TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-289

PRUNEYARD SHOPPING CENTER and FRED SAHADI,
Appellants,

v.

MICHEL ROBINS, *et al.*,
Appellees.

On Appeal from the Supreme Court of the State of California

BRIEF OF THE AMERICAN JEWISH CONGRESS AND THE SYNAGOGUE COUNCIL OF AMERICA AS *AMICI CURIAE*

Interest of the *Amici*

This brief is submitted on behalf of the American Jewish Congress and the Synagogue Council of America as *amici curiae.*

The American Jewish Congress is a national organization of American Jews founded in 1917 to protect the reli-

gious, political, civil and economic rights of Jews and to promote the principles of democracy. As a human rights organization, the American Jewish Congress has come before this Court on numerous occasions to defend the civil rights and civil liberties of Jews and all Americans.

The Synagogue Council of America is a co-ordinating body consisting of the organizations representing the three divisions of Jewish religious life: Orthodox, Conservative and Reform. It is composed of the Central Conference of American Rabbis, representing the Reform rabbinate; the Rabbinical Assembly of America, representing the Conservative rabbinate; the Rabbinical Council of America, representing the Orthodox rabbinate; the Union of American Hebrew Congregations, representing the Reform congregations; the Union of Orthodox Jewish Congregations of America, representing the Orthodox congregations; and the United Synagogue of America, representing the Conservative congregations.

Our interest in this suit is twofold. First, as Jews we have a commitment to the preservation of the State of Israel—a commitment which, though shared by the Government of the United States and the great majority of Americans, is nevertheless particular to American Jewry. Hence we are concerned with any judicial decision which interferes with the ability of American Jews to speak effectively about and to petition against the United Nations resolution condemning Zionism. Second, in a broader sense, we are committed to the freedom secured by the First Amendment to the United States Constitution and by the states' constitutional counterparts of that Amendment.

Statement of the Case

Appellant Fred Sahadi is the sole owner of the appellant Pruneyard Shopping Center [hereinafter sometimes referred to collectively as "Pruneyard"], a shopping center located in a suburb of San Jose, California. The center consists of approximately 21 acres—five devoted to parking and 16 occupied by walkways, plazas, and buildings that house 65 shops, 10 restaurants, and a cinema. The public is invited to visit for the purpose of patronizing these businesses, but no effort is made to exclude those who enter the center without intending to patronize any of the businesses there.

Appellees are students at confirmation classes at Temple Emanu-El in San Jose, who, with their teacher, as a class project, sought to collect signatures for a petition in opposition to the United Nations resolution condemning Zionism as a form of racism. The students set up a table in a corner of Pruneyard's central square. They harassed no one at the center, blocked no business entrances, and acted in a courteous and orderly manner.

Soon after they had begun soliciting, a member of Pruneyard's security force informed them that their conduct violated Pruneyard regulations. Appellees spoke to the officer's superior, who upheld the officer's action and advised them that, while they had to leave the premises, they could continue their solicitation on the public sidewalk outside the center's perimeter. This suggestion was rejected since, as a practical matter, they could obtain signatures for their petition only if they could present it to

persons who had already parked their cars in Pruneyard's parking lots.

Appellees instituted a proceeding in the Superior Court of California for an injunction establishing their right to solicit the public on Pruneyard's premises. In the trial court, the students introduced evidence of the socio-economic circumstances existing in California which made access to shopping centers necessary for the effective exercise of the right, guaranteed by the state constitution, to petition the government for redress of grievances. This evidence tended to prove that, in California, privately-owned shopping centers are public gathering places, and that shopping centers, because of their convenience, wide range of goods and services, and attractiveness to businesses which formerly were situated in downtown areas, not only had replaced the traditional public forums but were the principal cause of their demise. Viewing itself as bound by existing California precedent, the trial court ruled against the students. That decision was affirmed by the California Court of Appeals.

The Fair Political Practices Commission, an administrative agency established by the legislature to oversee the state's electoral processes, appeared before the Supreme Court of California as an *amicus curiae,* and urged the court to rule in favor of the students. The Supreme Court of California did so, overruling an earlier decision and adopting the position of the 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." (Jurisdictional State-

ment, p. c-9, n. 4). The court rejected Pruneyard's claim that permitting solicitation on its premises violated its Fourteenth Amendment free speech and property rights.

Federal and State Constitutional Provisions Involved

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Tenth Amendment to the United States Constitution provides: "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."

The Fourteenth Amendment to the United States Constitution provides: "... [N]or shall any State deprive any person of life, liberty, or property, without due process of law...."

Article I, Section 2 of the California Constitution provides: "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 of the California Constitution provides: "[P]eople have the right to ... petition government for redress of grievances."

Questions to Which This Brief Is Addressed

1. Is a shopping center in contemporary California a public forum where free expression is protected by the United States Constitution?

2. Does California's recognition of a state constitutional right to gather signatures for a petition at a privately-owned shopping center deprive the shopping center owner of liberty or property without due process of law?

Summary of Argument

In certain circumstances, free speech activities on private property are protected under the First Amendment. The company town, because it bears the attributes of a public forum, is one such place. For a period of time, this Court recognized that privately-owned shopping centers, like company towns, are places where free speech activities are constitutionally protected. The company town doctrine should once again be extended to the contemporary shopping center, the modern equivalent of the traditional public forum.

The Supreme Court of California has recognized a free speech right which is broader than the free speech guarantee of the First Amendment to the United States Constitution. Implicit in the nature of a federal form of government, and explicit in the terms of the Tenth Amendment to the United States Constitution, is the authority of the states to accord a broader recognition of civil rights and civil liberties than that mandated by the national constitution.

The right to solicit signatures for a petition at a privately-owned shopping center, a right which derives from several provisions of the California constitution, does not deprive the appellants of liberty or property without due process of law. What property rights inhere in ownership of a shopping center is primarily a question of state law. The Supreme Court of California has held that an owner of a shopping center has no property right to exclude persons who seek to solicit there.

Even if this Court were to find that appellants retain a property right sufficient to invoke the protection of the Fourteenth Amendment's Due Process Clause, it must balance that interest against the free speech right created in the appellees by virtue of the state constitution. The free speech rights at issue are important ones, ones deemed essential to the California form of government. The intrusion on property rights is minimal. The balance struck by the court below was a reasonable one. Accordingly, the decision of the Supreme Court of California should be affirmed.

ARGUMENT

I.

A shopping center in contemporary California is a public forum where free expression is protected by the United States Constitution.

On several occasions, this Court has considered the question of when activities on private property are protected under the free speech clause of the First Amendment. *Marsh* v. *Alabama,* 326 U.S. 501 (1946), presented a challenge to a state law making it a crime to enter or

remain on private premises after being warned by the owner not to do so. The law was applied against a Jehovah's Witness who distributed religious literature in the streets of a company-owned town in disregard of a posted company rule which read: "This Is Private Property, and Without Written Permission, No Street, or House Vendor, Agent or Solicitation of Any Kind Will Be Permitted."

The town, a suburb of Mobile, Alabama, known as Chickasaw, was entirely owned by the Gulf Shipbuilding Corporation. Except for that fact, it had all the characteristics of any other town; it consisted of residences, streets, sewers, and a "business block" for stores, restaurants and a cinema. All residents of the town were company employees and their families, but the streets and stores of the town were open to all persons.

In holding that the statute could not constitutionally be enforced against the Witness, the Court ruled (326 U.S. at 506-09):

> 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. . . . [People who live in company towns], just as residents of municipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens, they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties guar-

> anteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizens.
>
> When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. . . . In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a State statute. [footnotes omitted]

The company town in *Marsh* and the suburban shopping center of today are strikingly similar. Indeed, in 1968, this Court, in *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, 319-20 (1968), held that:

> because the shopping center serves as the community business block and "is freely accessible and open to the people in the area and those passing through," . . . the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put.

Four years later, this Court nevertheless ruled that a privately-owned and operated shopping center had not been so dedicated to public use so as to entitle persons to there distribute handbills unrelated to the shopping center's operations. *Lloyd Corp., Ltd.* v. *Tanner,* 407 U.S. 551 (1972).

While not expressly overruling *Logan Valley,* the *Lloyd* decision drew into question the continued validity of *Logan Valley.* Finally, in *Hudgens* v. *NLRB,* 424 U.S. 507 (1976), a majority of this Court held that *Logan Valley* could not be squared with *Lloyd* and that the former case was overruled.

We respectfully submit that *Lloyd* and *Hudgens* were wrongly decided and that *Marsh* should once again be extended, as it was in *Logan Valley,* to the contemporary shopping center. To recognize again that *Marsh* is applicable to suburban shopping centers would be a considerably less significant advancement of freedom of expression than was *Marsh* when it was decided. That traditional property law recognized a difference between public and private property, did not prevent the *Marsh* Court from holding that this distinction could not bar enjoyment of First Amendment rights by residents of a town wholly owned by a corporation. Applying the *Marsh* principle to shopping centers only acknowledges the reality that they are, in a highly mobile society, today's equivalent of company towns.

We recognize that the company town in *Marsh* differs from the suburban shopping center in that individuals do not live in the latter. Widespread ownership of automobiles has made it possible to separate one's place of residence from necessary commercial and public facilities. This difference, however, does not justify a different rule for shopping centers than for company towns.

The Constitution, including the First Amendment, is a living document, designed to meet the needs of an evolving society. This was the sociological basis of *Marsh*—an

awareness of the social role the company town played in the nineteenth and earlier years of the twentieth century. The Supreme Court of California has found that perhaps the most common of the traditional public forums, central business districts, have yielded their functions to suburban shopping centers. That finding is fully supported by statistical data which was introduced at trial and which was cited at length in the decision of the Supreme Court of California. This Court should recognize that the twentieth century shopping center is the modern equivalent of the Greek agora and that First Amendment guarantees must be afforded at these modern day public forums.

II.

California's recognition of a state constitutional right to gather signatures for a petition at a privately-owned shopping center does not deprive the shopping center owner of liberty or property without due process of law.

A. The United States Constitution recognizes the authority of the states to guarantee greater free speech protection than the Constitution itself guarantees.

The State of California, through its Supreme Court, has recognized appellees' right, derived from the California Constitution, to solicit signatures on a matter of public interest at a shopping center. That right, as authoritatively construed by the Supreme Court of California, is protected under the California Constitution's freedom of speech and right to petition clauses (Article I, §2; Article I, §3).

Lloyd Corp., Ltd. v. *Tanner, supra,* if it be deemed still viable, stands for the proposition that there is no federal constitutional right under the First Amendment to engage in such activity in a privately-owned shopping center. However, that the freedom of speech guaranteed by the California Constitution is broader than the free speech guarantee of the First Amendment to the United States Constitution, does not, in and of itself, render California's free speech protection susceptible to federal constitutional challenge.

Implicit in the nature of a federal form of government, and explicit in the terms of the Tenth Amendment, is the authority of the states to accord broader protection to civil rights and civil liberties than that mandated by the national constitution. *See generally,* Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. J. 489 (1977). Numerous instances can be cited in support of this principle of federalism. For example, this Court has ruled that no federal constitutional right is infringed by zoning ordinances which exclude houses of worship and parochial schools from areas restricted to residential uses. *Corporation of Presiding Bishop* v. *City of Porterville,* 90 Cal. App. 2d 656, 203 P.2d 823, *appeal dismissed for want of substantial federal question,* 338 U.S. 805 (1949); *State ex rel. Wisconsin Lutheran High School Conference* v. *Sinar,* 267 Wis. 91, 65 N.W. 2d 43 (1954), *appeal dismissed for want of substantial federal question,* 349 U.S. 913 (1955). That fact, however, does not prevent state courts from construing and applying their own constitutional equivalent of the Free Exercise Clause as barring such exclusionary zoning ordinances. *Beit Havurah* v. *Zoning Board of Appeals,* —— Conn. ——, —— A.2d ——, 40 Conn. L.J. 45 (May 8, 1979).

Racial restrictive covenants present another example. Before this Court, in *Shelley* v. *Kraemer,* 334 U.S. 1 (1948), held that enforcement of those covenants was violative of the federal Constitution, some state courts interpreted their own constitutions as barring their enforcement. *See, e.g., Yoshida* v. *Gelbert Improvement Co.,* 58 Pa. D. & C. 321 (Del. Cty. 1946). It was not then claimed nor could it have been argued that the courts in these states in so holding, violated any property rights of other signatories to the covenant. Other instances might be cited, but we believe that enough has been shown to establish the proposition that it is constitutionally permissible for a state to interpret its own equivalent of First Amendment rights more broadly than this Court has interpreted the provisions of the Amendment itself.

B. The right to solicit signatures for a petition at Pruneyard does not violate Pruneyard's rights under the Due Process Clause.

The Due Process Clause of the Fourteenth Amendment incorporates, with some qualifications, the first ten amendments to the Constitution and makes them applicable to the states. The clause also independently forbids the states to deprive persons of life, liberty or property without due process of law. Because we believe that the appellants' First Amendment argument is merely a restatement, with minor variations, of their property argument we do not discuss that argument separately in this brief. Here we examine only the contention that the decision below violates the right not to be deprived of property without due process of law.

In interpreting the meaning of "due process," considerably wider deference is accorded governmental action as against a claim of deprivation of property without due process of law than as against claims of deprivation of life or liberty. Such broad leeway is necessary so that government is able to cope with the problems, and meet the needs, of a twentieth century industrial and commercial society.

Whether any federal constitutional right to due process is violated will in many instances depend on whether, under state law, the individual's claim rises to the level of a property interest. For example, whether a teacher who is not rehired has a federal constitutional right to procedural due process depends on whether state law creates a property right and not merely an amorphous expectation of continued employment. *Board of Regents* v. *Roth,* 408 U.S. 564 (1972); *Perry* v. *Sindermann,* 408 U.S. 593 (1972).

To be sure, this Court retains the power to review state court determinations of whether a property right exists. Likewise, there are certainly limits beyond which the states cannot go in failing to recognize interests as property. Nevertheless, substantial deference should be paid to the determinations of the state courts. As this Court observed in *Demorest* v. *City Bank Farmers Trust Co.,* 321 U.S. 36, 42 (1944), a case involving a due process challenge to a state court decision allocating certain trust funds:

> Decisions of this Court as to its province in such circumstances were summarized in *Broad River Power Co.* v. *South Carolina,* 281 U.S. 537, 540, 50 S. Ct. 401, 402, 74 L.Ed. 1023, as follows: "Whether the state court has denied to rights asserted under local law the protection which the Constitution guarantees is a ques-

> tion upon which the petitioners are entitled to invoke the judgment of this Court. Even though the constitutional protection invoked be denied on nonfederal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded. * * * But, if there is no evasion of the constitutional issue, * * * and the nonfederal ground of decision has fair support, * * * this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule for that of the state court."

What property rights inhere in ownership of a shopping center is primarily a question of state law. The Supreme Court of California has consistently held, with only one exception,* that a shopping center owner has no right to exclude persons who seek to solicit, and that members of the public have a concomitant right, guaranteed by the California Constitution, to enter the premises of a shopping center for the purpose of soliciting the public. That determination can hardly be considered unreasonable; indeed, it was adopted for a time by this Court in *Logan Valley*.

To phrase the matter somewhat differently, the Supreme Court of California held that a shopping center is, as a matter of California law, a public forum. That decision, delimiting the appellants' property rights, and granting certain rights under state law to the appellees, was not unreasonable given the social circumstances that the court below found existed in California. It follows that appel-

* The exception, of course, was *Diamond* v. *Bland*, 11 Cal. 3d 331, 113 Cal. Rptr. 468, 521 P.2d 460, *cert. denied*, 419 U.S. 885 (1974), in which the Supreme Court of California reached a different result under what it thought to be the compulsion of federal law.

lants' rights under the Fourteenth Amendment were not violated by the decision below.

Even if this Court should find that appellants retain a property right under state law sufficient to invoke the protection of the Fourteenth Amendment's Due Process Clause, it must balance that interest against the rights granted appellees by virtue of the state constitution.

This Court has not already struck that balance in *Lloyd Corp., Ltd.* v. *Tanner, supra.* The Court in *Lloyd* held only that no federal First Amendment right to handbill at a shopping center existed because the necessary element of state action giving rise to a First Amendment claim was absent (407 U.S. at 570):

> We hold that there has been no 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 did not recognize a constitutionally protected property right of shopping center owners to exclude persons such as appellees who are exercising a free speech right; it simply found no First Amendment right of would-be handbillers to distribute handbills at privately-owned shopping centers. As this Court's opinion in *Hudgens* v. *NLRB, supra,* makes clear, the *Lloyd* Court did not balance First Amendment free speech rights against private property rights and did not decide that the latter must prevail. Rather, because the refusal to allow handbilling in *Lloyd* was deemed a refusal by a mere private property owner, no First Amendment claim existed. The Court therefore had no occasion to strike a balance between free speech rights and private property rights.

Here, however, since the state court has determined that appellees have, as a matter of state law, a right to distribute literature in shopping centers, regardless of the existence *vel non* of traditional state action, it is incumbent on this Court to weigh that right against Pruneyard's asserted rights under the Fourteenth Amendment.

So much is the teaching of *Eastex, Inc.* v. *NLRB,* 437 U.S. 556 (1978). There, this Court held that an employer's rights to control his property must be balanced against his employees' rights, conferred by the National Labor Relations Act, although not by the First Amendment, to act collectively. And, as in that case, we submit that the balance must be struck in favor of appellees both because the rights they assert have a preferred place in the hierarchy of American values, *Marsh* v. *Alabama, supra,* and because, as in *Eastex,* there has been no significant interference with appellants' use of their property.

Here, the Supreme Court of California has determined that the state Constitution guarantees a right of free speech and a right to petition the government which includes the right to exercise those rights in privately-owned shopping centers. The Supreme Court of California determined that that right is necessary to the very operation of California's form of government.

That determination does not impose any financial burden on shopping center owners. The court below found that appellees' activities did not interfere with the operation of the shopping center. No shoppers were deterred from shopping at Pruneyard as a result of appellees' activities. No tenants complained. All that appellants have lost

is the power to act as feudal lords and to control what might be said on the property they had opened to the public —a power that the Supreme Court of California has reasonably held is not incidental to the ownership of a twentieth century shopping center.

Thus, even if this Court should find that appellants retain a property right under state law sufficient to invoke the protection of the Fourteenth Amendment's Due Process Clause, the court below struck the correct balance.*

Appellants' entire argument that the decision below deprives them of their property rights is based on a fundamental misconception of the scope of constitutional protection for private property. Appellants' argument can survive only if *any* governmental curtailment of property rights is a violation of due process. But that is not the law, nor could it be in an increasingly complex society.

That the restriction on one aspect of property ownership imposed by the decision below—the power to exclude outsiders from petitioning for redress of grievances—does not constitute a deprivation of property without due process of law follows from a long line of decisions of this Court, including a case decided this Term, *Andrus* v. *Allard,* 48 U.S.L.W. 4013 (Nov. 27, 1979). There, the Eagle Protection Act's prohibition of commercial transactions in relics of birds legally killed before passage of the Act were upheld against a Fifth Amendment deprivation of property claim. While it was undeniable that the appellees, owners of such

* It may well be argued that Pruneyard cannot assert any Fourteenth Amendment Due Process claim for it has been held by the sovereign which created its property rights in the first instance that these rights do not extend as far as appellants claim. *Cf. Martinez* v. *California,* 48 U.S.L.W. 4076, 4077 n. 5 (Jan. 15, 1980).

relics, would suffer an economic loss as a result of the Act, this Court rejected the claim that the deprivation rose to constitutional magnitude. Citing its decision in *Penn Central Transportation Co.* v. *New York City,* 438 U.S. 104 (1978), this Court stated (48 U.S.L.W. at 4017):

> The Takings Clause, therefore, preserves governmental power to regulate, subject only to the dictates of " 'justice and fairness.' " *Penn Central, supra,* at 124; see *Goldblatt* v. *Hempstead,* 369 U.S. 590, 594 (1962). There is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate. Formulas and factors have been developed in a variety of settings. See *Penn Central, supra,* 123-128. Resolution of each case, however, ultimately calls as much for the exercise of judgment as for the application of logic.
>
> The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of disposing of the artifacts. But the 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. Compare *Penn Central, supra,* at 130-131, and *United States* v. *Twin City Power Co.,* 350 U.S. 222 (1956) with *Pennsylvania Coal Co.* v. *Mahon, supra,* and *United States* v. *Virginia Electric & Power Co.,* 365 U.S. 624 (1961). See also Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1230-1233 (1967). In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds.

That holding is fully applicable here. At most, appellants have been deprived on one strand of their "bundle of property rights"—and, unlike the situation in *Andrus* v. *Allard,* not even the most profitable one.

Although the record indicates that appellants have suffered no hardship whatever as a result of the decision below, no different result would be required even were there some minimal economic loss. As this Court reiterated in *Andrus* (48 U.S.L.W. at 4017), some economic loss as a result of governmental regulation is a burden which must be borne to secure "the advantage of living and doing business in a civilized community [citation omitted]." That observation applies with particular force when the challenged "deprivation" is designed to insure free and effective discourse on matters of public concern—the right that, perhaps more than any other, makes our society civilized.

Conclusion

For the reasons stated, the judgment below should be affirmed.

Respectfully submitted,

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