own constitutional guarantees to defeat other *federally* guaranteed rights of its citizens.

The California Supreme Court has attempted to relegate Fifth Amendment property rights to a subservient position vis-à-vis the "liberty of speech" provision of the California Constitution, even though this Court in *Hudgens* ruled that the superior free speech guarantee of the First Amendment cannot be used to force a landowner to yield his Fifth Amendment property rights. *See PruneYard, supra,* dissenting opinion of Richardson, J., at 911. The California Supreme Court has taken this position despite the fact that it has acknowledged the existence of the Supremacy Clauses contained in both the State and Federal Constitutions, *PruneYard,* 23 Cal. 3d at 903 n.2, and has recognized in an earlier case dealing with essentially the same facts that

> "[e]ven were we to hold that the state Constitution in some manner affords broader protection than the First Amendment to the United States Constitution . . . nevertheless supremacy principles would prevent us from employing state constitutional provisions to defeat defendant's federal constitutional rights." *Diamond v. Bland,* 11 Cal. 3d 331, 335 n.4 (1974).

In this instance the state constitutional guarantee of free speech is in conflict with the Fifth Amendment rights of the property owner. When there is a conflict between the Federal and State Constitutions, the Supremacy Clause of the United States Constitution controls. *Reynolds v. Sims,* 377 U.S. 533, 584 (1964); *Whitcomb v. Chavis,* 403 U.S. 124, 180 (1971); *Lucas v. State of Michigan,* 420 F.2d 259, 263 (6th Cir. 1970). Moreover, the courts of the several states are obligated to uphold the federal law. *Stone v. Powell,* 428 U.S. 465, 494 n.35, *rehearing denied,* 429 U.S.

874 (1976). *See* Cal. Const. art. III, § 1 (the United States Constitution is the supreme law of the land).

Justice Newman, writing for the majority of the California Supreme Court in *PruneYard,* posed the "main question" as being whether *Lloyd*

> "recognize[d] federally protected property rights of such a nature that we are now barred from ruling that the California Constitution creates broader speech rights as to private property than does the federal Constitution .... If not, does the California Constitution protect speech and petitioning at shopping centers?" *PruneYard,* 23 Cal. 3d at 903.

In an exercise of legal gymnastics, the Court answered the first question in the negative and the second in the affirmative.

The *PruneYard* Court began its analysis by inquiring whether *Lloyd* identified any special property rights protected by the United States Constitution, and determined that *Lloyd* is primarily a free speech case and does not purport to define federally guaranteed property rights. *PruneYard,* 23 Cal. 3d at 904. However, in *Lloyd,* Justice Powell indicated in the majority opinion:

> "We granted certiorari to consider petitioner's contention that the decision below violates rights of private property protected by the Fifth and Fourteenth Amendments." *Lloyd,* 407 U.S. at 552-53.

The discussion of this Court in *Lloyd* centered on the extent to which a property owner must allow his private property to be used for First Amendment purposes. The holding of this Court made it clear that this case was an attempt to determine the scope of private property rights:

> "We hold that there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights." *Id.* at 570.

The California Supreme Court for all practical purposes ignored this Court's decision in *Hudgens,* which further refined this area of the law. In the *PruneYard* decision, the Court devoted a total of three sentences to *Hudgens.* Although that case deals in part with First Amendment rights of picketers in a shopping center under the National Labor Relations Act, Justice Stewart preceded that discussion with an examination of First Amendment rights on privately owned shopping centers. He concluded that

> "under the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this." *Hudgens,* 424 U.S. at 521.

The California Supreme Court misread both *Lloyd* and *Hudgens.*

Ignoring the "supreme law of the land," the Court then launched into a zoning analysis to justify its position. It then examined how the modern shopping center has assumed the position of the new central business district in many locations. Even assuming this status, the state of the law is such that where the shopping center has assumed the functional equivalency of a central business district it is an insufficient basis upon which to extend First Amendment rights. *Lloyd* and *Hudgens* make it clear that unless a shopping center has assumed *all* of the attributes and characteristics of a state-created municipality,

it need not be opened up to the general public for the exercise of First Amendment rights. *See Curtis v. Rosso & Mastracco, Inc.*, 413 F. Supp. 804, 807 (E.D. Va. 1976); *People v. Bush*, 39 N.Y.2d 529, 534, 384 N.Y.S.2d 733, 735 (N.Y. 1976).

It is therefore clear that the *PruneYard* decision impermissibly conflicts with the Court's decision in *Lloyd* and *Hudgens* and that it must be set aside.

III

THE CALIFORNIA SUPREME COURT'S DECISION IN PRUNEYARD CONFLICTS WITH OTHER FEDERAL AND STATE COURT DECISIONS DEMONSTRATING THE NECESSITY FOR THE NOTING OF PROBABLE JURISDICTION

Decisions by state and federal courts have been consistent in their application of the *Lloyd* and *Hudgens* holdings that privately owned property need not be opened up to the public for the exercise of speech and petitioning. In a 1972 case, the Supreme Court of Oregon invoked the *Lloyd* rationale to *uphold* the federally guaranteed property rights of a shopping mall owner as against the attempted exercise of speech and speech-related activities by religious organizations in *Lenrich Associates v. Heyda*, 504 P.2d 112 (Or. 1972). The shopping mall in that case was almost identical to PruneYard and, as in this case, the defendants in *Lenrich Associates* argued that the state constitution afforded them greater individual rights of expression than those guaranteed by the First Amendment. The Court recognized that although it was

> "free to enforce the guarantees of our state constitution so as to allow greater freedom and to give greater

> protection to individual liberties than are given under the federal Bill of Rights as interpreted by the United States Supreme Court . . . [t]he issue raised by plaintiff is whether its rights under the Constitution of the U.S. as the owner of private property are outweighed by defendants' First Amendment rights of free speech." *Id.* at 115.

Based upon the controlling authority of *Lloyd,* the Court held that a property owner's Fifth and Fourteenth Amendment property rights cannot be outweighed by a state constitutional provision.

The *Lloyd* case was also used by the Supreme Court of Illinois in 1972 to resolve a controversy involving another attempted assertion of free speech rights in an enclosed, privately owned shopping center. In *People v. Sterling,* 287 N.E.2d 711 (Ill. 1972), the defendants sought to distribute leaflets criticizing a local newspaper's coverage of a "racial situation" in the state. Defendants were arrested after they refused to leave the privately owned mall and were found guilty of criminal trespass. On appeal, the defendants asserted that they were deprived of their federally guaranteed right to free speech, relying on *Logan Valley.* The Court disagreed, holding that *Lloyd* was dispositive of the issue. *Id.* at 714. *See also Homart Development Co. v. Fein,* 293 A.2d 493 (R.I. 1972).

International Society for Krishna Consciousness, Inc. v. Reber, 454 F. Supp. 1385 (C.D. Cal. 1978), involved an assertion of First Amendment rights by a religious society on the sidewalk of a privately owned street in an amusement park. The park had a policy against soliciting, distributing

leaflets, or otherwise proselytizing the public. The Court identified the issues as being

> "the extent to which speech should be protected under the First Amendment when it takes place on property that appears to be public but actually is privately owned." *Id.* at 1389.

After reviewing the federal law from *Marsh* to *Hudgens*, the Court observed that although the privately owned street

> "is the functional equivalent of a public street[,] [i]t is not, however, the functional equivalent of a municipality such as existed in *Marsh*. Therefore, under the Supreme Court's holding in *Hudgen* [*sic*], Plaintiffs are not entitled to . . . freely distribute and sell religious literature and solicit donations on private property . . . ." *Reber*, 454 F. Supp. at 1390.

In *Curtis v. Rosso & Mastracco, Inc., supra,* the plaintiff was arrested for trespassing while on the premises of a supermarket to unionize its employees. Plaintiff was acquitted of all charges and thereafter brought a civil rights action against the supermarket for denying him the "right 'to move about freely and peaceably in public places,' pursuant to 42 U.S.C. § 1983." 413 F. Supp. at 805. The Court examined whether there was sufficient state action in order to apply Section 1983 and whether the plaintiff had been denied any constitutional rights.

Turning to the state action issue, the Court reviewed *Marsh* and its progeny and concluded that

> "[i]t is evident from the most recent decisions emanating from the Supreme Court that . . . shopping center[s] . . . are not the functional equivalents of a public municipal facility. Therefore, traditional constitutional

> protections . . . do not attach to activities conducted in shopping centers." *Curtis,* 413 F. Supp. at 806-07.

The Court noted that although *Hudgens* involved a labor dispute, it was relied upon for the

> "delineation of the applicability of the Constitution and its protection to privately owned facilities which are publicly accessible." *Id.* at 807 n.1.

In a recent civil rights action, the Seventh Circuit applied the holding of *Marsh,* reaffirmed by *Hudgens,* to a challenge by the Illinois Migrant Council which sought to exercise First Amendment rights on residential property owned by a soup company. *Illinois Migrant Council v. Campbell Soup Company,* 574 F.2d 374 (7th Cir. 1978). The Court observed that because

> "the constitutional guarantee of free speech protects only against abridgement by government . . . one must find some sort of state action to establish a violation of First Amendment free speech rights." *Id.* at 375-76.

The Court then noted the *Marsh* exception that when a privately owned town assumed all the functions and components of a municipality, the state action prerequisite of the First Amendment is satisfied. After reviewing *Logan Valley* and *Lloyd,* the Court observed that in *Hudgens* the Supreme Court

> "returned to a strict *Marsh* analysis and held that a shopping center was not the functional equivalent of a town, ergo no violation of freedom of speech.

> "It is the *Marsh* doctrine, unscathed by *Logan Valley* and *Lloyd,* and reaffirmed by *Hudgens,* that we now will apply." *Illinois Migrant Council,* 574 F.2d at 376.

In *People v. Bush, supra,* union members who picketed on a private sidewalk in front of a supermarket were arrested for trespassing. They asserted a First Amendment right to picket on private property, based on *Logan Valley.* The Court, however, noted that *Logan Valley* was overruled by *Hudgens* and that

> "private property rights supercede First Amendment rights in all cases which fall short of the totality of control exhibited in *Marsh* . . . ." *People v. Bush,* 39 N.Y.2d at 533, 384 N.Y.S.2d at 735.

The *PruneYard* decision thus clearly conflicts with the decisions of both state and federal courts in the area of First Amendment rights and the extent to which such rights may be exercised on private property. The noting of probable jurisdiction of this Court is therefore essential.

CONCLUSION

Justice Richardson, writing for the dissent in the four to three *PruneYard* decision, recognized the "paramount federal constitutional imperative" that private property rights must not be sacrificed in favor of a subservient state policy or goal. *PruneYard,* 23 Cal. 3d at 916 (Richardson, J., dissenting). It is the position of amicus that this is the better reasoned opinion and one which is consistent with the pronouncements of this Court. Moreover, the existence of adequate and effective alternative channels of communication in this case, as concluded by the Superior Court,

render the deprivation of federally guaranteed property rights by the California Supreme Court in the *PruneYard* opinion wholly unnecessary.

For these reasons, this Court should note probable jurisdiction of this appeal and reverse the decision of the California Supreme Court.

Respectfully submitted,

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