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TABLE OF CASES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-289

PRUNEYARD SHOPPING CENTER, ET AL., *Appellant,*

v.

MICHAEL ROBINS, ET AL., *Appellee.*

On Appeal From the Supreme Court of the State of California

BRIEF *AMICUS CURIAE* OF THE INTERNATIONAL COUNCIL OF SHOPPING CENTERS

This brief is submitted with the written consent of counsel to both parties filed with the Clerk of the Court.

INTEREST OF THE *AMICUS CURIAE*

The International Council of Shopping Centers ("ICSC") is the trade association of the shopping center industry. Members of the ICSC, consisting of shopping center developers, owners, operators, tenants, lenders and related enterprises engage in the day-to-day activity of designing, planning, financing, developing, owning and managing shopping centers and their retail stores. The ICSC's 8800 members represent a majority of the shopping centers in the United States.

These members have a clear interest in the disposition of the present case, since the holding in the court below directly challenges the controlling decision of this Court in *Lloyd* v. *Tanner,* 407 U.S. 551 (1972), on which ICSC members have relied in establishing fair and proper business policies for shopping centers.

Because the decision of the court below in the present case affects the daily management and legal rights of every shopping center in the United States, the ICSC requests that the Court recognize the importance of this case to the business operations of the shopping center industry.

To bring to the Court's attention the views and arguments of the shopping center industry, the ICSC respectfully submits this brief.

1. The Decision Below Conflicts Directly With The Controlling Decisions Of This Court.

This case presents this Court with a question concerning a conflict between the exercise of First Amendment rights and the recognition of Fifth and Fourteenth Amendment property rights of shopping center owners. Specifically, this case raises the issue whether petitioning must be allowed on the premises of a privately-owned shopping center where the petitioning is not related to the operation of the center; the center is not dedicated to public use; the center's restrictions on petitioning are enforced in a non-discriminatory fashion; and other nearby places are available for the petitioning.

This court has previously addressed conflicts between First Amendment rights and property rights in the context of shopping centers. In balancing these rights, this Court has examined the applicability of its holding in *Marsh* v. *Alabama,* 326 U.S. 501 (1946), to the right of free speech and the rights of shopping center owners in *Amalgamated Food Employees* v. *Logan Valley Plaza,* 391 U.S. 308

(1968), *Lloyd Corp. Ltd.* v. *Tanner,* 407 U.S. 551 (1972), and *Hudgens* v. *NLRB*, 424 U.S. 407 (1976). Each of these cases forms part of an evolutionary process by which this Court has created an analytical framework for balancing First Amendment rights with the private property rights of shopping center owners. A review of this Court's reasoning and approach in each case is relevant to the standards and values applicable to the present case.

In *Marsh* this Court established a foundation for the application of the principles governing the present case. The Court faced the question whether a "State, consistently with the First and Fourteenth Amendments, can impose criminal punishment on a person who undertakes to distribute religious literature on the premises of a company-owned town contrary to the wishes of the town's management." 326 U.S. at 502.

In that case, a member of the religious sect of the Jehovah's Witnesses attempted to distribute religious literature on a sidewalk in front of a post office in the business district of Chickasaw, Alabama. Chickasaw was wholly owned by the Gulf Shipbuilding Corporation. It consisted of a traditional small-town business district, together with residences, streets, sewers, and a sewage disposal plant. The corporation owned all this property, as well as the adjacent and surrounding streets and sidewalks. The only approach to the business district of Chickasaw was over these privately-owned sidewalks and streets which had the appearance of ordinary public streets and which linked the business block to the town's residential areas. In setting out the facts, Justice Black observed that the corporation provided municipal services and owned and controlled the surrounding residential property:

> A deputy of the Mobile County Sheriff paid by the company, serves as the town's policeman. Merchants and service establishments have rented the stores and

> business places on the business block and the United States uses one of the places as a post office from which six carriers deliver mail to the people of Chickasaw and the adjacent area. The town and the surrounding neighborhood, which cannot be distinguished from the Gulf property by anyone not familiar with the property lines, are thickly settled, and according to all indications the residents use the business block as their regular shopping center. . .In short the town and its shopping district are accessible to and freely used by the public in general 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.

326 U.S. at 502-503.

In discussing the corporation's complete dominance of the residential and business areas of the town, the Court posed the following question:

> Can those people who live in or come to Chickasaw be denied freedom of press and religion simply because a single company has legal title to all the town?

326 U.S. at 505.

In answering its own question, the Court emphasized that the corporation controlled all of the town, not merely a piece of private property within the town, and that the citizens of Chickasaw had no other place to exercise their First Amendment rights. The Court was clearly considering an environment in which the private ownership of the town could be used to deprive the town's citizens of the effective exercise of their First Amendment rights. The corporation, through its dominance of the living, working and shopping areas of Chickasaw, could control the information available to the town's citizens. Such control would have been untenable. As the Court noted:

> Many people in the United States live in company-owned towns. These people, just as residents of mu-

> nicipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing their freedoms with respect to any other citizen.

The Court then held that the fact that the property from which the Jehovah's Witness was sought to be ejected for exercising her First Amendment rights was owned by a private corporation rather than the State was an insufficient basis to justify the infringement on her right to free expression.

Several distinctions between the present case and the Court's decision in *Marsh* are apparent. The PruneYard Shopping Center, unlike the town of Chickasaw, was not the functional equivalent of a municipality; municipal services were not provided by the PruneYard Shopping Center. The owners of the PruneYard Shopping Center, unlike the owners of the business district of Chickasaw, did not own or control the residential community surrounding the Center or any of the adjacent streets or sidewalks. The PruneYard Shopping Center, unlike the business district of Chickasaw, had nearby places available for the exercise of First Amendment rights; the Center was bounded in part by public streets available to all citizens. The owners of the PruneYard Shopping Center, unlike the owners of Chickasaw, could not deprive the citizens using the Center of their right to be informed. The ownership of the PruneYard Shopping Center, unlike the ownership of Chickasaw, did not mean absolute domination of the citizens using the Center.

More than twenty years after *Marsh*, this Court first addressed a conflict of First Amendment rights and private property rights in the specific context of a shopping center. In *Amalgamated Food Employees* v. *Logan Valley Plaza, supra,* the Court considered the right of union members to picket a non-union supermarket located within the confines of a modern shopping center.

Logan Valley Plaza contained two major retail stores (the Weis Supermarket involved in the litigation and a Sears Roebuck outlet) as well as other, smaller stores, not all of which were operating at the outset of the litigation. The appellants in *Logan Valley* were members of a union of employees of supermarkets and other food-related enterprises. They sought to picket the Weis Market which had opened in Logan Valley Plaza with an entirely non-union staff. The *Logan Valley* opinion therefore addressed the exercise of First Amendment rights on private shopping center property in the specific context of a labor dispute involving a tenant of the shopping center.

On review, this Court held that the union picketers were entitled to exercise their First Amendment rights on the shopping center property since the picketing was directly related to the shopping center's operations.

A review of the Court's rationale for this holding demonstrates that the relationship between the purpose of the exercise of First Amendment rights and the place where these rights are exercised is critical. The Court's opinion in *Logan Valley* went far in finding that Logan Valley Plaza was in many ways equivalent to a central business district. Writing for the majority, Justice Marshall called the shopping center the functional equivalent of the business district of the company-owned town in *Marsh.* Specifically, the Court said:

> All we decide here is that because the shopping center serves as the community business block 'and is freely

> accessible and open to the people in the area and those passing through,' Marsh v. State of Alabama, 326 U.S. at 508, 66 S.Ct. at 279, the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose *generally consonant with the use to which the property is actually put.* (Emphasis added.)

391 U.S. at 319-20

In its footnote to this paragraph, the Court described the meaning of the last, emphasized phrase:

> The picketing carried on by petitioners was directed specifically at patrons of the Weis Market located within the shopping center and the message sought to be conveyed to the public concerned the manner in which that particular market was being operated. We are, therefore, not called upon to consider whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing *which was not thus directly related in its purpose to the use to which the shopping center property was being put.*(Emphasis added.)

391 U.S. at 320.

Thus, although the Court in *Logan Valley* found that the shopping center was similar to a central business district, it did so explicitly within the limited context of picketing aimed directly at the patrons, management and operations of the store located within the shopping center. In the present case, the petitioning activities of the appellees were unrelated to the operation of the PruneYard Shopping Center.

Another compelling distinction exists between the present case and *Logan Valley.* Unlike the present case the Court in *Logan Valley,* as in *Marsh*, was faced with a situation in which the denial of access to private property

would have left the respective parties with virtually no capacity to exercise their First Amendment rights effectively. In *Logan Valley*, the very object of the picketing—the Weis Supermarket—was within the boundaries of the shopping center. Picketing of the store could not have been accomplished effectively outside of the shopping center's boundaries. In the present case, however, there were many places near the PruneYard Shopping Center where the petitioning could have been effectively accomplished.

This distinction was approved by this Court in *Lloyd Corporation, Ltd.* v. *Tanner, supra.* In that case, this Court decided a case so closely parallel to the present case that the California Supreme Court should have treated it as dispositive. In *Lloyd,* the Appellees, in the enclosed mall area of a shopping center, attempted to distribute handbills inviting people to a meeting to protest the draft and the war in Vietnam. The subject matter of the handbills was not related to the operation of the shopping center or any of its stores. The shopping center had a strict rule against handbilling, on the ground that handbilling was likely to annoy customers. The persons distributing the handbills left the center at the request of the security guards and later filed suit seeking declarative and injunctive relief.

Lloyd distinguished *Marsh* on the grounds that the shopping center was not the functional equivalent of a municipality and *Logan Valley* on the grounds that the handbilling activities were not related to the operation of the shopping center.

After distinguishing *Marsh* and *Logan Valley*, the Court in *Lloyd* squarely addressed the question of the property rights of the shopping center owners and stated the central issue of the case:

> The basic issue in this case is whether respondents in the exercise of asserted First Amendment rights, may distribute handbills on Lloyd's private property contrary to its wishes and contrary to a policy enforced against all handbilling.

407 U.S. at 567.

In examining this issue, the Court noted that the protection of the rights of free speech and assembly is accomplished under the First and Fourteenth Amendments by restrictions on State action, not on non-discriminatory action by private property owners on private property used for private purposes. Even where the public is invited to use private property, the Court recognized that that property is not necessarily available for the exercise of the rights of free speech.

> Nor does property lose its private character merely because the public is generally invited to use it for designated purposes. Few would argue that a free-standing store, with abutting parking space for customers, assumes significant public attributes merely because the public is invited to shop there. Nor is size alone the controlling factor. The essentially private character of a store and its privately-owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center.

407 U.S. at 569.

The Court then balanced the property rights of the PruneYard Shopping Center owners with the rights of speech of the persons distributing handbills, specifically holding:

> . . .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. . .We hold that there has been no such dedication of Lloyd's privately owned and operated shop-

> ping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights.

407 U.S. at 570.

This holding is equally applicable to the present case; the PruneYard Shopping Center was no more dedicated to public use than the Lloyd Center. It was a privately-owned business property which did not perform municipal functions and which enforced its restrictions on petitioning in an entirely non-discriminatory fashion. In the present case, as in *Lloyd,* other, nearby places were available for the exercise of First Amendment rights; PruneYard Shopping Center, like the Lloyd Center, was bounded in part by public streets available to all citizens.

Four years after the *Lloyd* decision, this Court clarified any conflict between the reasoning in *Lloyd* and the reasoning in *Logan Valley*. In *Hudgens* v. *NLRB, supra,* striking warehouse employees picketed both the warehouse and retail stores of their employer. One of these retail stores was located in a shopping center, and the picketing employees were ordered off the shopping center's property by the shopping center's manager. They departed and filed an unfair labor practice charge with the National Labor Relations Board.

The Court in *Hudgens* addressed the question whether the rights of the parties were to be decided under a First Amendment standard or under the criteria of the National Labor Relations Act. In deciding that the National Labor Relations Act exclusively governed these rights, this Court noted that *Lloyd* rejected and overruled the conflicting aspects of *Logan Valley:*

> The Court in its *Lloyd* opinion did not say that it was overruling the *Logan Valley* decision. Indeed a substantial portion of the Court's opinion in Lloyd was devoted to pointing out the differences between the two cases, noting particularly that, in contrast to

> the handbilling in *Lloyd*, the picketing in *Logan Valley* had been specifically directed to a store in the shopping center and the pickets had had no other reasonable opportunity to reach their intended audience. 407 U.S. at 561-567, 92 S.Ct., at 2225-2228. But the fact is that the reasoning of the Court's opinion in *Lloyd* cannot be squared with the reasoning of the Court's opinion in *Logan Valley*.
> . . .(We) make clear now, if it was not clear before, that the rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case. Not only did the *Lloyd* opinion incorporate lengthy excerpts from two of the dissenting opinions in *Logan Valley*, 407 U.S. at 562-563, 565, 92 S.Ct. at 2225-2226, 2227; the ultimate holding in *Lloyd* amounted to a total rejection of the holding in *Logan Valley*:. . .

424 U.S. at 518.

Thus, *Lloyd's* holding that a shopping center owner may bar persons seeking to exercise First Amendment rights on non-business related issues was clearly the law when the present dispute arose.

This law was not following by the Court below. Instead, the Court below in large part based its decision on its finding that the Constitution of the State of California conferred on the Appellees rights which go beyond those conferred by the First Amendment of the U.S. Constitution. To reach this conclusion, the lower court ignored basic principles of the supremacy of Federal law.

The Court below cannot be allowed to use an interpretation of the California State Constitution to deny the federally-protected property rights of the owner of the PruneYard Shopping Center which were clearly enunciated by this Court in *Lloyd*.

Federal property rights cannot depend upon the vagaries of state interpretations of State Constitutional law. In denying these property rights, the Court below erroneously disregarded this Court's clear exposition of the U.S. Constitution.

2. The Structure Of The Shopping Center Industry Underscores The Reasonableness Of The Rule In *Lloyd.*

In balancing the conflict between First Amendment rights and private property rights, this Court has not only addressed legal issues but also has given weight to the physical characteristics of shopping centers. This Court's decision in *Lloyd* is affirmed by an analysis of the extremely diverse nature of shopping center industry; the availability of public places near shopping centers for First Amendment activity; the physical problems and dangers inherent in allowing that activity in shopping centers; and the administrative burdens which may be imposed on shopping center owners.

The shopping center industry is extremely diverse; there is no single definition of the term "shopping center." Shopping centers are constructed in many different shapes and sizes: some shopping centers are comprised of single stores along highways; some are comprised of a single row of stores facing a roadway; and some are comprised of the planned development of many retail stores around a central mall.

Within this latter category of shopping centers, there are also several subcategories, which vary greatly in the number of square feet of leasable space within the center. These centers range from a small neighborhood center including one or two department stores, up to a large regional shopping center. This extreme diversity among shopping centers manifests the difficulty in applying a general rule which would permit the exercise of First Amendment rights in all shopping centers. For example, even a breakdown of shopping centers according to gross leasable space discloses a wide range in the size of shopping centers, with the majority of shopping centers with leasable space under 100,000 square feet.

DISTRIBUTION OF SHOPPING CENTERS BY GROSS LEASABLE AREA

GROSS LEASABLE AREA (IN SQUARE FEET)	% OF ALL SHOPPING CENTERS
Up to 100,000	67.5
100,001 - 200,000	19.3
200,000 - 400,000	7.5
400,001 and over	5.7

Source: *Shopping Center World* (Atlanta: January, 1979 at 71)

Despite this diversity, most shopping centers are bordered by public spaces available for First Amendment activity. This Court in *Lloyd* properly emphasized the availability of places near the Lloyd Center for the distribution of handbills. Like Lloyd Center and PruneYard Shopping Center, most regional shopping centers are also bordered by public streets which can readily serve as the location for the exercise of First Amendment rights. Smaller shopping centers are also likely to be so bordered.

Moreover, an emerging trend in the shopping center industry is toward the development of shopping centers in central cities, in many cases as part of the redevelopment of older central business districts. In these central city locations, most new centers sit side-by-side with other businesses in downtown retail areas, and form part of a traditional "business block," even though they may have special parking facilities and enclosed mall areas. They are also likely to be surrounded by public streets and sidewalks which are available to all citizens.

Additionally, some new and more complex forms of shopping center are being developed. For example, the so-

called "vertical" shopping center may consist of several floors of retail space incorporated into an office building complex. Such shopping centers frequently contain significantly less open space than horizontally constructed shopping centers, and customers generally move floor to floor by elevator or escalator. In these vertical centers, persons who are distributing handbills or gathering signatures can significantly damage the business use of the property by blocking staircases and impeding traffic flow. Such activities can also pose a threat to the safety of customers in crowded hallways and on elevators and escalators.

In most of these vertical centers, the overwhelming portion of the building's floor space is devoted to private office purposes, and the general public is not invited into the entire premises but only to do business with the retail facilities on the lower levels. Frequently, such buildings have a common lobby or entrance area which serves both the stores and the office building; in such a dual-purpose entrance area, the presence of persons obtaining signatures or distributing handbills can damage both the retail and private office building aspects of such a building.

In addition to the difficulties posed by various shopping center structures, this Court should also consider the administrative burdens which may be imposed on shopping center owners. If this Court adopts a rule requiring shopping center owners to allow First Amendment activities on their private property, these owners will also be required to establish and administer appropriate procedures for the exercise of these activities. However, public authorities with control over public property are far better equipped to establish proper procedures for orderly First Amendment activities than are private developers, owners and managers This is especially true in those cases where the activity may arouse hostile or adverse reactions from passers-by. The establishment of such procedures is better

assigned to municipal officials and police whose conduct is constantly open to public scrutiny than to private landowners whose conduct may be reviewable only by the judicial process.

CONCLUSION

For all the foregoing reasons and those set forth by the Appellants, the judgment of the Supreme Court of California should be reversed.

Respectfully submitted,

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