INDEX

TABLE OF AUTHORITIES

CASES:

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.

On Appeal From The Supreme Court Of California

BRIEF AMICUS CURIAE OF THE TAUBMAN COMPANY, INC. AND CALIFORNIA BUSINESS PROPERTIES ASSOCIATION IN SUPPORT OF APPELLANTS

OPINIONS BELOW

The opinions of the Supreme Court of California are reported at 23 Cal.3d 899, 592 P.2d 323, 153 Cal. Rptr. 836, and are reproduced as Appendix C to Appellants' Jurisdictional Statement. The order denying rehearing is reproduced in Appendix D to the Jurisdiction Statement. The opinion of the Court of Appeal of California is unreported; it is reproduced in Appendix B to

the Jurisdictional Statement. The findings of fact, conclusions of law, and judgment of the Superior Court of California are unreported; they are reproduced in Appendix A to the Jurisdictional Statement.

JURISDICTION

Jurisdiction of this Court exists pursuant to 28 U.S.C. § 1257(2) or 28 U.S.C. § 1257(3) and 28 U.S.C. § 2103. On November 13, 1979, this Court granted review of this appeal postponing the question of jurisdiction to consideration on the merits. —— U.S. ——; 100 S.Ct. —— (1979). The jurisdictional issue is addressed in Point I of this brief, *infra.*

QUESTIONS PRESENTED

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

2. Does the State's compulsion of Appellants to surrender their property for the purpose of politicking, proselytizing, and picketing on behalf of views not held by Appellants violate both Appellants' First and Fourteenth Amendments free speech rights, as well as their property rights under the Fifth and Fourteenth Amendments Due Process Clauses?

UNITED STATES AND CALIFORNIA CONSTITUTIONAL PROVISIONS

The Constitution of the United States, Amendment I reads:

> Congress shall make no law . . . abridging the freedom of speech or of the press. . . .

The Constitution of the United States, Amendment V reads:

> No person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

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 five 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 private property rights 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.

SUMMARY OF ARGUMENT

1. Appellants have constitutionally protected property rights to control the use of their own property, including the right to preclude its use by strangers for politicking, proselytizing, or picketing on issues totally unrelated to Appellants, their property, their tenants, or their employees. Of course, there may be constitutional interests in conflict with the Fourteenth Amendment protection of property and free speech rights. When competing claims do come into conflict, it is for this Court to say which constitutional right should take precedence. In *Lloyd Corp.* v. *Tanner,* 407 U.S. 551 (1972), on facts on all fours with this case, this Court determined that, as between a claim to commandeer private property as a free expression forum and the property owners' right to exclude others from use of their property, the Fourteenth Amendment property right prevails. That same Fourteenth Amendment right must prevail, *a fortiori,* where the claim of the usurpers of the property rest not on any federal constitutional right but merely on a state court construction of its own constitution that would take Appellants' property for the use of others without making compensation therefor. If the state court, by an *ipse dixit* that the right doesn't exist, can destroy at will speech and property rights of the Appellants which are protected by the Fourteenth Amendment, then the word "property" will have been read out of the Four-

teenth Amendment's Due Process Clause affording protection to "life, liberty, and property."

2. The State Court, by compelling Appellants to utilize their property for the presentation of views that they do not hold, invaded Appellants' First Amendment rights to freedom of speech as defined by this Court.

STATEMENT

This is an action brought by private parties plaintiff against private parties defendant to enjoin defendants from interfering with plaintiffs' use of defendants' property for plaintiffs' selfish purposes. The principal question presented here is exactly that stated by Mr. Justice Powell for the Court in *Lloyd Corp.* v. *Tanner,* 407 U.S. 551, 552 (1972):

> This case presents the question . . . 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.

The facts in this case and in *Lloyd* are as close to being identical as any two cases arising at different times can be. 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 (Pruneyard) occupies only 21 acres with no public streets crossing it. Both centers have adjacent public streets. Lloyd has about "60 commercial tenants", an auditorium, and skating rink. *Ibid.* Pruneyard has about 65 shops, a cinema, and restaurants. The Lloyd auditorium, but not its other facilities, was available as

a public forum for civic and charitable organizations and "presidential candidates of both parties." *Id.* at 555. Pruneyard has consistently and without exception refused to lend itself to politicking, picketing, or proselytizing by any political, civic, or religious groups or individuals.

Lloyd has 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 555-556. For the same reasons, Pruneyard has 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 them the use of its premises for their own purposes.

In the instant case, the Appellees set up a table in the central courtyard of the Pruneyard 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,* Pruneyard's security personnel informed the Appellees that their conduct was pro-

hibited by Pruneyard, requested them to leave, and suggested the possibility of using the public sidewalks adjacent to Pruneyard for their purposes. Appellees left Pruneyard but made no attempt to use the adjacent public ways for their enterprise. They, too, however, subsequently brought action to compel Pruneyard to make its premises available to them 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 of the United States Constitution. Here, the Appellees—in an attempt to evade the holding of this Court in *Lloyd* that the Fourteenth Amendment protects the private property owner's right to preclude uses of its property by persons having no claim on that property—rested not on the First Amendment, but on Article I, § 2 of the California Constitution, attempting to exalt a dubious construction of a state constitutional provision over the First Amendment and the Fourteenth Amendment as defined by this Court. In both cases, the shopping center defendants relied on the Due Process Clause of the Fourteenth Amendment with its incorporation of the First and Fifth Amendments. Unlike *Lloyd,* in this case the Appellant also asserted their own free speech rights under the First Amendment.

In *Lloyd,* this Court held that the intruders' claimed rights to freedom of expression could not justify the taking of Lloyd'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 rejecting similar state constitutional claims, *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 Article I, § 2 of the California Constitution created a "right" in strangers to commandeer the Appellants' private property and that this right was superior to the rights protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution. This appeal followed. On November 13, 1979, this Court undertook to hear the appeal, postponing consideration of its jurisdiction to consideration of the merits. —— U.S. ——; 100 S.Ct. —— (1979).

ARGUMENT

I.

This Court Has Jurisdiction Over This Appeal

This Court has jurisdiction over this appeal under 28 U.S.C. § 1257(2). The Supreme Court of California purported to hold that Art. I, § 2, of the California Constitution was applicable to this case and supported Appellees' claims against Appellants' contentions that such application of Art. I, § 2 was invalid as violative of the First, Fifth, and Fourteenth Amendments to the Constitution of the United States. Thus, on the California court's rationalization of its conclusion, jurisdiction attaches in this Court under 28 U.S.C. § 1257(2). *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U.S. 282 (1921); *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 61 n.3 (1963); *Cohen* v. *California,* 403 U.S. 15, 17-18 (1971), all cited in Stern & Gressman, *Supreme Court Practice* 163 (5th ed., 1978). A state constitutional provision is a state "statute" within the meaning of § 1257(2). See, e.g., *Railway Express Agency* v. *Virginia,* 282 U.S. 440 (1931); *Adamson* v.

California, 332 U.S. 46 (1947); *Torcaso* v. *Watkins,* 367 U.S. 488 (1961); Stern & Gressman, *supra,* at 160 n.2.

If, however, the real explanation of the decision below was not that the court relied on a state constitutional provision to deny a federal constitutional claim, but that it sought to redefine state common law of property, jurisdiction would be present in this Court pursuant to 28 U.S.C. § 1257(3), which is required to be invoked by the terms of 28 U.S.C. § 2103.

There is no reading of the California Supreme Court decision that can avoid the fact that its judgment rejected two claims of Appellants patently resting on provisions of the national Constitution: their entitlement to the protection of their property rights under the Fifth and Fourteenth Amendments and the protection of their free speech rights under the First and Fourteenth Amendments.

II.

Appellants' Constitutionally Established Right Under The Fourteenth Amendment To Exclude Appellees From Adverse Use Of Appellants' Private Property Cannot Be Denied By Invocation Of A State Constitutional Provision Or By Judicial Reconstruction Of The State's Law Of Private Property.

In *Kaiser Aetna* v. *United States,* —— U.S. ——, 100 S.Ct. ——; 48 L.W. 4045 (Dec. 4, 1979), this Court reiterated the longstanding constitutional rule that: "An essential element of individual property is the legal right to exclude others from enjoying it." *International News Serv.* v. *Associated Press,* 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting), quoted in *Kaiser Aetna,* 48 L.W., at 4049, n. 11. In *Kaiser Aetna,* the court ruled: "In this case, we hold that the

'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that a Government cannot take without compensation." *Id.* at 4049. The Court here quoted from *Chicago, R.I. & P.R. Co.* v. *United States,* 284 U.S. 80, 96 (1931): "Confiscation may result from a taking of the use of property without compensation quite as well as from the taking of title." 48 L.W. 4048 n.8. Cf. Mr. Justice Black dissenting in *Amalgamated Food Employees* v. *Logan Valley Plaza,* 391 U.S. 308, 330-331 (1968).

It was exactly this right of property under the Fourteenth Amendment that was held in *Lloyd Corp.* v. *Tanner,* 407 U.S. 551 (1972), to take precedence over claimed rights of strangers to the property to freedom of expression in circumstances exactly parallel to those of this case. In *Lloyd,* the question was stated thus: "We grant certiorari to consider petitioner's contention that the decision below violates rights of property protected by the Fifth and Fourteenth Amendments." 407 U.S. at 552. The Court resolved the question of balancing alleged rights to freedom of expression against this established constitutional right of private property, *id.* at 567-568, 570:

> [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.
>
> . . . . .
>
> 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.

Thus, this Court, in *Lloyd,* has established that the balance between the constitutional interests in free expression and the constitutional interests in private property rights to exclude must be struck in favor of the property right in a factual situation just like this one. If the federal right to free expression is an inadequate basis for destroying the Fourteenth Amendment property right, *a fortiori,* state law supporting free expression must be subordinated to the federal constitutional protection.

State courts have recognized the obligation to abide by this Court's determination of this issue. Indeed, the

California Supreme Court originally did so when the same claim of state law superiority was first proferred to it. In *Diamond* v. *Bland*, 11 C.3d 331, 335, 521 P.2d 460, *cert. den.*, 419 U.S. 885 (1974), the California Supreme Court said:

> *Lloyd's* rationale is controlling here. In this case, as in *Lloyd,* plaintiffs have alternative, effective channels of communication, for the customers and employees of the center may be solicited on any public sidewalks, parks and streets adjacent to the Center and in the communities in which persons reside. Unlike the situation in *Marsh* and *Logan,* no reason appears why such alternative means of communication would be ineffective, and plaintiffs concede that, unlike *Logan,* their initiative petition bears no particular relation to the shopping center, its individual stores or patrons. Under these circumstances, we must conclude that defendants' private property interests outweigh plaintiffs' own interest in exercising First Amendment rights in the manner sought herein.

In *Diamond,* too, the argument was made by the dissenters that the state constitutional protection for free speech afforded a ground for avoiding the clear meaning of *Lloyd* which, on balancing the interests in free speech against the interests in private property, ruled in favor of the Fourteenth Amendment property interests.

So, too, in *Lenrich Associates* v. *Heyda,* 264 Ore. 122, 504 P.2d 112 (1972), where plaintiffs pressed both rights under the First Amendment and rights under the state constitutional provisions guaranteeing freedom of expression. "The issue in this case, as in *Tanner,* is the extent to which plaintiff's rights as 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 difference the decision in *Tanner* is controlling and requires that this case be reversed." 264 Ore. at 129.

State courts have in the past sought to shift from a rationale held not to justify the state action in order to evade the obligation to abide by this Court's judgment on constitutional law. Thus, this Court said in *Kreshik* v. *St. Nicholas Cathedral,* 363 U.S. 190, 191 (1960), where the state courts attempted a revision of the state's property law to avoid an earlier Supreme Court ruling:

> As the opinions of the [New York] Court of Appeals make evident . . . the [state court] decision now under review rests on the same premises which were found to have underlain the enactment of the statute struck down in *Kedroff*. 344 U.S., at pages 117-118. But it is established doctrine that "[i]t is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize." *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, 463. See *Shelley* v. *Kraemer,* 334 U.S. 1, 14-16, and cases there cited. Accordingly, our ruling in *Kedroff* is controlling here, and requires dismissal of the complaint.

It must not be forgotten that what the court below seeks to do is to deny Appellants a right held by this Court to have been guaranteed them by the Fourteenth Amendment of the United States Constitution. As this Court said in *Cooper* v. *Aaron,* 358 U.S. 1, 18, 19 (1958):

> Article VI of the Constitution makes the Constitution the "supreme Law of the Land." . . .

> It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." . . .
>
> It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action.

This Court in *Lloyd* solemnly proclaimed that the Fourteenth Amendment affords property owners protection against the taking of their property at the command of the State court for the use of others, where these strangers were asserting rights of freedom of expression. That judgment must be binding on the California courts as well as all others.

As Mr. Justice Douglas said in his dissent in *N.A.A.C.P.* v. *Overstreet,* 384 U.S. 118, 123 (1966):

> This case thus carries us into territory in which principles of state law must be accommodated with overriding federal precepts. . . . [W]hen a state policy thwarts interests which the Federal Constitution affords special protection, that state policy must yield.

Nor does it make a difference that what is involved here are Fourteenth Amendment property rights in conflict with state judicial pronouncements denying those rights. "[I]t would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries de-

fined by the Fourteenth Amendment." *Shelley* v. *Kraemer,* 334 U.S. 1, 22 (1948). And, as this Court said in *Lynch* v. *Household Finance Corp.,* 405 U.S. 538, 544 (1972): "Acquisition, enjoyment, and alienation of property were among" the civil rights protected by the Fourteenth Amendment.

It may be that, given different factual circumstances, Appellants' constitutional property rights could be subordinated to competing constitutional commands, as where the evicting party was engaged in the exercise of a sovereign government function, *e.g., Marsh* v. *Alabama,* 326 U.S. 501 (1946); see also *Flagg Bros., Inc.* v. *Brooks,* 436 U.S. 149, 161-64 (1978); and *Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 346 (1974); or where the property sought to be utilized for proselytizing is public property, *e.g., Tucker* v. *Texas,* 326 U.S. 517 (1946); but see, *e.g., Adderley* v. *Florida,* 385 U.S. 39 (1966); *Lehman* v. *City of Shaker Heights,* 418 U.S. 298 (1974); *Greer* v. *Spock,* 424 U.S. 828 (1976); or where the seizers of the property of others are using it as a forum to express arguments in their controversy with the owners or tenants, *e.g., Amalgamated Food Employees* v. *Logan Valley Plaza,* 391 U.S. 308 (1968); *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, Inc.* v. *N.L.R.B.,* 437 U.S. 556 (1978). But in the instant case, there is no expression of views by persons in conflict with the proprietors of the property, nor public property, nor are the Appellants exercising any sovereign governmental function. In the absence of any of these bases for rejecting the Fourteenth Amendment protection of a private property owner's right of exclusion, the court below was required to deny the injunction invading Appellants' constitutional property rights.

Finally, it should be noted that the judicial scales should have on them not only Appellees' claims to free expression, on the one side, and Appellants' Fourteenth Amendment property claims, on the other. There is another weight to be placed on Appellants' side of the scales: their Fourteenth Amendment free speech rights, free speech rights endorsed by this Court under the First Amendment. This Court said, only recently, 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, where we held unconstitutional a Florida statute placing an affirmative duty upon newspapers to publish the replies of political candidates whom they had criticized.

In this case, the California Supreme Court has placed an affirmative duty on Appellants to afford to any individual or group who chooses to seize Appellants' private property for their own use, a forum for the publication of views that are not their own. Thus, not only are Appellants' property rights destroyed, but also their First Amendment right not to sponsor positions that are not theirs, in the name of a Califor-

nia constitutional provision never heretofore construed to command this result.

To allow a state court to subordinate Appellants' Fourteenth Amendment rights to such an *ad hoc* construction of a state constitutional provision, or to allow the state court to redefine property rights for each case that comes before it, would be to amend the United States Constitution by removing the word "property" —and some part of the word "liberty"—from the Due Process Clause of the Fourteenth Amendment. There is no authority in the courts, state or federal, to emend the Constitution in this fashion.

CONCLUSION

For the reasons heretofore set out, this Court should reverse the judgment below and restore to Appellants the constitutional rights taken from them by the California Supreme Court.

Respectfully submitted,

JOSEPH H. MOLESS, JR.
MOLESS & BRINTON
A Law Corporation
900 Lafayette St., #706
Santa Clara, CA 95050
(408) 249-8820

Attorney for Amicus Curiae

Of counsel

PHILIP B. KURLAND
Two First National Plaza
Chicago, Illinois 60603
(312) 372-2345