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CONSTITUTIONAL PROVISIONS AND STATUTES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-289

PRUNEYARD SHOPPING CENTER AND FRED SAHADI,
Appellants,

v.

MICHAEL ROBINS, ET AL.,
Appellees,

On Appeal From the Supreme Court of the State of California

BRIEF OF APPELLANTS

OPINIONS BELOW

The findings of fact, conclusions of law and judgment of the Superior Court, J.S. App. A, and the opinion of the District Court of Appeal, J.S. App. B, are not reported. The opinion of the Supreme Court of the State of California, J.S. App. C, is reported at 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (1979).

JURISDICTION

The decision of the Supreme Court of the State of California was filed on March 30, 1979. A timely petition for rehearing was filed. This was denied on May 23, 1979, and the judgment became final. J.S. App. D.

Appellants filed a notice of appeal to this Court in the Supreme Court of the State of California on May 30, 1979. J.S. App. E. The jurisdictional statement was filed on August 21, 1979, within 90 days from the denial of rehearing below. On November 13, 1979, this Court ordered that "further consideration of the question of jurisdiction is postponed until the hearing of the case on the merits." A. 68. As more fully discussed at pp. 7-9 of this brief, the jurisdiction of this Court rests upon 28 U.S.C. § 1257(2) or, in the alternative, upon 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

First Amendment, United States Constitution:

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

Fifth Amendment, United States Constitution:

> 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.

Fourteenth Amendment, Section 1, United State Constitution:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

28 U.S.C. § 1257. State courts; appeal; certiorari:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
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> * * *
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> (2) By appeal, where is drawn in question the validity of a statute of any state on the

ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari . . . where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of . . . the United States.

Article I, Section 2, California Constitution:

> 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.

Article I, Section 3, California Constitution:

> [P]eople have the right to . . . petition government for redress of grievances.

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to review the judgment below.

2. Whether the owner of a private shopping center that is not the functional equivalent of a municipality has rights under the First, Fifth and Fourteenth Amendments of the United States Constitution to prohibit non-business related petitioning on the premises of the center, when the persons who wish to engage in such petitioning have other adequate and effective channels of communication in the area.

STATEMENT

Appellant PruneYard Shopping Center ("PruneYard" or "Center") is a privately owned shopping center located in Santa Clara County, California, occupying approximately 21 acres and containing 65 shops, 10 restaurants and a cinema. A. 13-14. Public sidewalks and streets border the Center on two sides. A. 46-47. The Center had a policy prohibiting all handbilling and circulation of petitions. J.S. App. A-2. Appellant Fred Sahadi is the owner of the Center. J.S. App. A-1.

On November 16, 1975, appellees set up a table in the central courtyard of the Center and solicited signatures in support of petitions condemning Syria for refusing to allow Jews to leave the country and condemning a United Nations resolution on Zionism. A. 20-21. Security guards employed by the Center, after informing appellees that their conduct violated the Center's policy, requested them to leave and pointed out that they could resume their efforts on the public sidewalks adjoining the Center. Appellees left the Center, but did not attempt to solicit signatures in any public places. A. 27.

Appellees brought this action seeking an injunction against enforcement of the Center's policy. After a full evidentiary hearing, the Superior Court concluded that "[t]here has been no dedication of [the Center's] property to public use"; that the Center "is not the functional equivalent of a municipality"; that the appellees' petitions are "unrelated to the activities" of the Center; and that there are "adequate, effective channels of communication for [appellees] other than soliciting on the private property" of the Center. J.S. App. A-2, A-3. The Superior Court accordingly denied an injunction, and the District Court of Appeal affirmed.

On appeal in the Supreme Court of the State of California, the Center owner urged affirmance on the grounds, *inter alia,* that his "property rights are protected by the federal Constitution" [1] and that his "free speech rights under both the federal and state constitutions would be infringed if [he] were required to utilize his private property in support of plaintiffs' expressive activity." [2] In a four-to-three decision, that court reversed, holding that "sections 2 and 3 of article I of the California Constitution protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." J.S. App. C-12; 23 Cal. 3d at 910.[3]

SUMMARY OF ARGUMENT

This Court has jurisdiction, on appeal under 28 U.S.C. § 1257(2) or on certiorari under 28 U.S.C. § 1257(3), to review the judgment of a state's highest court when that judgment has upheld the validity of a state law over a claim that the state law is invalid on federal grounds. This is precisely such a case.

The decision of the California Supreme Court interpreted certain provisions of the California Constitution as creating a right to petition in privately owned

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[1] Brief in Response to Amicus Curiae Briefs at 27 (emphasis deleted). This was appellants' principal brief in the California Supreme Court.

[2] Brief in Response to Amicus Curiae Briefs at 35 (emphasis deleted).

[3] On June 12, 1979, Mr. Justice Rehnquist denied appellants' application for a stay with the notation "Denied. No irreparable injury." The Superior Court entered an injunction on June 21, 1979.

shopping centers over the objection of the owner of the shopping center. In so doing, the court rejected the owner's contention that the California Constitution, as so interpreted, infringed his rights of property and free speech under the United States Constitution.

This is not a case in which an adequate and independent state ground of decision insulates a state court judgment from review in this Court. The California Supreme Court premised its decision on a newly found interpretation of the free speech and petitioning provisions of the California Constitution. However, the ground of decision below was not "independent" of the federal constitutional defenses raised by the Center and its owner since the California Supreme Court could not and did not decide this case for appellees without also reaching and rejecting those federal defenses.

In compelling the shopping center owner to make his property available as a forum for petitioning, the California Supreme Court failed to balance the shopping center owner's rights protected by the First, Fifth and Fourteenth Amendments of the United States Constitution against the state-created right to enter upon the property to solicit petition signatures from shopping center patrons. This Court's decision in *Lloyd Corp.* v. *Tanner,* 407 U.S. 551 (1972), requires that such a balance be struck before a state may constitutionally require access to private property for speech purposes.

This Court in *Lloyd* defined the inquiry which must be made when that balance between federally protected property rights and any free speech right, whether federal or state, is struck: do those asserting a free speech right have an "adequate alternative avenue . . . of communication" available for the expression of their

views that does not impinge on the property owner's federal constitutional rights? 407 U.S. at 567. If so, the free speech rights of the public, whether under the First Amendment or under a state constitution, must yield to the property owner's federal constitutional rights. Here, the trial court specifically found that appellees had other adequate, effective avenues of communication. Under these circumstances, this Court should reverse the judgment of the California Supreme Court.

ARGUMENT

I. THIS COURT HAS JURISDICTION UNDER 28 U.S.C. § 1257(2)

The jurisdiction of this Court to hear the present appeal is conferred by 28 U.S.C. § 1257(2), which vests this Court with appellate jurisdiction over the judgment of the highest court of any state

> where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity.

In this case, the highest court of the State of California held that the free speech and petitioning provisions of the California Constitution include a right of access to shopping centers. It is well established that a state constitutional provision is a "statute" within the meaning of § 1257(2). *Torcaso* v. *Watkins,* 367 U.S. 488 (1961); *Adamson* v. *California,* 332 U.S. 46, 48 n.2 (1947); *Railway Express Agency* v. *Virginia,* 282 U.S. 440 (1931). That the validity of the state constitutional provisions—as so interpreted—was drawn in question on the ground of their being repugnant to the United States Constitution is clear from the opinion below. One of two "main questions" before it, stated

the California Supreme Court, was whether "*Lloyd* v. *Tanner* . . . 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." J.S. App. C-2. The court below held that *Lloyd* did not preclude its novel interpretation of the state constitution's free speech and petitioning provisions. Its holding establishes this Court's appellate jurisdiction:

> Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal.

Charleston Federal Savings and Loan Ass'n v. *Alderson,* 324 U.S. 182, 185-86 (1945).

Alternatively, this Court has jurisdiction over the present case on writ of certiorari, as a case "where [a] right [was] . . . specifically set up or claimed under the Constitution of the United States." 28 U.S.C. § 1257 (3). As the foregoing discussion makes clear, the Center and its owner specifically claimed a right under the United States Constitution to exclude appellees.

Nor is this a case in which an adequate and independent state ground of decision defeats this Court's jurisdiction. The court below was required to determine on the merits whether the shopping center owner's federal constitutional rights supersede a right of access grounded on the free speech and petitioning provisions of the state constitution. Because this is a case in which "decision of the federal question was necessary to the judgment rendered" below, *Herb* v. *Pitcairn,* 324 U.S. 117, 131 (1945), the decision of the California

Supreme Court is not supported by an adequate and independent state ground.

II. THE FEDERAL FIRST, FIFTH AND FOURTEENTH AMENDMENT RIGHTS OF A SHOPPING CENTER OWNER ARE SUPERIOR TO THE STATE LAW RIGHT OF ACCESS CREATED BY THE CALIFORNIA SUPREME COURT

A. The decisions of this Court establish that the owners of shopping centers, in common with the owners of other private property, have a paramount federal right to control the use of their property for speech purposes.

In *Lloyd Corp.* v. *Tanner,* 407 U.S. 551 (1972), this Court was squarely presented with the question of

> 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.

407 U.S. at 552. That question was answered in favor of the shopping center owner on constitutional grounds controlling here.

In *Lloyd,* this Court addressed "petitioner's contention that the decision below [in favor of the citizen activists] violate[d] rights of private property protected by the Fifth and Fourteenth Amendments." 407 U.S. at 552-53. *Lloyd* held both that the actions of the shopping center owner at issue did not rise to the level of state action because the shopping center in that case was not the "functional equivalent of a municipality", and that federally protected property rights of the owners were paramount under the circumstances presented there. The Court explained:

> It would be an unwarranted infringement of property rights to require them to yield to the exercise

> of First Amendment rights under circumstances where adequate alternative avenues of communication exist. Such an accommodation would diminish property rights without significantly enhancing the asserted right of free speech.

407 U.S. at 567. The Court further admonished that "the Fifth and Fourteenth Amendment rights of property owners . . . must be respected and protected." 407 U.S. at 570.

Because of the importance of federally protected property rights, *Lloyd* requires asserted speech rights to yield to them whenever adequate alternative avenues of communication are available. The constitutional stature of the rights of property owners in controversies over access to private property was recognized as long ago as *Marsh* v. *Alabama,* 326 U.S. 501 (1946), where Justice Black for the Court noted the necessity of "balanc[ing] the Constitutional rights of owners of property against those of the people to enjoy" First Amendment rights. 326 U.S. at 509. And in *Central Hardware Co.* v. *NLRB,* 407 U.S. 539 (1972), the Court held that the mere opening of a private parking lot to the public does not transform it into the equivalent of a municipal lot, because such a ruling would be an "unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments." 407 U.S. at 547.

The rights of a property owner to prohibit or control petitioning on his private property are rooted in the Fifth Amendment guarantee against the taking of property without just compensation and are incorporated in the Fourteenth Amendment guarantee against the deprivation of property without due process of law. *Lloyd Corp.* v. *Tanner,* 407 U.S. at 567. The principles

developed by this Court in condemnation and inverse condemnation cases are relevant in the present context as well, because they reflect the fundamental conception of private property ownership protected by the Constitution. The right to exclude those who would use the property in violation of the owner's desires is one such fundamental property right.

> 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. *City of 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).

Rowan v. *Post Office Dep't,* 397 U.S. 728, 738 (1970). In *Delaware, L. & W. R. Co.* v. *Town of Morristown,* 276 U.S. 182 (1928), the Court held that a city could not, under the guise of the police power, force a common carrier to admit taxicabs to a privately owned railroad station without paying compensation. The lower court was directed to enjoin the enforcement of the ordinance under which the city had acted.

Just this term, the Court reaffirmed that "the 'right to exclude', so universally held to be a fundamental element of the property right, falls within [the] category of interests that the Government cannot take without compensation." *Kaiser Aetna* v. *United States,* 48 U.S.L.W. 4045, 4049 (Dec. 4, 1979) (footnotes omitted).[4] *Kaiser Aetna* recognizes that the "right to

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[4] *See also United States* v. *Causby,* 328 U.S. 256 (1946) (physical "invasion" of land by airplanes compensable); *Portsmouth Harbor Land & Hotel Co.* v. *United States,* 260 U.S. 327 (1922) (invasion by noise compensable). Although this is not a condemnation case, the right to exclude is an incident of the property rights protected by the due process clause from state regulation that serves no end superior to the property right. As Justice Stevens

exclude" is such a central element of private property that the government, even in the name of reasonable regulation, cannot diminish that right without paying compensation.

The constitutional rights of private property owners also have their origins in the First Amendment right of the property owner not to be forced by the state to use his property as a forum for the speech of others.

In *Wooley* v. *Maynard,* 430 U.S. 705 (1977), this Court was faced with "the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." 430 U.S. at 713. The answer was direct: "We hold that the State may not do so." *Id.* In explaining its decision, the Court adverted to a core principle of our democratic order incorporated in the First Amendment:

> 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. . . . 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."

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noted in concurrence in *Moore* v. *City of East Cleveland,* 431 U.S. 494, 520 (1977), the due process clause protects against state action, unsupported by an overriding state interest, which "cut[s] . . . deeply into a fundamental right normally associated with the ownership of residential property."

430 U.S. at 714 (citations omitted). The right to be silent reaffirmed in *Wooley* has led the Court to strike down state laws requiring students to salute and pledge allegiance to the flag, *Board of Education* v. *Barnette,* 319 U.S. 624 (1943), and requiring newspapers to publish replies of political candidates whom they criticize, *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974), as well as the law invalidated in *Wooley* prohibiting automobile owners from obscuring a state motto, "Live Free or Die," on their license plates. *Wooley* v. *Maynard, supra.*

The property owner's right to remain silent cannot be defeated by arguing that the decision below does not "force" appellant to "say, espouse or believe anything." [5] A state court injunction ordering appellant to admit speakers onto his property or suffer the penalty of contempt is as coercive a state directive to furnish one's property as a forum for the speech of another as was the New Hampshire law at issue in *Wooley* compelling display of a motto on the license plate required to operate a car. Moreover, it makes no difference that appellant here chose to use his property as a shopping center, thereby, as appellees would have it, voluntarily exposing himself to the risk of such compulsion; in *Wooley,* the protesting driver could have avoided state compulsion to use his car as a forum by foregoing the purchase of an automobile. In both cases, once the property was purchased, the owner acquired the right not to be compelled by the state to use that private property as a forum for the views of others.

Nor is it persuasive to argue that *Wooley* is inapposite because the patrons of the shopping center may not attribute to Mr. Sahadi the views espoused

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[5] Motion to Dismiss at 22.

by appellees.[6] This argument simply misreads the nature of the right to refrain from speaking. The driver in *Wooley* could easily have dissociated himself from the New Hampshire motto by placing a bumper sticker with a contrary message on his car. The lesson of *Wooley* is not that the car owner was forced to display a message with which he disagreed; it is that the state forced him to display any message at all.

Had the New Hampshire law instead required only those who espoused the philosophy expressed in the pungent motto "live free or die" to display that motto on their license plates, while exempting those who opposed the sentiment or had no opinion, that law would equally have been inconsistent with the right to refrain from speaking. Such a law would have compelled those who supported the sentiment to use their property as a "moving billboard." *Wooley* v. *Maynard, supra,* 430 U.S. at 715. State-compelled speech, even speech in which the speaker might believe, offends the First Amendment right "to decline to foster" speech and to "refrain from speaking." 430 U.S. at 714. Here, it does not matter whether Mr. Sahadi supports Zionism or opposes it. It does not matter whether patrons of the Center attribute the sentiments of the appellees to Mr. Sahadi or believe that he opposes those sentiments. What does matter is that Mr. Sahadi is being forced by the state to use his private property as a forum for the expression of views, and that he is deprived of the choice guaranteed him by the First Amendment to remain silent or indifferent.

The right of the property owner to control the use of his private property thus has its origins in the First,

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[6] Motion to Dismiss at 22.

Fifth and Fourteenth Amendments. Decisions of this Court have vindicated that right over First Amendment challenges in the precise context of political speech at shopping centers. Although a state court is ordinarily free to interpret the provisions of a state constitution to create rights beyond those afforded by the United States Constitution, it may not in so doing infringe upon the federal constitutional rights of others. *Reitman* v. *Mulkey,* 387 U.S. 369 (1967). In an earlier decision, the California Supreme Court recognized this fundamental principle:

> Under the holding of the *Lloyd* case, the due process clause of the United States Constitution protects the property interests of the shopping center owner from infringement. . . . Even were we to hold that the state Constitution in some manner affords broader protection than the First Amendment of 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, 113 Cal. Rptr. 468, 471 n.4, 521 P.2d 460, 463 n.4 (citations omitted), *cert. denied,* 419 U.S. 885 (1974).[7]

In the present case, the court below overruled *Diamond* v. *Bland* and held that the California Constitution can, and does, require shopping center owners to allow unrelated speech and petitioning. Its new-found

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[7] The Oregon Supreme Court has also denied access on the grounds that to order entry upon private land in the name of a state free speech right would be contrary to the controlling authority of *Lloyd. Lenrich Associates* v. *Heyda,* 264 Or. 122, 504 P.2d 112 (1972) (plurality opinion).

analysis concludes with a suggestion that the shopping center in *Lloyd* was somehow a special case:

> The court in *Lloyd* examined the functions performed by Lloyd's center but did not purport to define the nature or scope of Fifth and Fourteenth Amendment rights of shopping center owners generally.

J.S. App. C-4, 23 Cal. 3d at 904.

Nothing in the *Lloyd* opinion or in subsequent decisions supports the notion that this Court intended to limit *Lloyd* to its facts, nor does the opinion below identify any salient differences between Lloyd Center and PruneYard. In fact, both are large centers located on private property; in both cases the speech activity was unrelated to the business of the center; and in both cases there were adequate alternative sites available to solicit signatures on petitions or to distribute handbills.

The California Supreme Court exceeded its authority when it rejected controlling precedent. As Justice Richardson for the dissenters emphasized, the decision below cannot be squared with *Lloyd*:

> The *Lloyd* rationale is applicable and unanswerable. The majority may not evade it by resort, in this instance, to the California Constitution, which must yield to a paramount federal constitutional imperative.

J.S. App. C-20, 23 Cal. 3d at 916.

B. When adequate alternative channels of communication are available, the federal constitutional rights of shopping center owners outweigh any state-created right of access.

The California Supreme Court, disregarding the controlling precedents, launched upon an unstructured discussion of the importance of the state interest, created

by the state constitution, in fostering speech.[8] To support its apparent view that property rights must yield to any conceivable state interest, J.S. App. C-6, 23 Cal. 3d at 906, the opinion below recites a number of permissible types of property regulation, such as zoning and environmental restrictions. This sketchy analysis is entirely unpersuasive. State regulation of property to promote orderly development, to ensure safety, or to protect public health or the environment is premised on the police power and involves interests far different from those involved in the present case.

This is a case involving, on the one hand, the interest of appellees in utilizing the property of the shopping center owner to convert others to their cause and, on the other hand, the interest of the shopping center's owner in controlling the use of his property. These are precisely the conflicting interests which were before this Court in *Lloyd*. Accordingly, if a balancing or accommodation of interests is required or appropriate in a clash between an asserted state law right to use private property for petitioning and the federal rights of the owner to be free from such interference, the court below had to take its guidance from that case.

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[8] The California Supreme Court premised its creation of the right to access on the free speech and petitioning clauses of the California Constitution (article I, sections 2 and 3). The court also drew support for the result it reached from the right protected by state law to engage in initiative, referendum and recall drives as one other source of this right of access (Cal. Const., article II, sections 8, 9 and 13). J.S. App. C-9. The direct democracy provisions of the California Constitution are wholly irrelevant to this case. The petitioning sought to be conducted at the PruneYard criticized Syrian emigration policy and a United Nations resolution. It did not involve an initiative, referendum, or recall; was not addressed to any state official; and did not concern state issues.

Lloyd requires that the speech interests of the citizen must yield to the competing interests of the property owner so long as the citizens have adequate alternative avenues to express their messages. As this Court held,

> *It would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist.* Such an accommodation would diminish property rights without significantly enhancing the asserted right of free speech.

407 U.S. at 567 (emphasis supplied).

Lloyd requires that an accommodation between the competing constitutional rights of citizens and property be struck whenever these rights are in conflict, and identifies the only circumstances under which that balance may tilt in favor of a would-be petitioner: namely, when to deny access would be to deny the petitioner an adequate forum for expression of his views.[9]

This method of accommodating conflicting interests was adapted from the method used by this Court in the analogous context of labor union access to employer property. A series of decisions has fleshed out accommodations under varying circumstances between the right of the employer to determine how his property shall be used and the statutory rights of employees to organize

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[9] This process of accommodating free speech rights with other competing rights and interests is a familiar one in constitutional law. *See, e.g., Procunier* v. *Martinez*, 416 U.S. 396 (1974) (speech rights of prisoners must yield to accommodate need for prison discipline).

and to bargain collectively.[10] As explained in *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956), "[a]ccommodation [between organization rights and property rights] must be obtained with as little destruction of one as is consistent with maintenance of the other." 351 U.S. at 112. For example, decisions of this Court allow employers to bar nonemployee organizers except when the organizers can demonstrate that "the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels." *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. at 112. Moreover, organizational picketing on employer property can be conducted over the employer's objection only during an organizational campaign. *Central Hardware Co.* v. *NLRB*, 407 U.S. at 545-46. Thus, even in the interpretation of the National Labor Relations Act, which expresses the strong national policy of "promot[ing] the peaceful settlement of industrial disputes," *Fibreboard Corp.* v. *NLRB*, 379 U.S. 203, 211 (1964), property rights have been forced to yield only under carefully limited circumstances and then only temporarily.

In the context of constitutional rights, *Lloyd* strikes the balance this Court found so necessary in *Babcock & Wilcox*, ensuring that the accommodation between competing rights will occur with "as little destruction of one [right] as is consistent with the maintenance of the other." *NLRB* v. *Babcock & Wilcox*, *supra*, at 112. Under this balancing test, free speech rights prevail over the constitutional rights of private property

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[10] *See, e.g., Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945); *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956); *Central Hardware Co.* v. *NLRB*, 407 U.S. 539 (1972); *Hudgens* v. *NLRB*, 424 U.S. 57 (1976); *Eastex* v. *NLRB*, 437 U.S. 556 (1978).

owners only if the denial of access to private property would effectively silence the speaker. The accommodation reached in *Lloyd* does not defeat the speaker's right to be heard, nor the property rights of the owner. The speaker may be relegated to a forum he would not otherwise choose as the outlet for his message. But there is no constitutional right to speak from what the speaker considers the best available soapbox. *See generally Adderly* v. *Florida,* 385 U.S. 39 (1966) (state may in pursuit of legitimate state interest close even some state-created forums); *Greer* v. *Spock,* 424 U.S. 828 (1976) (same result).

Of course, the outcome of this required balancing process will always depend on the availability of alternative forums for the speaker. *Lloyd* itself recognized that there may be situations where the accommodation of rights is "not easy." 407 U.S. at 570. Not all shopping centers are alike. Many are mammoth regional centers, like the shopping center in *Lloyd* or rural outposts drawing shoppers from a multi-county area. Shopping centers in downtown areas may be located in two-tier arcades of giant office buildings or in enclosed malls surrounded by bustling public spaces. Some shopping centers may be no more than collections of "Mom and Pop" stores serving small neighborhoods. A number of shopping centers, like the PruneYard itself, are medium-sized groupings of specialty stores serving the needs of suburban residents who drive to the center. While there may conceivably be circumstances under which coerced use of a shopping center as a forum might be constitutional, this is certainly not such a case. For here, as in *Lloyd,* the outcome of the balancing process "on the facts presented in this case" is "clear." 407 U.S. at 570.

The trial court heard all of the evidence and found that the appellees had alternative avenues of communication available that were both adequate and effective. J.S. App. A-3. The court found as a fact that "[t]he county in which the Center is located has many shopping centers, public shopping and business areas, public buildings, parks, stadia, universities, colleges, schools, post offices and similar public areas where large numbers of people congregate and where people can freely exercise First Amendment rights." J.S. App. A-2. Indeed, a Center guard advised appellees that they were free to petition on the public sidewalks outside the PruneYard itself. A. 27. Instead, when appellees were denied access to what they saw as the most convenient forum, they chose to litigate rather than use reasonable alternative public forums. Under *Lloyd,* however, they were not entitled to insist on the most convenient forum. So long as a citizen may adequately speak or petition without entering upon private property, he must rest content with the alternative available forums.

Ignoring controlling precedent, the California Supreme Court sacrificed Mr. Sahadi's constitutional rights on the altar of its own notion of public policy. That is not a sacrifice permitted by the United States Constitution. If Mr. Sahadi could not be forced to sign a petition condemning Syria, under *Lloyd* he cannot be required to devote his private property to appellees' cause, since adequate alternative sites for petitioning are available. Mr. Sahadi's federally protected rights of speech and property compel that result. The contrary decision of the California Supreme Court is in blatant disregard of the supremacy clause and must be reversed.

CONCLUSION

The judgment of the Supreme Court of the State of California should be reversed.

Respectfully submitted,

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