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Cases

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-289

PRUNEYARD SHOPPING CENTER and FRED SAHADI,
Appellants,

vs.

MICHAEL ROBINS, ET AL.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF OF HOMART DEVELOPMENT CO. AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE.

Homart Development Co. ("Homart") is the owner and operator of numerous private shopping centers located throughout the United States. Homart has been a party to three prior disputes involving the identical issue presented by the instant case.[1] Homart has also appeared as an *amicus curiae* before this

1. In the first of those cases, *Diamond* v. *Bland,* 3 Cal. 3d 653, 407 P. 2d 733 (1970), *cert. den. sub nom., Homart Development Co.* v. *Diamond,* 402 U. S. 988 (1971) (the Chief Justice and Mr. Justice Blackmun being of the opinion that certiorari should be granted), *rehg. den.,* 404 U. S. 874 (1971), *jt. pet. reh. den.,* 405 U. S. 981 (1972) (the Chief Justice and Mr. Justice Blackmun being

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Court to argue in support of the appeal in this case and to argue related questions in *Taggart* v. *Weinacker's,* 397 U. S. 223 (1970), and *Lloyd Corp.* v. *Tanner,* 407 U. S. 551 (1972). The decision below thus presents a recurrent question of substantial interest to Homart.

The issue presented in this case is not limited to merely the solicitation of signatures on a petition to the government in California. Its holding will also apply to a myriad of other "expressive activity" (App. to Jur. Stmnt., p. C-6) allegedly protected by California as well as other state constitutions and legislation.[2] Homart, for example, averages three requests each week, for each of its seventeen centers, to use its centers for

(Footnote continued from preceding page.)

of the opinion that certiorari should be granted), *rehg. den.,* 409 U. S. 897 (1972) (hereafter "Diamond I"), the California Supreme Court held that, under the First Amendment to the United States Constitution, the plaintiffs had the right to solicit signatures on an initiative petition and to handbill in connection therewith at one of Homart's shopping centers. This holding was overturned in *Diamond* v. *Bland,* 11 Cal. 3rd 331, 521 P. 2d 460 (1974), *cert. den.,* 419 U. S. 885 (1974), *rehg. den.,* 419 U. S. 1097 (1974), *rehg. den.,* 421 U. S. 972 (1975) (hereafter "Diamond II") where the California Supreme Court held that, by reason of this Court's subsequent decision in *Lloyd Corp.* v. *Tanner,* 407 U. S. 551 (1972), "the due process clause of the United States Constitution protects the property interests of the shopping center owner from infringement" under either the First Amendment or the California Constitution. 11 Cal. 3rd at 335, n. 4. *Diamond II,* in turn, was reversed by the majority of the California Supreme Court in the instant case. The third case in which Homart has been a party is *Homart Development Co.* v. *Fein,* 110 R. I. 1372, 293 A. 2d 493 (1972), a decision of the Rhode Island Supreme Court that the owner of a shopping center could bar political candidates from soliciting on its premises.

2. All but six states have a free speech clause resembling that incorporated in the California Constitution, with only Hawaii, Massachusetts, Mississippi, New Hampshire, Vermont, and South Carolina retaining a short clause such as that found in the Federal Constitution. Chafee, *Free Speech in the United States,* p. 5, n. 2. In addition, statutory protection could also be enacted. In Illinois, for example, a bill recently passed its Senate (S. 104, 81st Gen. Assy.) expressly sanctioning political campaign literature distribution on private shopping centers. If the decision below is affirmed, adoption of that bill would presumably not violate the Federal Constitution.

non-business related expressive activity. Should the decision below be upheld, it is likely that the number of these requests will significantly increase. In that eventuality, Homart's centers, which now nondiscriminatorily bar all unrelated non-commercial activities, will be forced to assume the burden and concomitant costs of providing forums for all such expressive activity. While the attractiveness of private shopping centers as a place of communication, both peaceful and otherwise, is apparent,[3] such facilities are not the functional equivalent of a municipality and are neither equipped, nor should they be, to provide a public forum for the infinite spectrum of political, social, religious, and economic ideas being espoused today.

The nature of the private property rights that have been appropriated by the decision below are also not confined to shopping centers the size of PruneYard. A "shopping center" can be of practically any size, ranging from local neighborhood centers like PruneYard Center, with but a few independent stores, to large regional centers like that involved in *Lloyd*.[4] Moreover, shopping centers may vary not only by size but also

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3. *See, e.g.*, Weiss, *Shopping Center Malls: The Next Place for Teen-Age Riots*, Advertising Age, April 14, 1969, p. 106; King, *Supermarkets Hub of Suburbs*, N. Y. Times, February 7, 1971, § 1 at p. 58, cols. 4-6; *How Shopping Malls Are Changing Life in the U. S.*, 74 U. S. News & World Report, pp. 43-46, June 18, 1973.

4. As of January 1, 1979, there were 19,201 "shopping centers" located in the United States. Of these, only 1.1%, or 203 centers, resembled the "large, multi-level building complex . . . [with][,] in addition to the stores, . . . parking facilities, malls, private sidewalks, stairways, escalators, gardens, an auditorium, and a skating rink" (*Lloyd*, 407 U. S. at 553) found in *Lloyd*, which encompassed more than one million square feet. The vast majority of "shopping centers," over 12,964 of the total, or 67.5%, are small, self-contained units varying between ten thousand and one hundred thousand square feet, an area no larger than the average supermarket. See, *Shopping Center World*, January 1979, p. 71. As such, most of the "shopping centers" encompassed by the decision below resemble that involved in *Taggart, i.e.*, a single retail store containing a supermarket and a small drug department, all owned and operated by the same company, with an adjacent parking lot able to accommodate two rows of automobiles.

by shape. Many department stores, discount houses, stores with leased departments or concessions, and multi-story buildings with shopping facilities, could be equated to shopping centers. Indeed, with the recent outpouring of "expressive activity" on a multitude of non-traditional public sites,[5] it is likely that the private forums established by the decision below would be extended to the smallest business and even to private residences.[6] This Court, in fact, has before it another case involving the question here presented in the setting of union picketing on the sidewalks situated between the store and parking areas of a single, free-standing Sears, Roebuck and Co. facility.[7]

A variety of ownership interests are also at issue, ranging from joint venture arrangements to multiple ownership relationships where several stores within the shopping center own their own premises and parking lots while granting easements to adjacent stores. In many shopping centers, tenant stores pay a

5. *See, e.g., Jones* v. *North Carolina Prison Union,* 433 U. S. 119 (1977) (prison); *Greer* v. *Spock,* 424 U. S. 828 (1976) (military base); *Madison School District* v. *Wisconsin Employment Relations Board,* 429 U. S. 167 (1967) (School Board meeting); *Tinker* v. *Des Moines School Dist.,* 393 U. S. 503 (1969) (high school classroom); *Collin* v. *Smith,* 578 F. 2d 1197 (7th Cir. 1978) (public streets); *Knights of the Ku Klux Klan* v. *East Baton Rouge School Board,* 578 F. 2d 1122 (5th Cir. 1978) (school gymnasium); *Dellums* v. *Powell,* 566 F. 2d 167 (D. C. Cir. 1977) (state capitol grounds); *Wright* v. *Chief of Transit Police,* 558 F. 2d 67 (2nd Cir. 1977) (subway system); *Moore* v. *Newell,* 548 F. 2d 671 (6th Cir. 1977) (retail store); *Sellers* v. *Regents of the University of California,* 432 F. 2d 493 (9th Cir. 1970) (university building); *Women Strike for Peace* v. *Hickel,* 420 F. 2d 597 (D. C. Cir. 1969) (national park); *Powe* v. *Miles,* 407 F. 2d 73 (2nd Cir. 1968) (university football field); and *Wolin* v. *Port of New York Authority,* 392 F. 2d 83 (2nd Cir. 1968) (bus terminal).

6. *See, e.g., Annenberg* v. *Southern California District Council of Laborers,* 38 C. A. 3rd 637, 113 Cal. Rptr. 519 (4th Dist. 1974).

7. *See also, e.g., Sears, Roebuck and Co.* v. *San Diego District Council of Carpenters,* No. 79-735, *pet cert. pend.,* on remand from this Court's decision at 436 U. S. 180 (1978). Sears has asked that 79-735 be considered together with the present case so as to "provide the Court with a desirable opportunity to resolve, in a different although equally compelling context, 'arguments . . . [which] are necessarily identical.' *Roe* v. *Wade,* 410 U. S. 113, 123 (1973)."

portion of the financial costs for the common malls and parking areas in consideration for those areas being designed, used, and maintained exclusively for commercial activity. If, by reason of the decision below, those areas can now be used for non-commercial purposes and their easements obstructed, the decision below will impact significantly on the future development of shopping centers.

In sum, if openness to the public is the touchstone for permitting "expressive activity," as the decision below concluded, this justification "could be made with respect to almost every retail and service establishment in the country, regardless of size or location." *Central Hardware Co.* v. *N. L. R. B.*, 407 U. S. 539, 547 (1975). Such business establishments "are all open to the public in the sense that customers and potential customers are invited and encouraged to enter In terms of being open to the public, there are differences only of degree—not of principle—between a free standing store and one located in a shopping center, between a small store and a large one, between a single store with some walls and [one with] . . . elaborate walls and interior landscaping." *Lloyd*, 407 U. S. at 565-66. The decision in this case is thus one that will have far-reaching consequences. It is for this reason that Homart seeks to present its views.

ARGUMENT.

A. The Decision Below Violates PruneYard's Rights Under the Fifth and Fourteenth Amendments.

The conflict presented in the instant case between "expressive activity" and PruneYard's right to the free use and enjoyment of its privately maintained commercial property raises an issue identical to that previously considered by this Court in *Lloyd*. In *Lloyd*, as here, the central question was whether the asserted free speech rights "violates rights of private property protected by the Fifth and Fourteenth Amendments." *Lloyd*, 407 U. S. at 553. PruneYard Center, like Lloyd Center, is "a private enterprise" which has neither assumed "all of the attributes of a state-created municipality" or exercised "semi-official municipal functions as a delegate of the State." *Id.* at 569. Absent such assumption of "the full spectrum of municipal powers" (*Hudgens* v. *N. L. R. B.*, 424 U. S. 507, 519 (1976)), PruneYard had no obligation to permit access for non-commercial, unrelated activities, particularly since "adequate alternative avenues of communication exist[ed]" and PruneYard's "private property [was] used nondiscriminatorily for private purposes only." *Lloyd*, 407 U. S. at 567.

The State in this case has violated PruneYard's Fifth and Fourteenth Amendment rights by appropriating its property without just compensation. In effect, the decision below mandates a permanent physical intrusion on PruneYard's privately maintained commercial property. The physical access provided for expressive activities would be continuing and constant "irrespective of how controversial, offensive, distracting or extensive such conduct may be." *Lloyd*, 407 U. S. at 564, n. 11. PruneYard would be required to provide, free of charge, its valuable commercial facilities to be utilized in a manner that will distract and even drive away those very customers it has attracted to its facility. Other customers will be enticed to devote their limited shopping time and even their monies to a variety of competing uses. Additional safety problems involving crowd control will arise, and the dangers of violence will be dramaticaly increased. While a few of the larger shopping centers employ their own security forces, none function as municipal police departments, and most shopping centers, because of their limited size, employ no security force at all. Accordingly, affirmation of the decision below would necessarily have a substantial adverse impact on normal commercial activities and, in effect, mandate a subsidization by the privately owned shopping center of a competing use of its property.

This appropriation of private property creates " 'a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country . . .' " *Hudgens,* 424 U. S. at 517, quoting from *Amalgamated Food Employees Union* v. *Logan Valley,* 391 U. S. 308, 333 (Black, J., dissenting). Although repeatedly called upon to define the permissible scope of "expressive activities" on both private[8] as well as public property,[9] "this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used non-discriminatorily for private purposes only." *Lloyd,* 407 U. S. at 568. To the contrary, this Court has carefully protected "the Constitutional rights of owners of property" (*Marsh,* 326 U. S. at 509) against "unwarranted infringement." *Central Hardware,* 407 U. S. at 547. It has repeatedly stated that "the Fifth and Fourteenth Amendment rights of private property owners . . . must be respected and protected." *Lloyd,* 407 U. S. at 570.

The court below disregarded these pronouncements. It sought, as the dissent below observed, "to circumvent *Lloyd* by relying

8. *See, e.g., Lloyd* v. *Tanner, supra; Amalgamated Food Employees Union* v. *Logan Valley, supra; Marsh* v. *Alabama,* 326 U. S. 501 (1946).

9. *See, e.g., Adderley* v. *Florida,* 385 U. S. 39 (1966); *Cox* v. *Louisiana,* 379 U. S. 559 (1965).

upon the 'liberty and speech clauses' of the California Constitution . . . [S]uch an analysis is clearly incorrect, because the owners of defendant PruneYard Shopping Center possess *federally* protected property rights which do not depend upon the varying and shifting interpretations of state constitutional law for their safeguard and survival . . . '[*S*]*upremacy principles would prevent* [*a state court*] *. . . from employing state constitutional provisions to defeat defendant's federal constitutional rights.*' " App. to Juris. Stmnt., p. C-15 (Richardson J., dissenting; emphasis the author's), quoting from *Diamond II,* 11 Cal. 3rd at 335, n. 4. This Constitutional preeminence of private property rights, when balanced against "a trespasser or an uninvited guest['s assertion of] . . . general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only" (*Lloyd,* 404 U. S. at 568), has also been recognized by post-*Lloyd* decisions of other state courts. See *Lenrich Associates* v. *Heyda,* 264 Or. 122, 504 P. 2d 112 (1972); *Homart Development Co.* v. *Fein, supra; State* v. *Marley,* 54 Haw. 450, 509 P. 2d 1095 (1973).

Private property rights may be required to yield in certain circumstances to the exercise of "the police power, asserted for the public welfare." *Village of Euclid* v. *Ambler Realty Co.,* 276 U. S. 365, 387 (1926). The instant case, however, presents a far different situation from one involving public health, safety or moral concerns. There is no assertion here that the State's appropriation of PruneYard's property is required to abate a nuisance or obviate a potential danger to the community's health or safety. Rather, the rationalization of the decision below is a presumed benefit to the public, *i.e.,* "protect[ing] free speech and petitioning" which, it is asserted, "surely matches the protecting of health and safety . . . and other societal goals that have been held to justify reasonable restrictions on private property rights." App. to Juris. Stmnt., p. C-9. This contention disregards the acknowledged fact that "PruneYard's policy . . . not to permit any tenant or visitor to engage in publicly expressive activity . . .

that is not directly related to [its] . . . commercial purposes . . . [was] strictly and disinterestedly enforced." App. to Juris. Stmnt., p. C-1. It also overlooks the absence in this case, as in *Lloyd,* of both (a) any relationship between the purpose of the "expressive activity" and the business of the owner or tenants of PruneYard Center, and (b) any necessity to permit access in order to provide the Appellees with a reasonable opportunity to convey their message. No attempt was made by the court below to determine the necessity for or reasonableness of the impairment of PruneYard's rights.[10] In such circumstances, a finding that there is an overriding public interest sufficient to appropriate private property resurrects what this Court has previously rejected: "an attenuated doctrine of dedication of private property to public use." *Lloyd,* 407 U. S. at 569. It establishes, as the California Supreme Court admitted (App. to Juris. Stmnt., pp. C-7-C-9), a new definition of the power of the State to regulate private property.

Decisions, such as *Hudgens* and *Eastex, Inc.* v. *N. L. R. B.,* 437 U. S. 556 (1978), relied upon by the court below (App. to Juris. Stmnt., pp. C-4-C-6) likewise provide no support for its decision. While under the National Labor Relations Act, "[i]nconvenience, or even some dislocation of property rights, may be necessary in order to safeguard the rights to collective bargaining,"[11] there is still an obligation that the "[a]ccommodation between the [statutory and property rights] must be ob-

10. Even where general welfare interests are involved, the relationship must be "substantial" and neither "arbitrary" or "unreasonable." *Village of Euclid,* 272 U. S. at 395. The public interests must be "promoted" by the intrusion upon private property rights (*Nectow* v. *Cambridge,* 277 U. S. 183, 188 (1928), and the State may not "cut so deeply into a fundamental right normally associated with the ownership of residential property . . . [as to constitute] a taking of property without due process and without just compensation." (*Moore* v. *East Cleveland,* 431 U. S. 494, 520 (1977) (Stevens, J., concurring)).

11. *N. L. R. B.* v. *Cities Service Oil Co.,* 122 F. 2d 149, 152 (2nd Cir. 1941). *See also Republic Aviation Corp.* v. *N. L. R. B.,* 324 U. S. 793 (1945); *N. L. R. B.* v. *Babcock & Wilcox,* 351 U. S. 105 (1956).

tained with as little destruction of one as is consistent with the maintenance of the other." *Babcock & Wilcox,* 351 U. S. at 112. The locus of this accommodation will necessarily "fall at different points along the spectrum depending on the nature and strength of the respective [statutory] rights and private property rights asserted in any given context." *Hudgens,* 424 U. S. at 522. For example, in the presumably compelling situation of solicitation by nonemployee union organizers on the private property of a facility desired to be organized, only "when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, [has] the right to exclude from property been required to yield to the extent needed to permit communication of information on the right to organize." *Babcock & Wilcox,* 351 U. S. at 112; see also *Central Hardware,* 407 U. S. at 544-45. Here, however, by contrast, the lower court did not seek to similarly evaluate or accommodate the competing interests of the parties.

The uncompensated appropriation of PruneYard Center's property is also not lessened by, as the California Supreme Court suggests, the adoption of "reasonable regulations" of "time, place, and manner." App. to Juris. Stmnt., pp. C-12-C-13. This suggestion requires the property owner to assume the State's responsibility to determine and enforce the appropriate time, place, and manner for the speech activities; to provide the attendant maintenance and security services; and to assume the risk of any potential disruption or damage liability. PruneYard would thus be obligated to exercise "semi-official municipal functions as a delegate of the State" (*Lloyd,* 407 U. S. 569) and have its privately-owned property assume "the functional attributes of public property devoted to public use." *Central Hardware,* 407 U. S. at 547. At the same time, however, that PruneYard had to assume these nebulous obligations, and absorb the concomitant loss of business that would result, there would be no means by which it could, through its own actions, remove the Appellees' source of discontent. As long as the Appellees chose

PruneYard Center as a desirable place to communicate their message, its owners would be forced to suffer the substantial and expensive burdens imposed by that use. Private commercial business was never designed, under our system of free enterprise, to be required to play this role.

B. By Mandating That Private Property Be Open to Unrelated Expressive Activity, the Decision Below Violates a Property Owner's First Amendment Rights.

By mandating "an enforceable right of access" to PruneYard Center's private property for the expressive activities of Appellees, the California Supreme Court has created "governmental coercion [which] . . . at once brings about a confrontation with the express provision of the First Amendment." *Miami Herald Publishing Co.* v. *Tornillo,* 418 U. S. 241, 254 (1974). This Court has long recognized that "the right of freedom of thought protected by the First Amendment against state action includes . . . the right to refrain from speaking at all." *Wooley* v. *Maynard,* 430 U. S. 705, 714 (1977). Here, as in *Wooley,* the State may not "constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property." *Id.* at 713. In doing so, the State "transcends constitutional limitations on [its] power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 642 (1943).

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette,* 319 U. S. at 642. Here, too, the State, within its own constitutional proscriptions, cannot dictate to PruneYard's owners an enforceable right of access which those owners would otherwise deny. By mandating that PruneYard permit its property be used for the dissemination of ideas and messages that its owners may not espouse, or wish to disseminate, the State is denying PruneYard's owners their First Amendment rights.

C. The Decision Below Impermissibly Denies Property Owners Rights Granted by Federal Law.

Under the National Labor Relations Act, as already noted, employers may exclude non-employee union activities on private property where adequate alternative channels of communication exist. An employer may not, however, discriminate against a union by forbidding its activities while allowing others to engage in similar conduct; such discrimination is forbidden by Section 8(a)(1) of the Labor Act.[12] The decision below, by requiring PruneYard Center to permit *non-union* speech and petitioning on its premises, has thereby concomitantly compelled the Center to forego its federally protected right to exclude *union* speech and petitioning. This result impermissibly regulates conduct encompassed by national labor law. As this Court noted in *Sears, Roebuck and Co.* v. *San Diego District Council of Carpenters,* 436 U. S. 180, 199-200 (1978), "there is a constitutional objection to state court interference with conduct actually protected by the [Labor] Act. Considerations of federal supremacy, therefore, are implicated . . ."

While PruneYard's Labor Act right to exclude non-employee union speech and petitioning is not a "right" in the sense that it is neither protected nor prohibited by the Labor Act, it is nonetheless "conduct which a State may not prohibit [or frustrate] even though it is not covered by § 7 of the [Labor] Act." *Sears,* 436 U. S. at 199, n. 30. See also, *Lodge 76, IAM* v. *Wisconsin Employment Relations Commission,* 427 U. S. 132, 138, 140-151 (1977). Congress has indicated, as this

12. *See, e.g., Babcock & Wilcox,* 351 U. S. at 112; *Kern's Bakeries,* 227 NLRB 1329 (1977); *Sunnyland Packing,* 227 NLRB 590 (1976).

Court recently made clear, that in certain situations, notwithstanding that the conduct involved is neither "protected" nor "prohibited" by the Labor Act, "the exercise of state authority" would, nevertheless, "frustrate effective implementation of the policies" of the Act. *New York Telephone Co.* v. *New York State Dept. of Labor,* .... U. S. ...., 99 S. Ct. 1328, 1336 (1979). This aspect of preemption has its "greatest force" where, as here, the state law involved is not a neutral "law of general applicability" but, instead, a law "regulating the relations between employees, their union and their employer." *Sears,* 436 U. S. at 193; see also *New York Telephone,* 99 S. Ct. at 1337-8, 1340-1.

In contrast to *New York Telephone,* California here has directly sought to impose its own substantive regulation of labor-management relations. As in *Teamsters Union* v. *Morton,* 377 U. S. 252, 260 (1964), the "inevitable result [will] be to frustrate the congressional determination . . . and to upset the balance of power between labor and management expressed in our national labor policy." This is impermissible. California cannot directly thwart federal labor policy.

CONCLUSION.

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted,

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