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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-289

PRUNEYARD SHOPPING CENTER, ET AL.,
Appellants,

VS.

MICHAEL ROBINS, ET AL.,
Appellees.

On Appeal from the Supreme Court of the State of California

BRIEF OF APPELLEES

OPINION BELOW

The opinion of the Supreme Court of the State of California is reported at 23 Cal.3d 899, 153 Cal.Rptr. 854, 592 Pac.2d 341 (1979), and was reprinted in Appellants' Jurisdictional Statement herein as Appendix C.

JURISDICTION

The decision of the California Supreme Court was filed on March 30, 1979. A petition for rehearing was filed and denied. The judgment became final on May 23, 1979.

Appellants filed a notice of appeal to this Court in the California Supreme Court on May 30, 1979. A jurisdictional statement was filed on August 21, 1979, and appellees filed a timely motion to dismiss.

Probable jurisdiction has not been noted. According to this Court's order of November 13, 1979, "[f]urther consideration of the question of jurisdiction is postponed to the hearing of the case on the merits." (App. 68)

This brief first addresses the question of jurisdiction by demonstrating that the decision below rests on adequate and independent state grounds, is not repugnant to any federal right in issue, and that no substantial federal question is before the Court.

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.

Tenth Amendment, United States Constitution:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Fourteenth Amendment, United States Constitution:

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

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:

> The people have the right to instruct their representatives, petition the government for the redress of grievances, and assemble freely to consult for the common good.

Article II, Section 8, California Constitution:

> *Initiative*
>
> (a) The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.
>
> (b) An initiative measure may be proposed by presenting to the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed by electors equal in number to 5 percent in the case of a statute, and 8 percent in the case of an amendment to the Constitution, of the votes for all candidates for Governor at the last gubernatorial election . . .

Article II, Section 9, California Constitution:

Referendum

(a) The referendum is the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State.

(b) The referendum measure may be proposed by presenting to the Secretary of State, within 90 days after the enactment date of the statute, a petition certified to have been signed by electors equal in number to five percent of the votes for all candidates for Governor at the last gubernatorial election, asking that the statute or part of it be submitted to the electors . . .

Article II, Section 14, California Constitution:

Recall Petitions

(a) Recall of a State officer is initiated by delivering to the Secretary of State a petition alleging reason for recall. . . . Proponents have 160 days to file signed petitions.

(b) A petition to recall a statewide officer must be signed by electors equal in number to 12 percent of the last vote for the office, with signatures from each of five counties equal in number to 1 percent of the last vote for the office in the county. Signatures to recall Senators, members of the assembly, members of the Board of Equalization, and judges of courts of appeal and trial courts must equal in number 20 percent of the last vote for the office. . . .

QUESTIONS PRESENTED

1. (a) The principal question before the Court is whether *Lloyd v. Tanner* (1972) 407 U.S. 551, recognized a paramount property right of shopping center owners whereby their power to prohibit expressive activity on their property may not be restricted by the states under state law.

(b) Does this Court's decision in *Hudgens v. NLRB* (1976) 424 U.S. 507, that shopping center owners' rights are dependent exclusively on the National Labor Relations Act so foreclose the principal question that it lacks sufficient substance to warrant review herein?

2. (a) May the State of California, under the State Constitution, protect rights of speech and petition in privately owned shopping centers where such centers are found to be essential and invaluable forums for the exercise of those rights, and where such protection is necessary to prevent irreparable injury to the petitioners and the general public?

(b) Does that decision in this case rest upon adequate and independent state grounds?

3. May this Court review issues raised by appellants concerning the Takings Clause and appellants' First Amendment rights, where there has been absolutely no showing made that such questions were properly and adequately raised in the State Court?

4. Does a restriction on a property owner's ability to control the protected conduct of a person permissibly on his property constitute a taking where the protected con-

duct has substantial public value and the restriction does not diminish the value of the property or interfere with its use?

5. By invoking the State Constitution to protect the right of individuals to solicit signatures on petitions to the government upon the premises of a privately owned shopping center, has the State of California adversely affected the landowner's First Amendment rights?

6. May shopping centers in California, where they are *the* centers of suburban communities, be characterized as forums in law since they are forums in fact?

STATEMENT OF THE CASE

On November 16, 1975, a group of students of the 1976 confirmation class of Temple Emanu-El, located in San Jose, California, went to the Pruneyard shopping center where they spoke with members of their community concerning a United Nations resolution labeling Zionism as a form of racism, and concerning the persecution of Jews in Syria. (A. 7) The students had drafted petitions, directed to the President of the United States and members of Congress, which set forth their grievances as to those situations. (A. 21)

Having set up a card table in one corner of the Pruneyard's central courtyard, the students began to collect the signatures of passersby. (A. 23) The project was well received by shopping center patrons. The students had a self-imposed rule that they would not harass people at the shopping center or block entrances to stores. Their conduct was at all times courteous and orderly. (A. 21-22)

After five to ten minutes, the students were advised by security personnel of the shopping center that their conduct was prohibited by shopping center regulations. The students were asked to leave, and did so. (A. 23)

The group that was excluded from the Pruneyard included Michael Robins, Ira David Marcus, and their confirmation class teacher, Roberta Bell-Kligler, who are the Appellees herein. (A. 7) For purposes of identification, these individuals are referred to herein as "the students."

Members of the confirmation class were all of high school age. (A. 20) School was then in session, and participation in the petition project was necessarily restricted to weekends. (A. 21) From prior experience, the students knew that publicly owned areas of downtown San Jose and neighboring municipalities were inadequate for a petition project because of the scarcity of people in such areas. (A. 22)

A petition project, unlike handbilling, leafleting, and picketing, could not be effectively carried out on the public sidewalks surrounding the shopping center. (A. 23) Where virtually all people drive onto the shopping center premises and do not have to set foot on its publicly owned surroundings, leafleting and picketing are effective only because of their instantaneous nature. (A. 23) The discussion of, and signing of, petitions requires personal contact in a manner precluded by roadside forums.

When they were asked by the Pruneyard's security officer to leave the premises, the students were advised that they could continue their petition project on the public sidewalk that ran along two sides of the property. (A. 27)

By admission of the Pruneyard's manager of operations, there is only a small amount of foot traffic on those sidewalks. (A. 48)

The students subsequently contacted the shopping center management, and offered to submit to any reasonable regulations so as to continue their project. (A. 8) The Pruneyard stated that the activity would not be allowed under any circumstances. (A. 14)

The students filed for an injunction to enjoin the Pruneyard from prohibiting the solicitation of signatures for their petitions in the common areas of the shopping center. (A. 6) The Superior Court of California, County of Santa Clara, denied the request. (J.S.App. A-4) The Court of Appeal affirmed, and the students petitioned for a hearing in the California Supreme Court. (J.S.App. B-11)

The Petition for Hearing was granted, and after consideration of the parties' briefs, several *amicus* briefs on both sides, and oral argument by both sides, the California Supreme Court reversed the judgment of the trial court. (J.S.App. C-13) After considering and denying the Pruneyard's Petition for Rehearing, (J.S.App. D-1) the State Supreme Court remitted the cause to the trial court with instructions that the requested injunction be issued. (A. 67)

The Pruneyard immediately sought from this honorable Court a stay of the mandate of the State Court. That application was denied by Mr. Justice Rehnquist, and the injunction was issued.

The trial court found that other sites, private and public, in Santa Clara County offered adequate and effective alternative forums for the students. (J.S.App. A-2)

The trial court did not find that alternative public forums, considered alone, were adequate and effective.

The California Supreme Court did not agree with the trial court's conclusion that "[t]here are adequate, effective channels of communication for plaintiffs other than soliciting on the private property of the Center." (J.S. App. A-3) The fact found by the State Supreme Court was that "[s]hopping centers to which the public is invited can provide an essential and invaluable forum for exercising [the rights of petition and speech]." (*Robins v. Pruneyard,* 23 Cal.3d 899, 910, 153 Cal.Rptr. 854, 860) (J.S.App. C-12)

The California Supreme Court, in finding that shopping centers in California are essential and invaluable forums, had been briefed as to the socio-economic circumstances existing in the state which makes access to shopping centers necessary for the effective exercise of the conduct at issue. The evidence indicated that shopping centers are the gathering places for California communities. Furthermore, privately owned shopping centers, because of their planned convenience, wide range of goods and services, and attractiveness to businesses which formerly were situated in downtown areas, not only have replaced the traditional public forums but were the principal cause of their demise.

The Fair Political Practices Commission, a California administrative agency established to oversee the State's electoral processes, appeared before the California Supreme Court as an *amicus curiae* in support of the students' case. The State Supreme Court expressly noted the

position of that state regulatory body that "because of the large number of signatures required to succeed in an initiative, referendum or recall drive, guaranteeing access to voters is essential to make meaningful the right to mount such a drive." (*Robins v. Pruneyard*, 23 Cal.3d 899, 908, 153 Cal.Rptr. 854, 858-859 [footnote 4]; J.S. App. C-9)

SUMMARY OF ARGUMENT
JURISDICTIONAL SUMMARY

The Pruneyard argues that *Lloyd v. Tanner* (1972) 407 U.S. 551, made shopping centers immune from otherwise proper state regulation. That argument has no merit.

This court, in *Lloyd, supra,* did not diminish the power of the states to regulate, but rather established the limits of the First Amendment as a basis of such regulation. That much is made clear by *Hudgens v. NLRB* (1976) 424 U.S. 507, where a shopping center's right to control conduct was held to be subject to the National Labor Relations Act. Fifth and Fourteenth Amendment rights do not include immunity from regulation.

An argument so devoid of merit, so contrary to prior decisions of the Court, does not present a substantial federal question suitable for Supreme Court review. *Equitable Life Assurance Society v. Brown* (1902) 187 U.S. 308, 311; *Zucht v. King* (1922) 260 U.S. 174.

The decision below rests expressly on the California Supreme Court's construction of petition and speech rights under the State Constitution. State law provides that such rights may be protected from irreparable injury by an injunction restraining those who would deny them. Fur-

thermore, the states have the power to reasonably regulate property uses for the common good. The opinion therefore rests on adequate and independent state grounds, and Supreme Court review is inappropriate. *Fox Film Corp. v. Muller* (1935) 296 U.S. 207.

Appellants argue two issues for which they fail to set a jurisdictional foundation. They contend that the State's action below is a "taking" and that the protection of appellees' rights violates the First Amendment rights of the appellants.

The opinion below makes no mention of these issues. In such a situation, it has been assumed by this Court that the absence of the issue is due to want of adequate presentation in the state court, unless the aggrieved party makes an affirmative showing to the contrary. *Street v. New York* (1969) 394 U.S. 576, 582.

Appellants' affirmative duty is to show not only the existence of a federal question, but also that it was properly raised under state law. (See, e.g., *Williams v. Georgia* (1955) 349 U.S. 375, 382-383). The duty is also set forth in Supreme Court Rule 15(1)(d).

Appellants have failed to make any such showing with respect to the "taking" and "negative First Amendment" questions addressed in their brief. They have had two opportunities to do so (Jurisdictional Statement and Brief of Appellants).

It is respectfully requested that this Court dismiss this matter for failure by appellants to present a substantial federal question.

SUMMARY OF ARGUMENT ON THE MERITS

Lloyd v. Tanner (1972) 407 U.S. 551, does not support appellants' argument that shopping center owners were therein granted immunity from regulations protecting petition and speech activities under state law.

That case defines the scope of First Amendment protection, but does not diminish the power of the states to give greater protection to petition and speech rights under their own constitutions. Nor does *Lloyd* in any way diminish the power of the state to regulate property and resolve disputes between its citizens under state law. *Hudgens v. NLRB* (1976) 424 U.S. 507.

The argument that appellants' reliance on *Lloyd* does not give rise to a substantial federal question is equally applicable to the correctness of the decision below on the merits.

Nor can California's action reasonably be called a taking. Since the public is generally invited to the premises, appellants' right to exclude is waived, and there is no resulting physical invasion.

A state may properly impose reasonable restrictions on one's use of property in arriving at a fair and just adjustment of rights for the common good. *Andrus v. Allard,* No. 78-740 (November 27, 1979), 48 U.S.L.W. 4013. There is no evidence that appellants have, or will suffer any injury by virtue of the protected conduct.

The decision below does not violate appellants' freedom of thought. Nor is there any indication that any idea or protected conduct is susceptible to being attributed to

appellant by virtue of his status as property owner. Furthermore, if shopping center owners are allowed to control expression in their common areas, they will become both censors and overseers of public opinion and awareness. No such monopoly over the marketplace of ideas was intended by the framers of the First Amendment.

Expert evidence and published socio-economic sources establish the crucial nature of the shopping center's role in California.

Shopping centers have been, by design, the principal cause of the central business district's failure. They have both followed suburban growth, and drawn such growth to themselves. For many Californians the shopping center is the only "town center" there ever was.

Although the shopping center industry claims herein that centers are not equipped to provide forums, it is strongly indicated that the industry consensus sees centers as socially responsive members of the community. They satisfy the whole range of human needs, and are the focal point of the community for all activities.

In California, where petitions are encouraged and are incorporated into the governing process, shopping centers are essential and invaluable forums.

ARGUMENT

I

THERE IS NO ADEQUATE BASIS UPON WHICH THE COURT MAY TAKE JURISDICTION OVER THIS MATTER. THE FEDERAL SYSTEM OF OUR GOVERNMENT ALLOWS AND ENCOURAGES THE STATES TO RESOLVE THEIR PECULIAR PROBLEMS UNDER STATE LAW. THIS COURT'S PRIOR DECISIONS CONCERNING EXPRESSIVE ACTIVITY IN SHOPPING CENTERS WITHHELD FEDERAL PROTECTION UNDER THE FIRST AMENDMENT, BUT NO DECISION HAS UNDERMINED THE STATES' POWER TO REGULATE SUCH PROPERTY TO PROTECT FUNDAMENTAL STATE RIGHTS. THE MATTER BEFORE THE COURT WAS DECIDED ON ADEQUATE AND INDEPENDENT STATE GROUNDS, AND NO SUBSTANTIAL FEDERAL QUESTION HAS BEEN RAISED.

A. The Rights of Petition and Incidental Speech Are Inherent Within a Democratic Society. Such Rights Are Especially Fundamental in California Where They Are Expressly Guaranteed by the State Constitution, and Are Used in the State's Governing Processes.

Appellees are residents of the State of California. They were aggrieved by certain political situations, and decided to amplify their grievance through their community's voice by circulating petitions addressed to the President of the United States and Members of Congress. (A. 7, 21)

The right to petition is fundamental to democratic self-government. "The very idea of government, republican in

form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *United States v. Cruikshank* (1875) 92 U.S. 542, 552.

The rights of petition and speech are expressly guaranteed by the Constitution of the State of California,[1] and such protection is not limited to instances of state action. (*Diamond v. Bland* (1970) (*Diamond I*) 3 Cal.3d 653, 91 Cal.Rptr. 501, 477 P.2d 733; *In re Lane* (1969) 71 Cal.2d 872, 79 Cal.Rptr. 729, 457 P.2d 561; *In re Hoffman* (1967) 67 Cal.2d 845, 64 Cal.Rptr. 97, 434 P.2d 353; *Diamond II v. Bland* (1974) 11 Cal.3d 331, 335, 113 Cal.Rptr. 468, 471, 521 P.2d 460, 463 (dissenting opinion of Mosk, J.).

The right to petition is of particular importance in California where the State, through its power to establish its governing processes under the Tenth Amendment to the United States Constitution,[2] has made it "vital to a basic process in the state's constitutional scheme—direct initiation of change by the citizenry through initiative, referendum, and recall. (Cal. Const., Art. II, Sections 8, 9, and 13.)" *Robins v. Pruneyard* (1979) 23 Cal.3d 899, 907-908 (J.S.App. C-8-9) (footnote omitted).

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[1]Petitioning is protected by California Constitution, Article I, Section 3: "The people have the right to instruct their representatives, petition the government for the redress of grievances, and assemble freely to consult for the common good."

Speech is protected by California Constitution, Article I, Section 2: "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."

[2]Each state has a constitutional responsibility and power under the Tenth Amendment to establish and operate its own government. *See, e.g., Sugarman v. Dougall* (1973) 413 U.S. 634, 647.

In recognition of the importance of speech and petition rights that Appellees seek to exercise, and of the socio-economic role of shopping centers in the State, the California Supreme Court found that shopping centers, such as the Pruneyard "can provide an essential and invaluable forum for exercising those rights." (J.S. C-12)

California has, by means of an injunction, restricted one aspect of the Pruneyard's property rights. In order to protect Appellees and the general public in California from irreparable injury, the State has imposed a reasonable regulation upon shopping center property.

B. The States Have the Power to Impose Reasonable Restrictions on the Use and Control of Private Property in Order to Protect Their General Welfare. That Power Has Not Been Diminished by This Court's Decisions Concerning Access to Shopping Centers.

The primary jurisdictional issue before the Court depends on whether *Lloyd v. Tanner* (1972) 407 U.S. 551, vested shopping center owners with a constitutional right to prohibit speech and petition activities on their property even though state law commands that such conduct be allowed for the preservation of the general welfare.

Lloyd is not controlling herein. That case presented the question whether the First Amendment to the United States Constitution protected certain conduct, handbilling and incidental speech, in privately owned areas of a shopping center in Portland, Oregon.

Lloyd held that First Amendment *guarantees* apply only in cases of state action, and that a shopping center does not possess the characteristics of a state.

> "In addressing this issue, it 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 non-discriminatorily for private purposes only." (*Lloyd v. Tanner*, 407 U.S. at 567, *first emphasis added, second in original.*)
>
> "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." (*Lloyd v. Tanner*, 407 U.S. at 570, *emphasis added.*)

Having decided that the *guarantees* of the First Amendment were not applicable in *Lloyd,* the Court did not foreclose the possibility that the individual's First Amendment activity could prevail over the property interests of the shopping center owner.

> "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 the due protection of both, are not easy. *But on the facts presented in this case,* the answer is clear." (*Lloyd v. Tanner*, 407 U.S. at 570, emphasis added.)

Appellees respectfully submit that only the first of *Lloyd's* two levels of inquiry is of Constitutional dimen-

sion. Contrary to the arguments of the Pruneyard and supporting *amici curiae* from the shopping center industry, the result of a factual evaluation of competing interests is not controlling in controversies characterized by different facts and concerns.

The state action requirement for protection under the Federal Constitution has special meaning. It exemplifies the Federal government's proper role in our nation's governmental scheme, i.e., to protect the people from abuse by the states. At the same time, it is largely the responsibility of the states to establish and maintain their own systems of government, and to resolve disputes between their residents, subject to the guarantees of the Federal Constitution. Federalism recognizes that differences exist in our society, and that nationwide regulation is not always necessary or appropriate.

This policy of federal restraint which underlies the state action limitation of First Amendment protection, also militates against the notion that *Lloyd* gives shopping center owners an unassailable Constitutional right to prohibit expressive activity in shopping center common areas. In deciding the reach of the First Amendment as against the property rights of shopping center owners, it was not necessary for the Court to rule on the power of a state to regulate the use and control of such property.

The issue was clarified and settled in *Hudgens v. NLRB* (1976) 424 U.S. 507, where, in describing the federal constitutional principles involved in *Lloyd*, the Court gave exclusive emphasis to the language concerning the absence

of state action, and the resulting non-availability of First Amendment protection (424 U.S. at 518-520).

Hudgens makes it clear that *Lloyd* did not immunize shopping center owners from reasonable regulations properly based on non-First Amendment grounds. Appellees respectfully submit that *Hudgens* invited the states to assess their own situations, and regulate shopping center property accordingly, by noting that "statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, [although] no such protection or redress is provided by the Constitution itself." (424 U.S. at 513)

Indeed, *Hudgens* expressly states that a shopping center owner's power to prohibit expressive activity is subject to reasonable regulation: "[T]he rights and liabilities of the parties in this case are dependent *exclusively* upon the National Labor Relations Act." Under the Act the task of the Board, subject to review by the courts, is to resolve conflicts between Section 7 rights and private property rights, "and to seek a proper accommodation between the two." (424 U.S. at 521, emphasis added)

Appellants' contention that shopping center owners have a paramount constitutional right to prohibit expressive activity does not withstand the *Hudgens* decision. The scope of such a right could not depend exclusively on the National Labor Relations Act, which is precisely the holding in *Hudgens*. It is significant that Appellants' Brief in this Court gives *Hudgens* only cursory discussion.

Hudgens indicates that a regulatory body charged with a specific purpose may restrict shopping center property rights in furtherance of that purpose. In this case the regulatory body is the California Supreme Court, which is charged with the duty and purpose to construe the State Constitution and to adjudicate disputes that arise thereunder.

The State of California has a legitimate interest in protecting rights of its citizens to discuss issues, and to circulate and sign petitions on those issues. The fundamental role of such conduct in a democracy compels the protection of such interests. The special significance of the petition in the state's governmental scheme makes the interest of the state even more compelling.

Hudgens clearly shows that appellants' property rights are not immune from restrictions imposed for the benefit of other interests protected by statutory and common law. The decision of the California Supreme Court protects important state rights by imposing a reasonable and specific restriction on appellants' property rights.

Appellants' contention that shopping centers are immune from state regulation in this matter is so explicitly foreclosed by *Hudgens* that there can be no controversy. *Equitable Life Assurance Society v. Brown* (1902) 187 U.S. 308, 311. The question raised is therefore so insubstantial as to defeat this Court's jurisdiction. *Zucht v. King* (1922) 260 U.S. 174.

C. The Decision of the California Supreme Court Is Based on Adequate and Independent State Grounds, and This Court Should Decline Further Review for That Reason.

That the decision below is based upon state, rather than federal grounds, is first made apparent in the California Supreme Court's opening paragraph:

> "In this appeal from a judgment denying an injunction we hold that the soliciting at a shopping center of signatures for a petition to the government is an activity protected by the California Constitution." (J.S. App. C-1)

The remedy sought by the students and granted by the state court is the subject of state law. California's Code of Civil Procedure, Section 526, specified the following applicable basis for injunctive relief:

> *Grounds for Issuance.*
>
> "An injunction may be granted in the following cases:
>
> "1. When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.
>
> * * * *."

The complaint herein alleges that the students were attempting to circulate petitions to the government on the premises of the shopping center, and that the Pruneyard was preventing such conduct.

Given the California Supreme Court's ruling, quoted above, that the students were entitled to protection for such conduct under the State Constitution, the injunction was properly issued under state law.

The Pruneyard has consistently argued only that *Lloyd v. Tanner,* 407 U.S. 551, prevented the State Courts from granting relief under state law. In its well reasoned opinion, the California Supreme Court addressed that issue prior to discussing the scope of the students' rights under the State Constitution.

The California Supreme Court found nothing in *Lloyd, supra,* which would prevent it from restricting under state law appellants' conduct complained of by the students. (See J.S.App. C-4 to C-9)

Finding no existing impediment to a state law basis of decision, the Court below held:

> "We conclude 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)

This honorable Court has never decided whether the First Amendment protects petitioning in shopping centers found to be essential and invaluable forums for such activity. The issue need not be considered at this time.

Where a case may have been decided upon two grounds, one federal, the other non-federal, this Court's first inquiry must be whether the non-federal ground is independent of the federal ground and adequate to support the judgment. *Fox Film Corp. v. Muller* (1935) 296 U.S. 207.

Clearly the Constitution of the State of California is a body of law independent of any federal doctrine. And this Court has recognized that "[i]t is fundamental that state courts be left free and unfettered by [this court] in interpreting their state constitutions." *Minnesota v. National Tea Company* (1940) 309 U.S. 551.

In a case such as this, where the state court's decision rests on an adequate non-federal ground, review by this Court is precluded. *Fox Film Corp. v. Muller* (1935) 296 U.S. 207.

D. The Adequacy of the State Ground Herein Finds Strong Support in Prior Decisions of this Court Concerning the Power of the State to Define and Regulate Property Rights.

The task of defining property rights has generally been left to the states. *Bishop v. Wood* (1976) 426 U.S. 341.

Similarly, it has long been held that states have the power to impose reasonable restrictions on the use of private property for the benefit of the public welfare. *Village of Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365; *Village of Belle Terre v. Boraas* (1974) 416 U.S. 1.

An analogous situation came before the Court in the mid-1960's. The Court was faced in several cases with the question whether the state action requirement of the Fourteenth Amendment precluded the extension of equal protection guarantees to racial minorities who were denied the use of privately owned facilities. See, e.g., *Griffin v. Maryland* (1964) 378 U.S. 130; *Robinson v. Florida* (1964) 378 U.S. 153; *Lombard v. Louisiana* (1963) 373 U.S. 267; *Bell*

v. Maryland (1964) 378 U.S. 226. Those members of the Court who insisted that there was insufficient state involvement upon which to base constitutional protection were very careful to note that their views did not implicate or restrict

> "[t]he power of Congress to pass a law compelling privately owned businesses to refrain from discrimination on the basis of race. Our sole conclusion is that Section 1 of the Fourteenth Amendment does not prohibit privately owned restaurants from choosing their own customers . . . as long as some valid regulatory statute does not tell him to do otherwise." (*Bell v. Maryland, supra*, 378 U.S. at 343. Black, J. dissenting, joined by Harlan, J. and White, J.)

When the validity of the nationwide public accommodations statute was presented in *Heart of Atlanta Motel, Inc. v. United States* (1964) 379 U.S. 241, the Court rejected the claims that the statute violated substantive due process or the takings clause (379 U.S. at 258-261). Mr. Justice Black, who had argued against extension of equal protection guarantees without state action, wrote separately in *Heart of Atlanta* to note that

> "This Court has consistently held that the regulation of the use of property by the Federal Government or by the states does not violate either the Fifth or Fourteenth Amendment. . . . A regulation such as that [in the] 1964 Civil Rights Act does not even come close to being a 'taking' in the constitutional sense. . . Nor does any view expressed in my dissenting opinion in *Bell v. State of Maryland*, 378 U.S. 226, 318, 84 S.Ct.

> 1814, 1864, 12 L.Ed.2d 822, in which Mr. Justice Harlan and Mr. Justice White joined, affect this conclusion in the slightest for that opinion stated only that the Fourteenth Amendment in and of itself . . . does not bar racial discrimination in privately owned places of business in the absence of state action." (379 U.S. at 277-278) (Black, J. concurring)

Mr. Justice Black's interpretation of the constitution in the civil rights cases was simple, and literal. In that view, those provisions which call for state action offer protection against the government, or an accepted substitute, only.

Lloyd v. Tanner (1972) 407 U.S. 551, came to the Court through the federal system. Protection was sought against a private property owner solely under the First Amendment. The guarantees of the First Amendment were held to require state action. (407 U.S. at 567)

To paraphrase Mr. Justice Black in *Heart of Atlanta, supra*, the decision in *Lloyd*, that the First Amendment in and of itself does not bar shopping center owners from prohibiting handbilling in the absence of state action, does not have the slightest bearing on the question whether a state may *protect* petitioning on the basis of a state constitutional guarantee which does not require the presence of state action.

A prior refusal by this Court to restrict property rights in the absence of state action has never been held to prevent the states from imposing a similar restriction under state law. Appellants' argument to the contrary does

not, therefore, address a substantial federal question. The regulation of property herein is no more than an adjustment of rights for the public good under state law, and the appeal should be dismissed.

E. The Taking Issue Is Not Properly Raised Before the Court.

Prior to discussing the taking argument made by appellants at pages 10-11 of Appellants' Brief, it is noted that the Pruneyard never even suggested in state court that its injunction would constitute a taking.

The issue was not raised as a defense at trial (see Answer to Complaint, A. 10-12). Nor was it argued by the Pruneyard at any appellate level in California. The California Supreme Court did not pass on the question now raised (J.S.App. C.1-13), nor was taking mentioned by the California dissenters (J.S.App. C.13-20).

Up to this point the question has been whether the State Constitution protected the students' conduct, and, if so, whether the state could regulate shopping center property to protect the rights of speech and petition from virtual extinction.

Before the California Supreme Court, the Pruneyard did argue that its property rights were absolutely protected by the Fifth and Fourteenth Amendments. However such reference was never in connection with a "taking" argument, but only in connection with their assertion that *Lloyd* had established for shopping centers an absolute and paramount right under those Amendments.

The United States Supreme Court does not have jurisdiction unless a substantial federal question was raised and decided in the state court below. *Cardinale v. Louisiana* (1969) 394 U.S. 437, 438.

This Court does not decide issues raised for the first time at this level. *Tacon v. Arizona* (1973) 410 U.S. 351, 352.

The California Supreme Court failed to pass upon a taking issue. Appellees submit that the issue was not adequately framed nor properly raised before that Court.

Rule 15(1)(d), Rules of the Supreme Court, provides that "If the appeal is from a state court, the statement of the case shall also specify the stage in the proceedings in the court of first instance, and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to change and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record where the matter appears . . . as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court."

The Pruneyard has failed to meet this burden with respect to the taking issue. Neither the Jurisdictional Statement nor Appellants' Brief shows when, where, or how the Pruneyard raised the question.

The trial court record, especially the Answer (A. 10-12), oral argument by appellants' attorney (R.T. 8-10), and the trial court's findings of fact (J.S.App. A-1), reveal no mention of a taking issue. In fact, the Fifth Amendment was not even mentioned as a general basis of appellants' theory. (R.T. 8-10)

Since the California Supreme Court failed to pass upon a taking issue, it must be assumed that such omission was due to the failure of appellants to properly present the issue in the state court. And, since the Pruneyard has made no affirmative showing to the contrary, there is no jurisdictional basis for its presentation at this time. *Street v. New York* (1969) 394 U.S. 576, 582.

F. Appellants Have Not Met Their Burden of Showing that the Issue of Their Own First Amendment Rights Was Raised in the State Court.

The Pruneyard now places great emphasis on a contention that the action of the State Court violates the First Amendment rights of shopping center owners.

Though it is demonstrated hereinbelow that the argument has no merit, appellees respectfully submit that this alleged federal question was not properly raised in the state court, and that the Pruneyard has failed to make any showing to the contrary.

The only language of Appellants' Jurisdictional Statement or Brief which remotely attempts to establish a jurisdictional foundation for this issue is found at page 12 of the Jurisdictional Statement: "Although the California Supreme Court opinion discusses at length the free

speech rights of appellees, it fails to recognize the First and Fourteenth Amendment free speech rights of appellants."

In that respect, appellants are correct. A review of the opinion below reveals not even the vaguest reference to the Pruneyard's claim now in question.

When "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York* (1969) 394 U.S. 576, 582.

Again, it is pointed out that the issue in question was not raised at the trial court. (See, e.g., Answer at A. 10-12.)

The Pruneyard has completely ignored the requirement of this Court's Rule 15(1)(d) as to the showing of a jurisdictional foundation for the issue. It is respectfully submitted, on the basis of the entire record, that this failure is due solely to appellants' lack of proper presentation of the issue in the court below.

Accordingly, appellants' "negative" First Amendment argument does not provide a jurisdictional basis for this Court. *Cardinale v. Louisiana* (1969) 394 U.S. 437, 438.

II

CALIFORNIA'S RESTRICTIONS ON THE PRUNEYARD'S POWER TO CONTROL ITS PROPERTY DOES NOT CONSTITUTE A TAKING UNDER THE FIFTH AMENDMENT.

Principles of taking, just compensation, condemnation, and inverse condemnation now appear in appellants' argument (Brief of Appellant, pp. 10-12).

Appellees respectfully submit that such issues are not properly before the Court. As previously shown herein, (see Section I-E, supra), appellants have failed to lay a jurisdictional foundation for this question either in their Brief or in their Jurisdictional Statement. There is no showing by appellants, or any indication in the record, that a taking question was properly and adequately raised at the state level.

Even had such question been raised, it would be answered in favor of the judgment below. The opinion below does not interfere with appellants' use of shopping center property. The only evidence in the record concerning the effect of the students' conduct on the Pruneyard is that the petition project was well received by appellants' patrons (App.-23), and that the students were orderly in their conduct (App.-22-23). The students were not competing with the Pruneyard, or in any way detracting from its operation. There is no evidence that appellants have suffered any economic injury whatsoever, or that they will in the future.

Brief of Appellants, page 11, cites decisions of this Court in support of the taking argument. None support appellants' position.

Rowan v. Post Office Dept. (1970) 397 U.S. 728, involved the constitutionality of a federal statute pursuant to which a person may request the Postmaster General to order the removal of the person's name from the mailing list of a sender of "pandering" advertisements. (39 U.S.C. Section 4009, "Prohibition of pandering advertisements in the mails.") The primary issue was whether the statute violated the free speech and due process rights of the "mailers" under the First and Fourteenth Amendments (397 U.S. at 731).

The fundamental values protected in *Rowan, supra,* were not property rights, but privacy rights. The legislative objective "was to protect minors and the privacy of homes from such material and to place the judgment of what constitutes an offensive invasion of these interests in the hands of the addressee" (397 U.S. at 732).

> "The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another." *Rowan, supra,* 397 U.S. at 737.

The opinion below does not violate the privacy of family and home. Nor, by protecting speech and petition rights in a public gathering place, has the California Supreme Court effected a taking of privacy—related property rights.

Delaware, Lackawanna & Western Railroad Company v. Town of Morristown (1928) 276 U.S. 182, cited in Brief of Appellants, page 11, involved a local ordinance that estab-

lished a cab stand on the premises of a privately owned railway station. The railroad had contracted with a particular cab company for exclusive service on the premises. The company did not have enough permits to give adequate service. The town, objecting to the contractual arrangement as creating a monopoly and injuring other cabmen, refused to issue the company additional permits. The town's decision was upheld in state court.

The town then enacted the ordinance in question. Other cabmen began parking in the space and soliciting fares. This Court struck down the ordinance, holding that it violated the Fourteenth Amendment due process clause. (276 U.S. at 193)

In *Delaware, Lackawanna & Western Railroad, supra,* the ordinance forced upon the railroad a commercial use which nearly destroyed the value of its exclusive cab service agreement. The railroad had a reasonable and an actual expectation of compensation from that commercial use. That expectation was shattered by the ordinance, which in effect established a zone for commercial use from which no compensation would be derived. (276 U.S. at 193)[3]

Even so, as Mr. Justice Brandeis noted in his concurring opinion (joined by Holmes, J.), the railroad could not expect compensation whenever a third party entered the property in a commercial role. The railroad had a duty to recognize the basic needs of its patrons, including the pro-

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[3]The reasonableness of the property owner's expectation of compensation as a basis for application of the Takings Clause was recently considered by the Court in *Kaiser Aetna v. United States,* Dock. No. 78-738 (Dec. 4, 1979), 48 U.S.L.W. 4045. That case is discussed *infra.*

vision of suitable transportation to and from the station. (276 U.S. at 199, concurring opinion of Brandeis, J.)

Therefore, even as early as the *Delaware, Lackawanna & Western Railroad* case of 1928, *supra,* it was recognized that the owner of private property which is used by the public is subject to regulation for the public welfare. One's expectation of compensation does not apply where a particular third party use of the property is imposed for the benefit of the public that is present on the property.

The Pruneyard has no interest in the communication that takes place among the members of the public that go there. Unlike the railroad company in Morristown, a shopping center has no reasonable expectation of compensation from the activity in question. Nor do conversations become property-related simply because they result in the signing of a paper concerning the topic of discussion.

Delaware, Lackawanna & Western Railroad, supra, therefore supports the decision below. No compensable taking occurs when the state protects communication between individuals on private property. Since the owner has no right to silence his patrons he suffers no loss by their non-interfering speech and petitioning. Furthermore, the owner of land which serves the general public is subject to reasonable regulations imposed for the public welfare. (276 U.S. at 199, concurring opinion of Brandeis, J.)

The recently announced opinion of this Court in *Kaiser Aetna v. United States,* No. 78-738 (December 4, 1979) 48 U.S.L.W. 4045, contains language which, *if taken out of context,* arguably supports appellants' taking contentions.

Appellants rely on the statement that "the 'right to exclude' so universally held to be a fundamental element of the property right, falls within this category of interests that the government cannot take without compensation." (48 U.S.L.W. 4045, 4049)

The issue in *Kaiser Aetna* was whether the public could freely enter a private enclave in spite of the owner's intention that access be limited to residents and other fee-paying users. Thus, the Court was not considering whether important public interests can be protected in what is, in fact, a gathering place of the public.

In *Kaiser Aetna*, a land developer had acquired private property which included a pond. At great expense, the developer dredged the pond, connected it to an adjacent public waterway, and built a marina and subdivision community on the property. Use of the facilities, including the pond, was offered only to residents of the development and those renting marina space. The property owner had not opened the facilities to the public whatsoever.

The developer, who had a fee interest in the pond under state law, had dredged the pond and connected it to the ocean so as to make it navigable in fact. The government argued that "as a result of one of these improvements, the pond's connection to the navigable waterway in a manner approved by the Corps of Engineers, the owner has somehow lost one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others." (*Kaiser Aetna*, 48 U.S.L.W. at 4049.)

After noting generally that the right to exclude is an interest that cannot be taken without compensation, the court explained that "(t)his is not a case in which the government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina." (*Kaiser Aetna*, 48 U.S.L.W. 4049-4050.)

The "right to exclude" described in *Kaiser Aetna* is not at issue in this case. The Pruneyard is open to the public during operating hours and it has never been contended that the students, or any members of the public, do not have access to the property. Therefore, this is not a physical invasion case, and the reasoning behind the taking rule of *Kaiser Aetna* should not be applied.

In other words, by opening itself to the public the Pruneyard has generally waived its right to exclude. The opinion below does not result in a physical invasion, but rather a restriction on the Pruneyard's ability to control the conduct of individuals who are permissibly on the property.

This case is also different from *Kaiser Aetna* in that the regulation imposed by the state will not cause a devaluation of the property, or use, in question. There is no evidence of diminished property value in the record. Other shopping center interests, before the Court as *amici curiae,* contend that the protected conduct is detrimental to business and property values. This allegation is not supported in the record. Furthermore, where all shopping centers in California are equally affected under the law, it is incon-

ceivable that their market value is adversely affected. Since the regulation gives no advantage to any property devoted to that use, there can be no disadvantage to property or business values. And if the property should be marketed for a different use, the regulation would naturally disappear.

The briefs from the shopping center industry claim a substantial injury will be incurred in administering the reasonable regulations they may establish under the opinion below.[4] That burden is mostly speculative, but to the extent it may exist in such legitimate areas as scheduling, it is certainly minimal. In this regard, it must also be pointed out that the shopping center industry owes its very existence to public patronage. It is an industry that has contributed to urban decay and suburban sprawl. The complaint about this minimal burden is, therefore, ironic since, as recently noted by this Court, "(a regulation) is a burden borne to secure 'the advantage of living and doing business in a civilized community.' " *Andrus v. Allard*, No. 78-740 (November 27, 1979), 48 U.S.L.W. 4013, 4017, quoting from *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 422 (Brandeis, J., dissenting).

The cases and concerns cited by appellants and their supporting *amici curiae* do not, therefore, establish the existence of a taking in this case. The California Supreme Court has done no more than to reach a reasonable and specific accommodation between petition and speech rights,

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[4]Shopping center briefs charge that the decision below will result in litter from handbills, solicitation of money, violence, picketing, and religious activities. The first paragraph of the decision makes it clear that such activity is not protected. (J.S.App. C-1)

on one hand, and property rights on the other. It has recognized that, at least in California, shopping centers are the principal places of public assembly, the center of the community. (J.S.App. C-11-12) The Court below recognizes that to a certain extent the public's interests and needs exist wherever the public is present, and that for speech and petition activities the public presence in shopping centers makes them essential and invaluable forums. But by restricting such activity to common areas, by allowing for reasonable regulations, and by limiting its holding to specified activities, the Court below truly accommodates for the benefit of all.

> As this Court stated in *Andrus v. Allard, supra:*
> " . . . (G)overnment regulation—by definition—involves the adjustment of rights for the public good . . .
> "The Takings Clause, therefore, preserves governmental power to regulate, subject only to the dictates of 'justice and fairness'. There is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate . . . Resolution of each case however, ultimately calls as much for exercise of judgment as for application of logic.
> " . . . (T)he denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."

Andrus v. Allard, 48 U.S.L.W. 4013, 4017.

Appellees respectfully submit that the court below has not offended "dictates of 'justice and fairness'" in its "adjustment of rights for the common good." The Prune-

yard's aggregate property rights are unchanged, except that its owners cannot now prohibit certain non-detrimental conduct by and between members of the public who are otherwise welcome on the premises.

The principle upon which the California Supreme Court adjusted rights for the common good was described in *Marsh v. Alabama* (1946) 326 U.S. 501:

> "Ownership does not always mean absolute dominion. 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 the statutory and constitutional rights of those who use it."
> (326 U.S. at 506)

Since there is no economic detriment to appellants, nor any interference with their present use, nor any physical invasion of their property as a result of the opinion below, there is no taking. The decision of the California Supreme Court is a fair and equitable adjustment of rights for the common good, and the restriction imposed is therefore valid.

III

THE PROTECTION OF SPEECH AND PETITIONING BETWEEN MEMBERS OF THE PUBLIC DOES NOT VIOLATE FIRST AMENDMENT RIGHTS OF INDIVIDUALS WHO OWN THE PROPERTY UPON WHICH THE PUBLIC IS PRESENT.

Appellants contend that they have a right, under the First Amendment, to disallow expressive activity between members of the public who are in the shopping center. The Pruneyard describes the right as "the right 'to decline to

foster' speech and to 'refrain from speaking' " (Brief of Appellants, page 14). They contend that such right is applicable to this case and that it has been violated.

As a preliminary matter, this Court should not consider the issue, regardless of its merit, since appellants have failed to show that it is properly raised. (See section I-F, *supra*)

But if for some reason the question is considered, it is respectfully submitted that appellants' argument lacks legal substance and basic logic. It is simply unrealistic to claim that a petition project, such as that of the students herein, offends appellants' "freedom of thought," or any personal First Amendment freedom of appellants.

This "negative" First Amendment argument draws on cases wherein the Court protected interests actually threatened by state action, such as privacy of thought (*Wooley v. Maynard* (1977) 430 U.S. 705; *Board of Education v. Barnette* (1943) 319 U.S. 624) and freedom of the press (*Miami Herald Publishing Co. v. Tornillo* (1974) 418 U.S. 241).

Wooley, Barnette, and *Miami Herald,* all *supra,* contained actual controversies where First Amendment freedoms were clearly offended. In each of those cases, there was an act of coercion whereby an individual was put into a position where an idea or statement could be attributed to his own thought or belief.

Appellants fail to explain how the protected activity in this case will result in the attribution of a thought or belief to a shopping center owner. Where the public knows that

petition and speech activities are protected in shopping centers, there is no reason for anyone to attribute the ideas in question to the landowner unless he personally endorses the project. The right of the shopping center owner to refrain from speaking therefore remains intact, and appellants' argument to the contrary is an invention, and an unfounded one at that.

In reality, the Pruneyard is not being forced to devote its property as a forum for others. The forum is not the property but the public presence on it. The opinion below does not require appellants to do anything with their property; rather, it recognizes that the significant public presence in the shopping center has certain attributes which the landowner may reasonably limit but not destroy, especially where such attributes are fundamental to the public welfare.

It cannot be disputed that individual expression is inevitable in places open to the public. It is common during a visit to a privately owned shopping center to see campaign or other expressive buttons, t-shirts, bumper stickers, and so forth. Moreover, it is reasonably certain that ideas and opinions are exchanged between individuals in shopping centers, as a result of one person's expression. Any public expression invites response either pro or con, silently or verbally. The interchange of ideas is therefore inevitable in shopping centers because it is a gathering place of the public, a forum in fact.

It is unrealistic for the Pruneyard to argue that expressive activity between members of the public in the shopping center is reflective of its own thoughts. Where expres-

sion already occurs there is no basis for the bare allegation that the manner of expression protected herein infringes upon appellants' speech rights. The petition is merely a documented statement of one public viewpoint. It differs from individual expression only in the degree of force it carries to its addressee. And the act of building that forceful statement requires communication among members of the public. It is illogical to conclude that conduct which seeks out and records public opinion on an issue is injurious either to the land upon which it takes place, or the private thoughts of the landowner.

Emphasizing the finding of the California Supreme Court that "(s)hopping centers to which the public is invited can provide an essential and invaluable forum for exercising those rights (speech and petition)," (J.S. App. C-12) appellees urge this court to recognize that if shopping centers in California can control the peaceful expression that takes place in their common areas, then shopping center owners can not only silence the public voice, but also tailor its expression to meet their own purposes.

Therefore, if shopping center interests had a First Amendment right to control peaceful and orderly expression on their property, which they do not, such persons could cause irreparable injury not only by preventing open public discourse, but also by controlling the community voice. No such monopoly over speech was intended by the authors of the First Amendment.

For these very clear reasons, appellees believe that appellants' First Amendment rights are not in controversy,

and that an application of the principles argued by appellants would make shopping center owners in California powerful censors and arbiters of public awareness and expression.

Appellants' argument of First Amendment injury is merely the "taking" issue recast. In each case there is a premise that communication between individuals in public somehow violates a right of the person on whose land the speaker is standing. In addressing either of appellants' theories it must first be recognized that the claimed violation is superficial, if it exists at all. In reality, expressive activity is a natural byproduct of public patronage. The inherent incidents of public assembly transcend such things as property lines. A landowner may keep his property for private use. In that case, he is exercising his option to control his property and what happens on his property. (See, e.g., *Kaiser Aetna v. United States,* Dock. No. 78-738 (December 4, 1979) 48 U.S.L.W. 4045.) Where, however, he opens his property to the public and then tries to restrict an inherent aspect of public presence, the landowner attempts to control not his property, but the rights of others.

The California Supreme Court has held that the state's constitution protects the right of speech and petition. People are not required to surrender those rights in exchange for entry to shopping centers. A shopping center owner has a right to refrain from speaking. He may be compensated when his property is taken for public use. But where public entry is granted, people will communicate. Where no taking or First Amendment prob-

lem exists in inevitable public discourse, it makes no sense to find any such violation simply because that discourse leads to the signing of a petition.

IV

SHOPPING CENTERS, ESPECIALLY THOSE IN CALIFORNIA, ARE BY DESIGN AND ADMISSION, THE CENTER OF OUR COMMUNITIES. THE TRADITIONAL PUBLIC FORUM OF THE CENTRAL BUSINESS DISTRICT IS NOT ONLY THE FORERUNNER OF THE SHOPPING CENTER, BUT ALSO ITS VICTIM. IN CALIFORNIA, WITH ITS PREDOMINATELY SUBURBAN POPULATION, SHOPPING CENTERS ARE THE ONLY CENTERS AVAILABLE IN MANY AREAS. IT IS GENERALLY RECOGNIZED, EVEN BY THE SHOPPING CENTER INDUSTRY, THAT SHOPPING CENTERS SHOULD AND DO PLAY A ROLE IN SOCIETY, AND THAT THEIR USE IS NOT LIMITED TO DESIGNATED PURPOSES.

The Pruneyard and its supporting *amici curiae* from the shopping center industry would have the Court believe that shopping centers are nothing more than large commercial entities with no social responsibility.

Studies of the industry and other published writings of which the Court may take notice clearly indicate that shopping centers serve not only a commercial function, but that they are the centers for satisfying nearly the total spectrum of human need.

The demise of the central business district, and the rise of shopping centers, are concurrent with San Jose's

decrease in central population and extensive suburban expansion.

Expert evidence taken at trial shows that between 1960 and 1970 there was an overall 67% increase in the population of Northern Santa Clara County, while central San Jose experienced a 4.7% population decrease. (A. 56) As of 1970, 92.2% of the county's population lived in suburban or rural communities. (A. 56-57)

In 1972, retail sales in San Jose's Central Business District totaled $86,831,000. That figure is only 4.67% of the county's total sales of $1,857,659,000 for that year. Deterioration of downtown retailing made post-1972 retail figures unavailable. (A. 60) Furthermore, it is reasonable to assume that a significant portion of the downtown retail activity is attributable to business rather than consumer spending.

It was further shown at trial that in a given thirty-day period between October, 1974, and July, 1975, 685,000 out of 788,000 adults living in Northern Santa Clara County, or 86.9% of that group, made one or more trips to one of the fifteen largest shopping centers in the area. (A. 61) In 1974, 25% of the county's adults visited the Pruneyard at least once in a given thirty-day period. (A. 65)

In 1974, the total retail sales of the 15 largest shopping centers in the county was $455,112,996. (A. 61) There were, at that time, approximately 126 shopping centers in the county. (A. 61)

The analysis of demographics, retail sales figures, and goods and services offered by shopping centers, was conducted by appellees' expert "to ascertain at least what is available for persons to visit, congregate, and spend significant portions of their time. It appear(ed) clearly to the (expert) that the suburban shopping center complexes provide this availability." (A. 62)

Consideration of local circumstances led the expert to conclude, as paraphrased by the court below, that "(t)he largest segment of the county's population is likely to spend the most significant amount of its time in suburban areas where its needs and wants are satisfied; and shopping centers provide the location, goods and services to satisfy these wants and needs." (J.S.App. C-8; A. 62)

The expert evidence was relied on by the California Supreme Court in adjudicating between the competing interests. (J.S.App. C-8) Such evidence demonstrates the actual role played by shopping centers in Santa Clara County, and in California in general.

A shift in the national population is one cause of the California suburban phenomenon which makes the shopping center an indispensible forum. One authority, using census data for the years 1970-1975, has noted that people are migrating out of the eastern population centers and, except for those who move to the Southern states, most of them are settling in the West. It is indicated that by 1978 the combined population of the South and West will have surpassed that of the rest of the nation. At the same time there is another trend in which the urban areas of South and West are experiencing substantial outmi-

gration. Unlike the rest of the country, however, the movement in these growing regions represents an intra-metropolitan relocation to the suburbs of the same city.[5]

Another source has noted that the changing pattern of metropolitan life has two components: "The disruption of existing facilities caused by the stress of continuous growth of the urban system, and the long-run changes in our way of life."[6]

Due to increased mobility and the rise of suburbs, the walk-in store is disappearing, and high vacancy rates characterize the older continuous ribbon retail formations, among which is the traditional outlying public shopping district.[7]

There is also a direct relation between modern residential planning and shopping center development. It has been noted that "as the residential areas are now designed by community units rather than by single dwellings, shopping facilities are added by center instead of establishment."[8] In other words, the rapid increase in California's suburban population has seen shopping centers built to serve the new communities, and as to those communities there never has been a publicly owned center.

The end result is that the older retail patterns do not have the proximity, the parking, or the space to accommo-

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[5]Thomas Muller, "Urban Growth and Decline," *Challenge*, May-June, 1976, pp. 10-11.

[6]James Simmons, *The Changing Pattern of Retail Location*, University of Chicago, Department of Geography, Research Paper No. 92, 1964, p. 147.

[7]Simmons, *supra*, pp. 148-149.

[8]Simmons, *supra*, p. 149.

date the growing suburban population. Nor do they offer the variety and convenience demanded by today's consumer. The traditional public shopping districts are being destroyed by the modern retail scheme in which competition is not between single establishments, but rather between shopping centers.[9]

V

THE ACTUAL ROLE OF THE SHOPPING CENTER IS NOT LIMITED TO COMMERCIAL FUNCTIONS. SHOPPING CENTERS IN CALIFORNIA ARE RECOGNIZED AS BEING CENTERS OF COMMUNITY ACTIVITY.

The recognition of the California Supreme Court that "(s)hopping centers to which the public is invited can provide an essential and invaluable forum for exercising [the rights of speech and petition]" (J.S.App. C-12), represents an accurate characterization of the role actually played by shopping centers in California.

Shopping centers not only can provide necessary forums; they have assumed that social responsibility and function. The shopping center is the modern day counterpart of the traditional town center and is "seizing the role once held by the central business district, not only in retailing, but as the social, cultural, and recreational focal point of the entire community."[10]

It is not contended that shopping centers are the functional equivalent of a municipal corporation—they have a

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[9]Simmons, *supra*, pp. 147-149.

[10]Gurney Breckenfeld, "Downtown Has Fled to the Suburbs," *Fortune*, October, 1972, pp. 80-82.

uniqueness of their own. They are a socio-economic phenomenon, a product of modern marketing principles that has paralleled the development of suburban communities and automobile transportation.[11] They are lineal descendants of traditional community forums—the American town square, the great European marketplaces, and the Acropolis of ancient Greece.[12] The contention made here, which was agreed with by the California Supreme Court, is that shopping centers are the logical and natural forum, as well as a necessary forum, to which people must be able to turn in the context of existing social conditions.

A recognized change in socio-economic patterns has resulted in the decline of the town center and the emergence of shopping centers. In this regard, it was recognized as early as 1956 that shopping centers "evolved to meet the needs generated by changing environmental factors such as increasing urban population decentralization, increased use of the automobile, increased congestion in the downtown area of the cities, the lack of economical and convenient parking provisions in the central shopping district,

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[11]Neil Harris, "American Space: Spaced Out of the Shopping Center," *The New Republic*, December 13, 1975, p. 23; Eugene J. Kelley, *Shopping Centers: Locating Controlled Regional Centers*, (Saugatuck, Conn.: The ENO Foundation for Highway Traffic Control), 1956, p. 2; David J. Rachman, *Retail Strategy and Structure*, (Edgewood Cliffs, N.J.; Prentice Hall) 1975, p. 75; C. Winston Borgen, *Learning Experiences in Retailing*, (Pacific Palisades, Ca.), 1976, p. 55.

[12]Neil Harris, supra, note 11, pp. 23-24; Gurney Breckenfeld, supra, note 10, p. 82; Eric Peterson, "Shopping Centers: The Role Centers Must Play," *Shopping Center World*, July, 1976, p. 10; "Important Facts About Shopping Centers—Main Street, U.S.A.," *International Council of Shopping Centers Newsletter*, January, 1975, No. 3; "How Shopping Malls Are Changing Life in the U.S.," *U.S. News and World Report*, June 18, 1973, p. 43; "Right Now," *McCalls*, January 1973, p. 61.

and changed consumer buying habits."[13] In other words, shopping centers were conceived to serve as the community centers of the developing suburbs because the cities were inadequate for the task.

Shopping centers have in turn fostered suburban development. A notable example is Eastridge Mall, a super-regional center situated approximately ten miles southeast of downtown San Jose. Eastridge was developed, and is owned and operated, by the Taubman Company, which has filed a Brief *Amicus Curiae* herein. When it opened in 1972, city planners predicted that Eastridge would pull the future growth of San Jose in its direction.[14] According to an Eastridge developer, "The old retail concept was to follow the growth of an area . . . what we're trying to do is make the growth follow us."[15]

The California Supreme Court had these same references made to it by appellees at the state level. That court also had the ability to take judicial notice of the area's growth so as to witness that growth has indeed followed the center.

Whether the suburb begets the shopping center or vice-versa, the shopping center is the focal point for the suburban community in California. According to the *San Francisco Chronicle,* one of the state's leading daily newspapers, shopping centers are "the common denominator of the suburban California lifestyle . . . where people go to

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[13]Eugene J. Kelley, *Shopping Centers: Locating Controlled Regional Centers,* (Saugatuck, Conn.: The ENO Foundation for Highway Traffic Control), 1956, p. 2.

[14]Gurney Breckenfeld, "Downtown Has Fled to the Suburbs," *Fortune,* October 1972, p. 85.

[15]"Shopping Centers Grow Into Shopping Cities," *Business Week,* September 4, 1971, p. 36.

bank, buy a house, buy groceries and clothes, fix the car, make travel plans, see a lawyer, groom the dog, check their eyes, dine out, drink, dance, see a movie or meet a friendly stranger." (*San Francisco Chronicle,* June 28, 1976, p. 1)

VI.

THE SHOPPING CENTER HAS BEEN A PRINCIPAL CONTRIBUTING CAUSE TO THE DEMISE OF TRADITIONAL PUBLIC FORUMS.

An examination of changing socio-economic patterns reveals that shopping centers have played a major role in the decline of the public shopping district, and the town center in general. Previously discussed observations as to the evolution of the shopping center in the 1950's, and as to their role as community centers, both in following suburban expansion and in encouraging it, support this contention.

In addition, there is evidence related to modern business practices which demonstrates that shopping center owners and developers have actively sought to capture the market that historically patronized those establishments which made the public areas effective forums.

Expert evidence at trial revealed that the entrepreneurs of Santa Clara County are dedicated to "a newer marketing concept" of "total consumer orientation." (A. 34) Emphasis is placed on serving a market, not on selling a product. (A. 62) Following the philosophy of serving the people where they live and where they are willing to go, "Businessmen have found that people are willing to shop and spend a significant amount of their time in shopping centers . . . providing that their wants and needs are

satisfied." (A. 62) This last provision, it was noted, has been met in that "the shopping center complexes provide the location, the availability of goods and services and thus the satisfaction of consumer wants and needs." (A. 62)

Shopping centers have brought to California's suburban communities all of the goods and services that previously drew the public to the central business district. Then, by virtue of their convenience, more efficient use of space, and other advantages they offer, shopping centers captured the suburban market, the great majority of the population.[16] Retail theorists and developers have thus kept abreast of consumer psychological development spurred by social changes by offering shopping centers to suburbanites as a more rational choice than the central business district.

The deterioration of retail outlets is not limited to the downtown areas. The private control of shopping centers and the appeal they hold for shoppers has also had a devastating effect on independent merchants located in the suburbs. Unable to compete with the compartmentalized selection and convenience of the shopping center, and unable to afford rent or otherwise acquire space in a center, it has been predicted that the small independent merchants will eventually disappear from the suburbs as well as the central business district.[17]

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[16]Gurney Breckenfeld, "Downtown Has Fled to the Suburbs," *Fortune*, October 1972, P. 80-82; "How Shopping Malls are Changing Life in the U.S." *U.S. News and World Report*, June 18, 1973, p. 43; C. Winston Borgen, *Learning Experience in Retailing* (Pacific Palisades, Ca.), 1976, p. 55.

[17]Rose De Wolf, "Main Street Goes Private," *The Nation*, December 18, 1972, p. 627.

The conclusion drawn from this discussion of the nature and effect of shopping center marketing is that the very economic principles and social conditions acted upon by shopping center developers, which have led to the success of their enterprises, were also instrumental in drawing away the market and the people from the traditional public districts. In drawing away that market, the shopping centers have drawn to themselves our essential forums.

VII.

SHOPPING CENTER OWNERS AND DEVELOPERS HAVE ENDEAVORED TO MAKE THEIR CENTERS THE HUB OF SUBURBAN COMMUNITIES, BOTH FOR THEIR OWN ECONOMIC GAIN AND IN RECOGNITION OF THE COMMUNITY'S EXPECTATION THAT THEY PLAY THAT ROLE.

Extensive discussion of relevant socio-economic conditions and judicially noticeable observations concerning the shopping center industry is necessary primarily to place this Court in the same position of awareness as the State Court, which had been similarly briefed.

This type of brief is also compelled by the unsupported allegations of an *amicus curiae,* Homart Development Co., whose brief contains irrelevant factual contentions having no basis in the record.

To the extent Homart's allegations are not supported by cited sources, and to the extent they concern issues unrelated to orderly speech and petitioning in California shop-

ping centers, Homart's *amicus* brief should not be considered.[18]

Furthermore, as shown herein, Homart's general proposition that shopping centers are inappropriate locations for the conduct protected in California does not accurately state the industry's position, or even Homart's extrajudicial representations.

The argument that shopping centers are not equipped to serve as a forum for the students' protected conduct does not withstand logic or reality.

Logically, if shopping centers were not equipped to serve as forums, there would be no dispute, since there would be no interest in using them as such. Furthermore, logic dictates that the public presence in shopping center common areas renders such areas ideally equipped to serve the protected function.

In reality, shopping centers have not only displaced the streets and sidewalks of the central business district, they

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[18]Appellees urge the court not to be influenced by Homart's distorted presentation of the situation at pages 3-4 of that company's brief. The purpose of an *amicus curiae* is to assist the court in determining the issues before it. That purpose is not served in this case by raising questions as to a possible extension of the State Court's reasoning to non-shopping center facilities such as "department stores, discount houses, stores with leased departments or concessions, multi-story buildings," smaller businesses and private residences. Nor is the case about union picketing, regardless of its location. (Brief of Homart Development Co., p. 4) Furthermore the Pruneyard is not a local neighborhood center (Homart Brief, p. 3), but rather a specialty center, and actually a regional center by virtue of its size and trading area (A. 37). Appellees submit that Homart's allegations are pretentious and unfounded. Should any of the issues ever be raised in California, they can be adjudicated in State Court with ultimate review at this level. But it is clear that in this case such issues are not in controversy.

have also actively sought to become centers of the community. According to a leading publication dealing with the shopping center industry, the general consensus of that industry's leaders is that "while the shopping center was conceived as a retail/commercial entity, it has today taken on the additional burdens of supplying entertainment, services, community spirit, and the like, and has evolved into something which provides the townsfolk with a place to 'hang out'."[19]

According to the same source, "The industry very much accepts its position in the community and indeed is searching for new and better ways to contribute, if for no other reason than anything the shopping center can provide to the community almost invariably comes back in the form of higher sales volume."[20]

The International Council of Shopping Centers, which also has filed an *amicus* brief herein, recognizes that centers have become "socially responsive members of the community." That body further notes that the malls of shopping centers are "the leisure time meeting place for young and old alike," and that "time spent in shopping centers by all age groups ranks only behind time spent on the job and at home."[21]

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[19]Eric Peterson, "Shopping Centers: The Role Centers Must Play." *Shopping Center World*, July 1976, p. 10.

[20]Peterson, *supra*, pp. 10-11.

[21]"Important Facts about Shopping Centers—Main Street, U.S.A.," *International Council of Shopping Centers Newsletter*, January 1975, No. 3, *citing* "How Shopping Malls are Changing Life in the U.S.," *U.S. News and World Report*, June 18, 1973.

According to the International Council of Shopping Centers, "Thousands of activities take place each week across the land which instruct, entertain, contribute to charitable causes and the public welfare, and add to the cultural life of the community."[22] Among the activities referred to by the International Council of Shopping Centers are musical concerts, health education programs and clinics, religious services, fashion shows, charity drives, and auto shows.[23]

Political candidates have turned to shopping centers, recognizing them to be the gathering places of the communities.[24]

Leaders of the shopping center industry agree that their establishments are the nuclei of the sprawling suburbs—that they fill a void that has traditionally been occupied by the downtown area and other public centers. In the published words of a representative of Homart Development Company:

> "The suburban shopping mall is the sociological center of activity in an area where there is no other magnet. Human need to see and be seen is fulfilled."[25]

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[22]"Important Facts About Shopping Centers—Main Street, U.S.A.," *International Council of Shopping Centers Newsletter*, January 1975, No. 3.

[23]Ibid.

[24]Gurney Breckenfeld, "Downtown Has Fled to the Suburbs," *Fortune*, October 1972, p. 82.

[25]Bob Moor of Homart Development Co., in Eric Peterson, "Shopping Centers: The Role Centers Must Play," *Shopping Center World*, July 1976, p. 10.

VIII

SHOPPING CENTERS ARE ESPECIALLY CHARACTERISTIC OF CALIFORNIA COMMUNITIES WHERE THEIR DEVELOPMENT PARALLELED THAT OF GENERAL SOCIAL PATTERNS. SHOPPING CENTERS IN CALIFORNIA ARE THUS AN INTEGRAL PART OF THE STATE'S SOCIAL PATTERN.

Shopping centers are especially characteristic of California society. Neil Harris, professor of history at the University of Chicago, has observed that "(e)arly shopping centers . . . developed in California during the 1920's and 1930's. Living in the first set of urban communities built entirely around the automobile, Californians quickly discovered the advantages of placing groups of stores around or within parking areas."[26]

It was during the 1950's that shopping center development accelerated its pace, making its move toward the status it now enjoys in the suburban lifestyle. The development rates further increased in the 1960's.[27]

These same time periods mark the westward migration of the millions of Americans who settled in California. Santa Clara County is representative of the pattern of the state's development. The population of the county increased fourfold between 1950 and 1975, going from 290,547 to 1,293,400. (Clerk's Transcript of State Court Record, p. 59) 71 percent of that gain is attributable to immigration (A. 54). As of 1970, 92.2 percent of the total North County

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[26]Neil Harris, "American Space: Spaced Out of the Shopping Center," *The New Republic*, December 13, 1975, p. 23.

[27]"Important Facts about Shopping Centers—Main Street U.S.A.," *International Council of Shopping Centers Newsletter*, January 1975, No. 3.

population (1,034,190) lived outside the central San Jose planning area, i.e., in the suburbs or rural areas (A. 56). This fact was expressly recognized by the highest state court. (J.S.App. C-8). This is in great contrast with the national pattern of distribution in which only 40 percent of the people lived in suburbs in 1972.[28]

This predominantly suburban lifestyle, coupled with the early rise of shopping centers in conjunction therewith, indicates that in California, perhaps more than anywhere else, the shopping center is engrained in the social pattern. Centers have not only displaced the town centers in California, they are historically the original nuclei of many firmly established suburban communities, the only public assembly point they have ever known. To such people, the central business district was never central, but remote.

The California Supreme Court has recognized the important position of shopping centers in that state. In that Court's view, based on the record, relevant publications, and common knowledge within the state, California shopping centers are essential and invaluable forums for the conduct at issue—and individuals and the general public would suffer irreparable injury if certain fundamental attributes of public presence are not protected from inequitable restriction.

In *Lloyd v. Tanner*, 407 U.S. 551, this Court held that the state action component of First Amendment protection was not present in the shopping center context. The Court stated that the shopping center does not lose its

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[28]Rose DeWolf, "Shopping Centers: Main Street Goes Private," *The Nation*, December 18, 1972, P. 626.

private character "merely because the public is generally invited to use it for designated purposes."

Article I, Sections 2 and 3 of the California Constitution are not limited in scope and application by the presence of state action. The State's Constitution, unlike its federal counterpart, is primarily intended to establish and preserve the rights and interests of individuals in its jurisdiction, not only as against the state, but as to each other.

This difference in the respective constitutions is an inherent ingredient of federalism. Disputes between individuals, and classes of individuals, within a state, are wisely assigned to state courts for resolution with an eye toward local need and circumstance. *Lloyd's* test for First Amendment protection does not prevent the individual states from protecting state-created rights that are more expansive than those under the First Amendment, especially when the social context of the state issue may not exist nationwide.

Nor can it reasonably be said that California shopping centers are open for the "designated purposes" of the center in *Lloyd.*

Even if the primary purpose of the Pruneyard, or any shopping center, is commercial, the state court has recognized that in reality the common areas of centers are not so designated. These areas are in fact used for pedestrian traffic, public gathering, and relaxation in the midst of, but not in, commercially designated facilities. (See discussion, *supra,* and Sections V and VII, *supra.*)

In contrast to the facts presented in *Lloyd*, it has been shown in this case, both here and in the court below, that

one of the major "designated purposes" of the shopping center has been to displace the central business district. In California, moreover, shopping center development has eliminated the need to build public shopping areas to serve suburban communities. It has also been shown that it is a designated purpose of shopping centers to assume the role of the community center, the focal point to which members of the public turn for social, economic, cultural, political and recreational needs.

" 'The key word . . .' says James W. Rouse of Rouse Company, one of the largest developers, 'is completeness—the integration of all of the retail and commercial functions of modern life and the activities that people are involved in: entertainment, recreation, health, shopping, eating and education.' "[29]

It is requested that this Court either uphold or decline to review the decision of the California Supreme Court. That court's judgment is well founded in law, does not violate the Pruneyard's federal rights, and represents an adjustment of rights for the common good that fairly and justly protects both parties.

Dated, January 30, 1980.

Respectfully submitted,

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[29]Rose DeWolf, "Main Street Goes Private," *The Nation*, December 18, 1972, P. 626.