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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

PRUNEYARD SHOPPING CENTER and FRED SAHADI,
Appellants,

v.

MICHAEL ROBINS, ET AL., *Appellees.*

On Appeal From the Supreme Court of the State of California

JURISDICTIONAL STATEMENT

The PruneYard Shopping Center ("Center") and its owner, Fred Sahadi, appeal from the judgment of the Supreme Court of the State of California which was filed on March 30, 1979, and became final on May 23, 1979, holding that the California Constitution gives appellees the right to solicit signatures on petitions within the Center.

OPINIONS BELOW

The Findings of Fact, Conclusions of Law, and Judgment of the Superior Court (Appendix A), and

the opinion of the District Court of Appeal (Appendix B), are not reported.

The opinion of the Supreme Court of the State of California (Appendix C) is reported at 23 Cal. 3d 899, 153 Cal. Rptr. 836, 592 P.2d 323 (1979).

JURISDICTION

The decision of the Supreme Court of the State of California was filed on March 30, 1979. On May 23, 1979, a timely petition for rehearing was denied and the judgment became final (Appendix D). Appellants filed a notice of appeal to this Court in the Supreme Court of the State of California on May 30, 1979 (Appendix E).

This appeal is being docketed in this Court within 90 days from the denial of rehearing below. The jurisdiction of this Court to review the case on appeal is conferred by 28 U.S.C. § 1257(2) (appeal lies when a state "statute" is upheld over a claim that it is repugnant to the federal Constitution). A state constitutional provision is a state "statute" for purposes of this Court's appellate jurisdiction under that section. *Torcaso* v. *Watkins,* 367 U.S. 488 (1961); *Adamson* v. *California,* 332 U.S. 46, 48 n.2 (1947); *Railway Express Co.* v. *Virginia,* 282 U.S. 440 (1931). If the Court should conclude that this case is not within its appellate jurisdiction, appellants request that this jurisdictional statement be treated as a petition for a writ of certiorari pursuant to 28 U.S.C. § 2103. Jurisdiction would then lie under 28 U.S.C. § 1257(3).

FEDERAL AND STATE CONSTITUTIONAL PROVISIONS

First Amendment, United States Constitution:

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

Fifth Amendment, United States Constitution:

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

Fourteenth Amendment, Section 1, United 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:

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

QUESTIONS PRESENTED

1. Whether the owner of a private shopping center which has not been dedicated to public use and which is not the functional equivalent of a municipality has a property right under the Fifth and Fourteenth Amendments to prohibit non-business-related petitioning on the premises of the center when the persons who wish to engage in such petitioning have other adequate and effective channels of communication in the area.

2. Whether the owner of a private shopping center which has not been dedicated to public use and which is not the functional equivalent of a municipality has a free speech right under the First and Fourteenth Amendments to prohibit non-business-related petitioning on the premises of the center, when the persons who

wish to engage in such petitioning have other adequate and effective channels of communication in the area.

STATEMENT OF CASE

Appellant PruneYard Shopping Center ("Center") is a privately owned shopping center located in Santa Clara County, California, occupying approximately 21 acres and containing 65 shops, 10 restaurants and a cinema. Public sidewalks and streets border the Center on two sides. The Center has a policy prohibiting all handbilling and circulation of petitions.

On November 17, 1975, appellees set up a table in the central courtyard of the Center and solicited signatures in support of petitions condemning Syria for refusing to allow Jews to leave the country and condemning a United Nations resolution on Zionism. Security guards employed by the Center, after informing appellees that their conduct violated the Center's policy, requested them to leave and pointed out that they could resume their efforts on the public sidewalks adjoining the Center. Appellees left the Center, but did not attempt to solicit signatures in any public places.

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

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

THE QUESTIONS ARE SUBSTANTIAL

In reliance upon the decisions of this Court, appellants and other shopping center owners have established policies against non-business-related expression on the premises of their shopping centers. The decision below strips the owners of the right to establish such policies by denying the constitutional stature of their property rights. Moreover, the decision forces the shopping center owners to use their private property in support of the ideas of others, in violation of the owners' First and Fourteenth Amendment right to refrain

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

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

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

from speaking. Because of its constitutional significance and its widespread impact on shopping centers, this appeal, which falls within the Court's mandatory jurisdiction, warrants plenary review.

1. The Decision Below Denying Appellants' Fifth and Fourteenth Amendment Property Rights Is in Conflict With the Controlling Decisions of This Court.

This Court has repeatedly explored in the context of shopping centers the reach of the holding in *Marsh* v. *Alabama,* 326 U.S. 501 (1946), that a "company town" is "the functional equivalent of a municipality" and is therefore required by the First and Fourteenth Amendments to allow expression as if it were a municipality. *See Food Employees* v. *Logan Plaza,* 391 U.S. 308 (1968); *Lloyd Corp.* v. *Tanner,* 407 U.S. 551 (1972); *Hudgens* v. *NLRB,* 424 U.S. 507 (1976) (overruling *Food Employees* v. *Logan Plaza*). The controlling decisions establish that a shopping center owner has a right under the Fifth and Fourteenth Amendments to bar those who would conduct speech activities over his objection.

Lloyd Corp. involved a group which sought access to a large shopping center known as Lloyd Center to distribute handbills opposing American military involvement in the Vietnam War. Finding that there were adequate alternative places on adjoining public property for distributing handbills, 407 U.S. at 567, and that the message of the handbills "had no relation to any purpose for which the center was built and being used," 407 U.S. at 564, the Court held that the owner of the center could not be forced to allow the handbilling. 407 U.S. at 570. The decision in *Hudgens* went further, making clear that would-be speakers have no con-

stitutional right to demand that a shopping center provide a forum for expression, even when that expression is related to the purposes of the center. *Lloyd Corp.* and *Hudgens* recognized a sharp distinction for constitutional purposes between public property and private property, holding that even a large self-contained shopping center is private property and is not the functional equivalent of a municipality. *Lloyd Corp.* v. *Tanner,* 407 U.S. at 569; *Hudgens* v. *NLRB,* 424 U.S. at 518-20.

In rejecting a First Amendment right of access to shopping centers, this Court has grounded the competing rights of shopping center owners squarely on the takings clause of the Fifth Amendment and the due process clauses of the Fifth and Fourteenth Amendments. In *Lloyd Corp.,* the Court "granted certiorari to consider [the shopping center owner's] contention that the decision below violates rights of private property protected by the Fifth and Fourteenth Amendments." 407 U.S. at 552-53. Quoting the relevant sections of the Fifth and Fourteenth amendments, 407 U.S. at 567, the Court instructed that "[t]he Fifth and Fourteenth Amendment rights of private property owners . . . must be respected and protected." 407 U.S. at 570. *See also Hudgens* v. *NLRB,* 424 U.S. at 516-17 (quoting Mr. Justice Black's dissent in *Food Employees* v. *Logan Plaza,* 391 U.S. at 332-33).

Related cases involving the clash between property rights and rights of expression have confirmed that the property owner's rights are premised on the federal constitution. In *Marsh* v. *Alabama,* for example, the Court stated that its function was to "balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion. . . ." 326 U.S. at 509. And in *Central Hardware Co.* v.

NLRB, 407 U.S. 539 (1972), the Court held that the mere opening of parking lots to the public does not make the parking lots the equivalent of a public municipal facility because such a ruling would "constitute an unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments." 407 U.S. at 547.

While a state court is ordinarily free to interpret the provisions of a state constitution to create rights beyond those afforded by the United States Constitution, it may not in so doing infringe upon the federal constitutional rights of others. In an earlier decision, the California Supreme Court recognized this fundamental principle:

> Under the holding of the *Lloyd* case, the due process clause of the United States Constitution protects the property interests of the shopping center owner from infringement. . . . Even were we to hold that the state Constitution in some manner affords broader protection than the First Amendment of the United States Constitution . . . nevertheless supremacy principles would prevent us from employing state constitutional provisions to defeat defendant's federal constitutional rights. *Diamond* v. *Bland,* 11 Cal. 3d 331, 335 n.4, 113 Cal. Rptr. 468, 471 n.4, 521 P. 2d 460, 463 n.4, *cert. den.* 419 U.S. 885 (1974).

In the present case, the court below overruled *Diamond* v. *Bland* and held that the California Constitution can, and does, require shopping center owners to allow unrelated speech and petitioning. Its new-found analysis concludes with a suggestion that Lloyd Center was somehow a special case:

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

> Amendment rights of shopping center owners generally. P. C-4, *infra*; 23 Cal. 3d at 904.

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

The California Supreme Court also asserted that this Court's "conclusion [in *Hudgens* v. *NLRB*] that the National Labor Relations Act controlled the issues there presented indicates that *Lloyd* by no means created any property right immune from regulation." P. C-5; *infra;* 23 Cal. 3d at 905. The court's reliance on *Hudgens* is misplaced. The decision in that case did indeed recognize that § 7 of the National Labor Relations Act, 29 U.S.C. § 157, may entitle employees engaged in a lawful economic strike to picket at the entrances to a store operated by their employer and located in a shopping center. But this Court did not in *Hudgens* and has not in other cases lightly dismissed the employer's property rights. As explained in *NLRB* v. *Babcock & Wilcox Co.,* 351 U.S. 105 (1956):

> Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with maintenance of the other. 351 U.S. at 112.

A series of landmark decisions has fleshed out accommodations under varying circumstances between the right of the employer to determine how his property shall be used and the rights of employees to organize and to bargain collectively.[4] For example, decisions of this Court allow employers to bar nonemployee organizers except when the organizer can demonstrate that "the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels." *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. at 112. And such organizational picketing can be conducted over the employer's objection only during an organizational campaign. *Central Hardware Co.* v. *NLRB*, 407 U.S. at 545-46. Thus, even in the interpretation of the National Labor Relations Act, which expresses the strong national policy of "promot[ing] the peaceful settlement of industrial disputes", *Fibreboard Corp.* v. *NLRB*, 379 U.S. 203, 211 (1964), property rights have been forced to yield only under carefully limited circumstances and then only temporarily.

The opinion of the court below recites a number of other permissible types of property regulation, such as zoning and environmental restrictions, to support its apparent view that property rights must yield to any conceivable state interest. P. C-6, *infra;* 23 Cal. 3d at 906. This sketchy analysis is entirely unpersuasive. State regulation of property to promote orderly development, to ensure safety, or to protect public health or the environment is premised on the police power and involves interest far different from those involved

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[4] *See, e.g., Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945); *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956); *Central Hardware Co.* v. *NLRB*, 407 U.S. 539 (1972); *Hudgens* v. *NLRB*, 424 U.S. 507 (1976).

in the present case. This is a case involving, on the one hand, the interest of appellees in utilizing the property of the shopping center owner to solicit signatures on petitions, and, on the other hand, the interest of the shopping center's owner in controlling the use of his property. These are precisely the conflicting interests which were before this Court in *Lloyd Corp.* and were resolved in favor of the shopping center owner.[5]

In the present case, the California Supreme Court exceeded its authority when it substituted its own resolution of these competing rights and interests. As Justice Richardson for the dissenters emphasized, the decision below cannot be squared with *Lloyd Corp.:*

> The *Lloyd* rationale is applicable and unanswerable. The majority may not evade it by resort, in this instance, to the California Constitution, which must yield to a paramount federal constitutional imperative. P. C-20, *infra;* 23 Cal. 3d at 916.

2. The Decision Below Conflicts With a Decision of Another State Supreme Court as to Whether a State Constitutional Provision May Supersede a Shopping Center Owner's Property Rights Under the Fifth and Fourteenth Amendments.

The decision below is in conflict with that of the Oregon Supreme Court in *Lenrich Associates* v. *Heyda,* 264 Or. 122, 504 P.2d 112 (Ore. 1972). Members of a religious group who wished to conduct speech activities in a shopping mall contended in that case that the provisions of the Oregon constitution "give the individual

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[5] Although the California Supreme Court in the present case refers to provisions of the California Constitution guaranteeing the rights to petition and initiate change, pp. C-8, C-9, *infra*; 23 Cal.3d at 907-08, in fact this case involves neither a petition to the government of the State of California nor direct citizen action in the form of initiative, referendum or recall.

rights of expression and religious freedom greater protection than that provided under *Tanner*". 264 Or. at 126, 504 P.2d at 114.

After close examination of Mr. Justice Powell's opinion for the Court in *Lloyd Corp.*, the Oregon court found it "clear" that this Court was there "engaged in weighing the First Amendment rights of the respondents against the Fifth and Fourteenth Amendment rights of private property owners." 264 Or. at 128, 504 P.2d at 115. The court held that *Lloyd Corp.* was controlling and that the shopping mall owner's Fifth and Fourteenth Amendment property rights cannot be overcome by a state constitutional provision. One member of the Oregon court, concurring, found *Lloyd Corp.* ambiguous as to whether the property rights of the shopping center owners have a constitutional basis in the absence of clarification by this Court: "[N]o one can be certain of the intention of the Supreme Court of the United States until the opinion is clarified." 264 Or. at 135, 504 P.2d at 118-19.

This Court should resolve the conflict between *Lenrich* and the decision below by providing guidance as to the source and scope of the property rights of shopping center owners.

3. The Decision Below Denying the Shopping Center Owner's First and Fourteenth Amendment Right to Control the Use of His Property for Expressive Purposes Is in Conflict With the Governing Decisions of This Court.

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 common with owners of other private property, the shopping center

owner is constitutionally entitled to muster his property in support of ideas he espouses, to lend his property on a neutral basis to all who would use it, or to determine, as has the PruneYard's owner, that the center will not be made available for non-business-related speech. These rights flow from the fundamental distinction between public and private property, delineated for shopping centers in the line of cases culminating in *Hudgens* v. *NLRB, supra.* Under those standards, the PruneYard is without question private property: the trial court specifically found that the Center is "not the functional equivalent of a municipality" and that "[t]here has been no dedication of [the Center's] property to public use." P. A-2, *infra.*

The owner of the PruneYard has chosen to withhold the use of his property from all non-business-related speech, a decision which is protected by the First Amendment.[6] This Court enunciated the fundamental "proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley* v. *Maynard,* 430 U.S. 705, 714 (1977). The right to refrain from speaking has led the Court to strike down state laws requiring public school students to salute and pledge allegiance to the flag, *Board of Education* v. *Barnette,* 319 U.S. 624 (1943); requiring newspapers to publish replies of political candidates whom they criticize, *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974); and forbidding automobile drivers to obscure a license

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[6] *See* F. Schauer, *Hudgens* v. *NLRB and the Problem of State Action in First Amendment Adjudication,* 61 Minn. L. Rev. 433, 448-51 (1977).

plate motto which they find offensive. *Wooley* v. *Maynard, supra.*

As these cases make clear, the First Amendment right to refrain from speaking includes the right to decline to use one's property for speech purposes. The constitutional vice of the New Hampshire statute struck down in *Wooley* was that it

> "in effect require[d] that appellees use their private property as a 'mobile billboard' for the State's ideological message. . . ."

430 U.S. at 715. Moreover, a state mandate to provide a forum for the speech of others equally offends the First Amendment as does a requirement to speak or display a state-mandated message. *Miami Herald Publishing Co.* v. *Tornillo, supra.*

The decision of the court below, compelling the Center's owner, Fred Sahadi, to make his private property available to appellees as a forum for expressing their views, violates his right to determine which ideas, if any, his property will be used to promote. But what the court below has done in this case abridges the rights not just of one shopping center owner but of thousands of shopping center owners in California, whose rights according to the California Supreme Court now have no basis in the U.S. Constitution. Such a departure from the settled principles of the First and Fourteenth Amendments merits full review by this Court.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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Dated: August, 1979

APPENDICES

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

No. 349363

MICHAEL ROBINS, a minor, by his guardian ad litem, DAVID ROBINS, IRA DAVID MARCUS, a minor, by his guardian ad litem, FRED WERNER MARCUS, and ROBERTA BELL-KLIGLER, *Plaintiffs*,

vs.

PRUNEYARD SHOPPING CENTER, and FRED SAHADI, individually and doing business as THE TOWERS VENTURE, and DOES I through V, inclusive, *Defendants*.

Findings of Fact and Conclusions of Law

The above-entitled cause came on regularly for trial on June 15, 1976, in Courtroom 13 of the above-entitled Court, the Honorable Homer B. Thompson, Judge, presiding, without a jury. Plaintiffs appearing by Attorneys Ann Miller Ravel and Philip L. Hammer of Morgan, Beauzay, Hammer, Ezgar, Bledsoe & Rucka, and defendants appearing by Attorney Thomas P. O'Donnell of Ruffo, Ferrari & McNeil.

Said cause having been heard, evidence both oral and documentary having been introduced, and said cause having been argued and briefed and submitted for decision, the court having rendered its decision in favor of defendants and against plaintiffs now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

The court finds that:

1. THE PRUNEYARD SHOPPING CENTER ("the CENTER") is located in Campbell, California, entirely on private property and is owned by defendant FRED SAHADI.

2. The CENTER has a number of commercial enterprises, such as specialty shops, restaurants, banks and a market.

3. The policy of the CENTER prohibits all handbilling and circulation of petitions.

4. Plaintiffs, while on the private property of the CENTER, sought to obtain signatures to petitions unrelated to the activities of the CENTER.

5. Plaintiffs' petitions were not in the nature of initiative petitions.

6. The county in which the CENTER is located has many shopping centers, public shopping and business areas, public buildings, parks, stadia, universities, colleges, schools, post offices and similar public areas where large numbers of people congregate and where people can freely exercise First Amendment rights, including, without limitation, distribution of handbills and seeking signatures on petitions.

7. Plaintiffs only attempted to obtain signatures to their petition on private property, rather than in public areas whether nearby or otherwise.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the court makes the following Conclusions of Law:

1. There has been no dedication of the CENTER's property to public use, such as to entitle plaintiffs to exercise the asserted First Amendment rights.

2. There has been no dedication of the CENTER's property to public use, such as to entitle plaintiffs to exercise the asserted rights under the Constitution of the State of California.

3. The CENTER is not the functional equivalent of a municipality.

4. There are adequate, effective channels of communication for plaintiffs other than soliciting on the private property of the CENTER.

Let judgment be entered accordingly.

Dated: September 14, 1976

/s/ HOMER B. THOMPSON
Homer B. Thompson
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA

No. 349363

MICHAEL ROBINS, a minor, by his guardian ad litem, DAVID ROBINS, IRA DAVID MARCUS, a minor, by his guardian ad litem, FRED WERNER MARCUS, and ROBERTA BELL-KLIGLER, *Plaintiffs*,

vs.

PRUNEYARD SHOPPING CENTER, and FRED SAHADI, individually and doing business as THE TOWERS VENTURE, and DOES I through V, inclusive, *Defendants*.

Judgment

This cause came on regularly for trial in June 15, 1976, in Courtroom 13 of the above-entitled court, the Honorable Homer B. Thompson, Judge, presiding, sitting without a jury. Plaintiff appearing by Attorney Philip L. Hammer of Morgan, Beauzay, Hammer, Ezgar, Bledsoe & Rucka, and defendants appearing by Attorney Thomas P. O'Donnell of Ruffo, Ferrari & McNeil, and evidence both oral and documentary having been presented by both parties and cause having been argued and briefed and submitted for decision,

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiffs MICHAEL ROBINS, a minor, by his guardian ad litem, DAVID ROBINS, IRA DAVID MARCUS, a minor, by his guardian ad litem, FRED WERNER MARCUS, and ROBERTA BELL-KLIGLER, take nothing by their complaint from defendants and that defendants PRUNEYARD SHOPPING CENTER and FRED SAHADI, individually and doing business as THE TOWERS VENTURE, have judgment against Plaintiffs and recover from Plaintiffs their costs of suit herein.

Dated this 14th day of September, 1976.

/s/ HOMER B. THOMPSON
Homer B. Thompson
Judge of the Superior Court

APPENDIX B

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

1 Civil 40776

(Sup. Ct. No. 349363)

MICHAEL ROBINS, a minor, by his guardian ad litem, DAVID ROBINS, IRA DAVID MARCUS, a minor, by his guardian ad litem, FRED WERNER MARCUS AND ROBERTA BELL-KLIGLER,
Plaintiffs and Appellants,

VS.

PRUNEYARD SHOPPING CENTER, et al.,
Defendants and Respondents.

On April 7, 1976, plaintiffs and appellants filed suit for preliminary and permanent injunction in the Santa Clara County Superior Court. Appellants sought to enjoin defendants and respondents Pruneyard Shopping Center and its owner, from denying them access to respondents' privately owned shopping center for the purpose of circulating petitions on social and political matters. Following judgment for respondents, this appeal was filed.

Respondent Pruneyard is a privately owned shopping center located in the City of Campbell. It consists of approximately 21 acres, five of which are devoted to parking, and 16 of which are occupied by covered walkways, plazas, sidewalks and buildings containing more than 65 specialty shops, 10 restaurants and a cinema. Members of the public are invited to visit the Pruneyard for the purpose of patronizing the commercial establishments located therein. It is the policy of the Pruneyard not to permit any visitor or tenant to engage in any expressive activity, including the circulation of petitions, which is not directly related

to the commercial purposes of the Pruneyard. This policy has been strictly enforced on a non-discriminatory basis.

Appellants went to the Pruneyard [1] and set up a card table in one corner of the center's "Grand Plaza," a central courtyard. No sign was placed on the table. Appellants then proceeded to ask passersby to sign the petitions. Their activity was peaceful and orderly, and was well received by the center's patrons.

Within five to ten minutes after appellants began soliciting signatures on the Pruneyard premises, appellants were approached by a uniformed security officer, who informed them that such conduct was against the regulations of the center. Appellants spoke to the guard's superior who informed them that they would have to leave since they did not have permission to be there. The officers suggested that the appellants continue soliciting signatures on the public sidewalks on the center's perimeter.[2] Appellants ceased their activity and immediately left the premises.

After leaving the Pruneyard, appellants proceeded to another privately owned shopping center, the Westgate in San Jose. There they were again denied access for the purpose of circulating their petitions. Appellants made no further efforts to gather signatures on their petitions at any location.[3] Based on this record the trial court found that appellants "only attempted to obtain signatures to their petition on private property, rather than in public areas whether nearby or otherwise."

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[1] Other groups went to the San Jose Airport and to other local shopping centers.

[2] The Pruneyard is bordered on two sides by private property, and on the other two sides by public streets and sidewalks.

[3] Appellants made no attempt to collect signatures in downtown San Jose, Willow Glen, Campbell, Los Gatos or Saratoga; nor did they attempt to solicit signatures at the main post office in San Jose or at any public athletic event.

Evidence submitted by appellants establishes the following:

(1) As of 1970, 92.2 percent of the county's population lived outside of the central San Jose planning area in suburban or rural communities.

(2) During the period between 1960 and 1970, central San Jose experienced a 4.7 percent decrease in population as compared to an overall 67 percent increase for the 19 north county planning areas.

(3) Retail sales in the central business district have declined to such an extent that statistics thereon have not been kept since 1973. In 1972, the central business district accounted for only 4.67 percent of the county's total retail sales.

(4) In a given 30-day period between October 1974 and July 1975, adults making one or more shopping trips to the 15 largest shopping centers in the metropolitan San Jose standard metropolitan statistical area totaled 685,000 out of 788,000 adults living within that area.

(5) During that 1974-1975 season, monthly attendance at each of the county's 18 parks averaged only three percent of the total population. Combined monthly attendance at all of Santa Clara County's 18 parks averaged 54 percent of the county's total population while total park attendance for that year was 7,712,432.

(6) The largest share of the county's population is likely to spend the most significant amount of its time in the suburban areas where its wants and needs are satisfied, and shopping centers provide the location, goods and services to satisfy those wants and needs.

Appellants recognize the existence of a conflict between their First Amendment rights and respondents' constitutional right to the free use and enjoyment of their private property under the Fifth and Fourteenth Amendments.

Relying upon *Lloyd Corp. v. Tanner* (1972) 407 U.S. 551, and *Diamond v. Bland* (1974) 11 Cal.3d 331, appellants contend that these competing constitutional and property rights must be balanced, with the decisive factor being the availability of other public forums. On the other hand, respondents contend that a constitutional right to engage in First Amendment activities in privately owned shopping centers exists only if the shopping center is the functional equivalent of a municipal business district. Absent a finding of functional equivalence, respondents maintain, individuals seeking to engage in expressive activity on private property have failed to establish the element of state action necessary to activate the constitutional protections of the First Amendment.

The First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on *state* action, not on action by the owner of private property used nondiscriminatorily for private purposes only. (Lloyd Corp. v. Tanner, *supra,* 407 U.S. at p. 567; see Hudgens v. NLRB (1976) 424 U.S. 507, 513.) In *Marsh v. Alabama* (1946) 326 U.S. 501, the United States Supreme Court recognized that, under some circumstances, property that is privately owned may for First Amendment purposes be treated as though it were publicly held. The court therein concluded that a member of a religious organization was constitutionally entitled to distribute religious literature on the streets of the company-owned town of Chickasaw, Alabama. In *Food Employees Union v. Logan Plaza* (1968) 391 U.S. 308, the court held that the shopping center there involved was the "functional equivalent" of the business district of Chickasaw (391 U.S. at p. 318), and that the center therefore could not prohibit the exercise of ". . . First Amendment rights [by the labor union] on the premises in a manner and for a purpose generally consonant with

the use to which the property was actually put."[4] (*Id.*, at pp. 319-320.)

In *Lloyd Corp. v. Tanner, supra,* 407 U.S. 551, however, the court declined to extend the rationale of *Marsh* and *Logan Plaza* to require the owner of a shopping center to permit the respondents to distribute, on the premises of the shopping center, handbills regarding the draft and the Vietnam war. In so holding, the court rejected respondents' contention that the property of a large shopping center serves the same purposes as a business district of a municipality, and therefore has been dedicated to certain types of public use.[5] *Lloyd* distinguished *Logan Plaza* on the

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[4] The court specifically stated it was not passing upon the question of ". . . picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put." (391 U.S. at p. 320, fn. 9.)

[5] "The argument reaches too far. The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use. The closest decision in theory, *Marsh v. Alabama, supra,* involved the assumption by a private enterprise of all of the attributes of a state-created municipality and the exercise by that enterprise of semi-official municipal functions as a delegate of the State. In effect, the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State. In the instant case there is no comparable assumption or exercise of municipal functions or power.

"Nor does property lose its private character merely because the public is generally invited to use it for designated purposes. Few would argue that a free-standing store, with abutting parking space for customers, assumes significant public attributes merely because the public is invited to shop there. Nor is size alone the controlling factor. The essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center. . . .

"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 Amend-

basis that, unlike the situation in *Logan Plaza,* the handbilling had no relation to any purpose for which the shopping center was being used, and that respondents had adequate alternative avenues to disseminate their views by distributing the material on the public streets and sidewalks, including those surrounding the shopping center. The court dismissed as dicta the holding in the *Logan Plaza* opinion that a shopping center is the functional equivalent of a public business district. (407 U.S. 562-563.)[6] On the basis of this language the *Lloyd* opinion was interpreted as establishing alternative grounds for holding that the owner of private property may not prohibit First Amendment activities on his premises: (1) the property has been so dedicated to the public use that it is the functional equivalent of a municipality or, (2) the expressive activity is related to the business purpose of the shopping center and no adequate alternative avenues of communication exist. (See e.g., Diamond v. Bland, *supra,* 11 Cal.3d at pp. 334-335.)

In *Hudgens v. NLRB, supra,* 424 U.S. 507, however, the Supreme Court held that the owner of a private shopping center which has not been dedicated to public use, may prohibit the exercise of First Amendment rights therein regardless of whether there exist adequate alternative channels of communication for such activities. In *Hudgens,* a group of labor union members who engaged in peaceful primary picketing within the confines of a privately owned shopping center were threatened by an agent of the owner

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ment rights. Accordingly, we reverse the judgment and remand the case to the Court of Appeals with directions to vacate the injunction." (407 U.S. at pp. 569-570.)

[6] "*Marsh* was distinguished on the basis that there the owner of the company town was substituting for and performing the customary functions of government; moreover, there existed no public streets on which First Amendment activities could be carried out." (Diamond v. Bland, *supra,* 11 Cal.3d at p. 334.)

with arrest for criminal trespass if they did not depart. The Court of Appeals for the Fifth Circuit held that the picketing was related to the use to which the property was put (501 F.2d 161, 168), and that alternative means of communication to reach the intended audience "were either unavailable or inadequate." (501 F.2d at p. 169.) Relying upon *Lloyd,* the Court of Appeal therefore upheld the NLRB's cease-and-desist order.

The Supreme Court reversed the Fifth Circuit's decision and concluded that "under the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this." (Hudgens v. NLRB, *supra,* 424 U.S., at p. 521.) In so holding, the court recognized that the holdings of *Lloyd* and *Logan Plaza* could not be reconciled, and that the ultimate holding in *Lloyd* amounted to a total rejection of the holding of *Logan Plaza.* (424 U.S., at p. 518.)

"If a large self-contained shopping center is the functional equivalent of a municipality, as *Logan Valley* held, then the First and Fourteenth Amendments would not permit control of speech within such a center to depend upon the speech's content. . . . It conversely follows, therefore, that if the respondents in the *Lloyd* case did not have a First Amendment right to enter that shopping center to distribute handbills concerning Vietnam, then the pickets in the present case did not have a First Amendment right to enter this shopping center for the purpose of advertising their strike against the Butler Shoe Co.

"We conclude, in short, that under the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this." (424 U.S., at pp. 520-521; fns. omitted.)

In the present case the trial court conclusively determined that respondents' shopping center has not been so dedicated to public use as to have become the functional

equivalent of a municipal business district. Appellants do not allege error as to these conclusions, nor do they attack the sufficiency of the evidence in support thereof. Under these circumstances, the First Amendment free speech guarantee is inapplicable, regardless of whether or not adequate alternative channels of communication were available to appellants.

II

The trial court found that: "The county in which the center is located has many shopping centers, public shopping and business areas, public buildings, parks, stadia, universities, colleges, schools, post offices and similar public areas where large numbers of people congregate and where people can freely exercise First Amendment rights, including, without limitation, distribution of handbills and seeking signatures on petitions." On the basis of this finding, the court concluded that "There are adequate, effective channels of communication for plaintiffs other than soliciting on the private property of the CENTER."

Appellants contend that the trial court improperly considered private forums in determining whether there were alternative forums available to appellants in which they might effectively exercise their First Amendment rights. They argue that the court may look only to public forums that are traditionally open to speech activities in making such a determination. Appellants further assign error to the trial court's failure to make an independent finding as to the availability of publicly owned forums.

In view of the trial court's conclusion that respondents' shopping center has not been dedicated to public use, appellants cannot prevail regardless of whether or not adequate and effective alternative channels of communication are available to them. Under these circumstances, any error by the trial court in determining the availability of other forums is harmless. (D'Amico v. Board of Medical

Examiners (1974) 11 Cal. 3d 1, 18-19; Davey v. Southern Pacific Co. (1897) 116 Cal. 325, 329; Chilton v. Contra Costa Community College Dist. (1976) 55 Cal.App.3d 544, 548-549; see Cal. Const., art. VI, § 13; Code Civ. Proc., § 475.)

Moreover, the distinction urged by appellants between forums which are publicly held and those which are privately owned is both artificial and unnatural, and is unsupported by case law. Appellants rely upon the following language from *Diamond v. Bland, supra,* 11 Cal.3d at pp. 334-335: "The . . . [United States Supreme Court, in *Lloyd*] stated that, in view of the availability . . . of other *public forums* for the distribution and dissemination of their ideas, '[i]t would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist.' (407 U.S. at p. 567 . . . .) . . . In this case, as in *Lloyd,* plaintiffs have alternative, effective channels of communication, for the customers and employees of the center may be solicited on any public sidewalks, parks and streets adjacent to the Center and in the communities in which such persons reside." (Emphasis added.)

The test set forth in *Lloyd* and *Diamond* is whether "adequate alternative avenues of communication exist." Although both *Lloyd* and *Diamond* give as examples of such alternatives certain forums located on publicly owned property, there is no indication in either case that such examples were intended to be either exclusive or exhaustive. Nor is there any indication that the reference to "public forums" is limited to property owned by the government. Rather, the context in which the term "public forum" is used, coupled with the test of the availability of "adequate alternative avenues of communication," indicates that a court may properly consider any forum that is available for the free exercise of expressive activity regardless of

whether that forum is located on property owned by the government or by a private person. The only relevant consideration is whether such forum is in fact open and available for the free exercise of expressive activity.

As the trial court may consider privately owned, as well as publicly held property, in determining whether adequate alternative avenues of communication exist, the trial court did not err in failing to make an independent finding as to the existence of publicly held forums.[7]

III

Appellants contend that the guarantees of freedom of speech and petition found in sections 9 and 10 respectively of the California Constitution, provide adequate and independent state grounds for enjoining respondents from prohibiting appellants' expressive activities on the premises of the Pruneyard.

This contention was summarily rejected by the California Supreme Court in *Diamond v. Bland, supra,* 11 Cal.3d 331. The court declared at page 335, footnote 4: "Under the holding of the *Lloyd* case, the due process clause of the United States Constitution protects the property interests of the shopping center owner from infringement (407 U.S. at pp. 552-553, 567, 570 . . . .) That being so, we must reject plaintiffs' proposal, echoed in the dissenting opinion herein, that we consider using the 'free speech' provisions of our state Constitution to reach a contrary result in this case. Even were we to hold that the state Constitution in

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[7] Appellants urge that this court exercise its power pursuant to Code of Civil Procedure section 909 to make a finding as to the existence or nonexistence of adequate alternative forums, and take additional evidence for the purpose of making such finding. However, having concluded that the existence or nonexistence of alternative forums is immaterial, the exercise of our power pursuant to section 909 would be inappropriate in this case. (See Tupman v. Haberkern (1929) 208 Cal. 256, 269-270.)

some manner affords broader protection than the First Amendment to the United States Constitution (a question which we expressly leave open), nevertheless supremacy principles would prevent us from employing state constitutional provisions to defeat defendant's federal constitutional rights. (Accord: Lenrich Associates v. Heyda (Ore.) 504 P.2d 112, 115-116 [plurality opn.].)''

Appellants maintain that the language of the Fourteenth Amendment does not support the Supreme Court's conclusion that principles of supremacy preclude reliance upon the free speech provisions of the state Constitution. Whether or not the *Diamond* case was correctly decided, this court is bound by and must follow prior California Supreme Court decisions. (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455.)

The judgment is affirmed.

Caldecott, P. J.

We concur:

Rattigan, J.

Christian, J.

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

March 30,1979

S.F. 23812

MICHAEL ROBINS, a Minor, etc., et al.,
Plaintiffs and Appellants,

v.

PRUNEYARD SHOPPING CENTER et al.,
Defendants and Respondents.

* * * * * * * * * *

Opinion

NEWMAN, J.—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.

Pruneyard Shopping Center is a privately owned center that consists of approximately 21 acres—5 devoted to parking and 16 occupied by walkways, plazas, and buildings that contain 65 shops, 10 restaurants, and a cinema. The public is invited to visit for the purpose of patronizing the many businesses. Pruneyard's policy is not to permit any tenant or visitor to engage in publicly expressive activity, including the circulating of petitions, that is not directly related to the commercial purposes. The policy seems to have been strictly and disinterestedly enforced.

Appellants are high school students who attempted one Saturday afternoon to solicit support for their opposition to a United Nations resolution against "Zionism." They set up a cardtable in a corner of Pruneyard's central courtyard and sought to discuss their concerns with shoppers and to solicit signatures for a petition to be sent to

the White House in Washington. Their activity was peaceful and apparently well-received by Pruneyard patrons.

Soon after they had begun their soliciting they were approach by a security guard who informed them that their conduct violated Pruneyard regulations. They spoke to the guard's superior, who informed them they would have to leave because they did not have permission to solicit. The officers suggested that appellants continue their activities on the public sidewalk at the center's perimeter.[1]

Appellants immediately left the premises and later brought suit. The trial court rejected their request that Pruneyard be enjoined from denying them access.

Our main questions are: (1) Did *Lloyd Corp.* v. *Tanner* (1972) 407 U.S. 551 [33 L.Ed.2d 131, 92 S.Ct. 2219] recognize federally protected property rights of such a nature that we now are barred from ruling that the California Constitution creates broader speech rights as to private property than does the federal Constitution. (2) If not, does the California Constitution protect speech and petitioning at shopping centers?

This court last faced those issues in *Diamond* v. *Bland* (1974) 11 Cal.3d 331 [113 Cal.Rptr. 468, 521 P.2d 460] (*Diamond II*), wherein *Diamond* v. *Bland* (1970) 3 Cal.3d 653 [91 Cal.Rptr. 501, 477 P.2d 733] (*Diamond I*) was reversed because of *Lloyd Corp.* v. *Tanner, supra,* 407 U.S. 551. The *Diamond* cases involved facts much like those of the instant case. *Diamond II* stated: "*Lloyd's* rationale is controlling here. In this case, as in *Lloyd,* plaintiffs have alternative, effective channels of communication, for the customers and employees of the center may be solicited on any public sidewalks, parks and streets adjacent to the Center and in the communities in which such persons reside." (11 Cal.3d at p. 335.)

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[1] Pruneyard is bordered on two sides by private property, on its other sides by public sidewalks and streets.

The opinion articulating that conclusion did not examine the liberty of speech clauses of the California Constitution. A footnote suggested that such an inquiry was barred by federal and state supremacy clauses[2] because "[u]nder the holding of the *Lloyd* case, the due process clause of the United States Constitution protects the property interests of the shopping center owner from infringement (407 U.S. at pp. 552-553, 567, 570 [33 L.Ed.2d at pp. 133-134, 141, 143])." (11 Cal.3d at p. 335, fn. 4.)

Respondents contend that *Diamond II* was correctly decided and controls this case. They argue that *Lloyd* did more than define parameters of First Amendment free speech, that it recognized identifiable property rights under the Fifth and Fourteenth Amendments. They acknowledge that states are free to establish greater rights under their constitutions than those guaranteed by the federal Constitution. They contend however that, since a ruling that petitioners' activity here was protected by the California Constitution would diminish respondents' property rights under *Lloyd,* we may not so rule.

Appellants argue that *Lloyd* merely defined federal speech rights and did not prescribe federal property rights. Even if it did prescribe such rights, appellants contend that, since states generally may regulate shopping centers for proper state purposes, California is free to impose public-interest restrictions on the centers in order to safe-

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[2] Article VI, clause 2 of the United States Constitution provides: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

Article III, section 1 of the California Constitution provides: "The State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land."

guard the right of petition. That right, they assert, surely reflects a public interest that equals in importance the interests that justify restrictions designed to ensure health and safety, a natural environment, aesthetics, property values, and other accepted goals. Such restrictions on property routinely are enacted or declared and enforced.

Appellants ask us to overrule *Diamond II* and to hold that the California Constitution does guarantee the right to seek signatures at shopping centers.

Does *Lloyd* Identify Special Property Rights Protected by the Federal Constitution?

Lloyd held that a shopping center owner could prohibit distribution of leaflets when they communicated no information relating to the center's business and when there was an adequate, alternate means of communication. The court stated, "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." (407 U.S. at p. 570 [33 L.Ed.2d at p. 143].)

Appellants correctly assert that *Lloyd* is primarily a First Amendment case. The references to Fifth and Fourteenth Amendment rights were made specifically in connection with the court's discussion of state action requirements. The court was focusing on *Marsh* v. *Alabama* (1946) 326 U.S. 501 [90 L.Ed. 265, 66 S.Ct. 276], which held that a property owner's actions in some circumstances are equivalent to state action because of public functions performed by the property. The court in *Lloyd* examined the functions performed by Lloyd's center but did not purport to define the nature or scope of Fifth and Fourteenth Amendment rights of shopping center owners generally.

Subsequent decisions support that reading of *Lloyd*. In *Hudgens* v. *NLRB* (1976) 424 U.S. 507 [47 L.Ed.2d 196,

96 S.Ct. 1029] the court again considered First Amendment rights in relation to private property. Though it concluded that the First Amendment did not protect picketing in a shopping center, it acknowledged 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 . . . ." (*Id.*, p. 513 [47 L.Ed.2d p. 203].) The court's conclusion that the National Labor Relations Act controlled the issues there presented indicates that *Lloyd* by no means created any property right immune from regulation.

Eastex, Inc. v. *NLRB* (1978) 437 U.S. 556 [57 L.Ed.2d 428, 98 S.Ct. —] is comparable. The employees sought to distribute a four-part union newsletter. Two parts involved organizational requests; the other parts were irrelevant to the relations between employer and union.[3] A dissent by Justice Rehnquist, joined by Chief Justice Burger, states that property rights "explicitly protected from federal interference by the Fifth Amendment to the Constitution" were involved in the controversy. Rejecting that view, the majority had little difficulty recognizing that, as noted in *Hudgens, supra,* 424 U.S. at page 513 [47 L.Ed.2d at page 203], the National Labor Relations Act could provide statutory protection for the activity involved. The court observed that prior cases established that the act assures a right to distribute organizational literature on an employer's premises because employees already are rightfully there, to perform the duties of their employment. (See *Republic Aviations* [sic] *Corp.* v. *NLRB* (1945) 324 U.S. 793 [89 L. Ed. 1372, 65 S.Ct. 982, 157 A.L.R. 1081].) The court con-

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[3] It was clear prior to *Eastex* that employees' right of self-organization included the right to distribute organizational literature on the employer's property. (*Eastex, supra,* 437 U.S. 556.) The two parts of the newsletter at issue were a request to write the Legislature opposing a "right-to-work" measure and an expression of opposition to a presidential veto of a minimum wage increase.

cluded, "Even if the mere distribution by employees of material . . . can be said to intrude on petitioner's property rights in any meaningful sense, the degree of intrusion does not vary with the content of the material." (*Eastex, supra,* 437 U.S. 556.)

The same may be said here. Members of the public are rightfully on Pruneyard's premises because the premises are open to the public during shopping hours. *Lloyd* when viewed in conjunction with *Hudgens* and *Eastex* does not preclude law-making in California which requires that shopping center owners permit expressive activity on their property. To hold otherwise would flout the whole development of law regarding states' power to regulate uses of property and would place a state's interest in strengthening First Amendment rights in an inferior rather than a preferred position. "[A]ll private property is held subject to the power of the government to regulate its use for the public welfare." (*Agricultural Labor Relations Bd.* v. *Superior Court* (1976) 16 Cal.3d 392, 403 [128 Cal.Rptr. 183, 546 P.2d 687]; app. dism. for want of substantial federal question, 429 U.S. 802 [50 L.Ed.2d 63, 97 S.Ct. 33].)

Property rights must yield to the public interest served by zoning laws (*Village of Euclid* v. *Ambler Realty Co.* (1926) 272 U.S. 365 [71 L.Ed. 303, 47 S.Ct. 114, 54 A.L.R. 1016]), to environmental needs (Pub. Resources Code, § 21000 et seq.), and to many other public concerns. (See, e.g., the California Coastal Act (*id.,* § 30000 et seq.), the California Water Quality Control Act (Wat. Code, § 13000 et seq.), the Subdivision Map Act (Gov. Code, § 66410 et seq.), and the Subdivision Lands Act (Bus. & Prof. Code, § 11000 et seq. See also Powell, *The Relationship Between Property Rights and Civil Rights* (1963) 15 Hastings L.J. 135, 148-149.)

"We do not minimize the importance of the constitutional guarantees attaching to private ownership of property; but as long as 50 years ago it was already ' "thor-

oughly established in this country that the rights preserved to the individual by these constitutional provisions are held in subordination to the rights of society. Although one owns property, he may not do with it as he pleases any more than he may act in accordance with his personal desires. As the interest of society justifies restraints upon individual conduct, so, also, does it justify restraints upon the use to which property may be devoted. It was not intended by these constitutional provisions to so far protect the individual in the use of his property as to enable him to use it to the detriment of society. By thus protecting individual rights, society did not part with the power to protect itself or to promote its general well-being. Where the interest of the individual conflicts with the interest of society, such individual interest is subordinated to the general welfare.'' ' '' (*Agricultural Labor Relations Bd.* v. *Superior Court, supra,* 16 Cal.3d at p. 403, holding that use of private property may be restricted because of the public interest in collective bargaining, and quoting *Miller* v. *Board of Public Works* (1925) 195 Cal. 477, 488 [234 P. 381, 38 A.L.R. 1479].)

The *Agricultural Labor Relations Board* opinion further observes that the power to regulate property is not static; rather it is capable of expansion to meet new conditions of modern life. Property rights must be '' 'redefined in response to a swelling demand that ownership be responsible and responsive to the needs of the social whole. Property rights cannot be used as a shibboleth to cloak conduct which adversely affects the health, the safety, the morals, or the welfare of others.' '' (16 Cal.3d at p. 404, quoting Powell, *The Relationship Between Property Rights and Civil Rights, supra,* 15 Hastings L.J. at pp. 149-150.)

Several years have passed since this court decided *Diamond II.* Since that time central business districts apparently have continued to yield their functions more and more to suburban centers. Evidence submitted by appel-

lants in this case helps dramatize the potential impact of the public forums sought here:

(1) As of 1970, 92.2 percent of the county's population lived outside the central San Jose planning area in suburban or rural communities.

(2) From 1960 to 1970 central San Jose experienced a 4.7 percent decrease in population as compared with an overall 67 percent increase for the 19 north county planning areas.

(3) Retail sales in the central business district declined to such an extent that statistics have not been kept since 1973. In 1972 that district accounted for only 4.67 percent of the county's total retail sales.

(4) In a given 30-day period between October 1974 and July 1975 adults making one or more shopping trips to the 15 largest shopping centers in the metropolitan San Jose statistical area totaled 685,000 out of 788,000 adults living within that area.

(5) The 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 those needs and wants.

In assessing the significance of the growing importance of the shopping center we stress also that to prohibit expressive activity in the centers would impinge on constitutional rights beyond speech rights. Courts have long protected the right to petition as an essential attribute of governing. (*United States* v. *Cruikshank* (1876) 92 U.S. 542, 552 [23 L.Ed. 588, 591].) The California Constitution declares that "people have the right to . . . petition government for redress of grievances . . . ." (Art. I, § 3.) That right in California is, moreover, 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, §§ 8, 9, and 13.) [4]

To protect free speech and petitioning is a goal that surely matches the protecting of health and safety, the environment, aesthetics, property values and other societal goals that have been held to justify reasonable restrictions on private property rights.

Does the California Constitution Guarantee the Right to Gather Signatures at Shopping Centers?

No California statute prescribes that shopping center owners provide public forums. But article I, section 2 of the state Constitution reads: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Though the framers could have adopted the words of the federal Bill of Rights they chose not to do so. (See Note, *Rediscovering the California Declaration of Rights* (1974) 26 Hastings L.J. 481.) Special protections thus accorded speech are marked in this court's opinions. *Wilson* v. *Superior Court* (1975) 13 Cal.3d 652, 658 [119 Cal.Rptr. 468, 532 P.2d 116], for instance, noted that "[a] protective provision more definitive and inclusive than the First Amendment is contained in our state constitutional guarantee of the right of free speech and press."

Past decisions on speech and private property testify to the strength of "liberty of speech" in this state. *Diamond*

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[4] The Fair Political Practices Commission filed an amicus brief supporting appellants here. The commission urges that we consider the impact of our decision on exercise of the right to initiate change through the initiative, referendum, and recall processes. The brief points out 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.

I held that distributing leaflets and soliciting initiative signatures at a shopping center are constitutionally protected. Though the court relied partly on federal law, California precedents also were cited. (E.g., *Schwartz-Torrance Investment Corp.* v. *Bakery & Confectionary Workers' Union* (1964) 61 Cal.2d 766 [40 Cal.Rptr. 233, 394 P.2d 921]; *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].) The fact that those opinions cited federal law that subsequently took a divergent course does not diminish their usefulness as precedent. (*People* v. *Pettingill* (1978) 21 Cal.3d 231, 247 [145 Cal.Rptr. 861, 578 P.2d 108]; and see Cal. Const. Revision Com., Recommendations (1971) art. I, § 3, com., p. 17 ["Federal . . . legal precedents are subject to change and uncertain in scope"].) The duty of this court is to help determine what "liberty of speech" means in California. Federal principles are relevant but not conclusive so long as federal rights are protected.

Schwartz-Torrance, supra, 61 Cal.2d 766, held that a labor union has the right to picket a bakery located in a shopping center. The opinion noted that the basic problem is one of "accommodating conflicting interests: plaintiff's assertion of its right to the exclusive use of the shopping center premises to which the public in general has been invited as against the union's right of communication of its position which, it asserts, rests upon public policy and constitutional protection." (61 Cal.2d at p. 768.)

In re Lane, supra, extended the assurance of protected speech to the privately owned sidewalk of a grocery store. "Certainly, this sidewalk is not private in the sense of not being open to the public. The public is openly invited to use it in gaining access to the store and in leaving the premises. Thus, in our view it is a public area in which members of the public may exercise First Amendment rights." (71 Cal. 2d at p. 878.)

The issue arose too in *In re Hoffman* (1967) 67 Cal.2d 845 [64 Cal.Rptr. 97, 434 P.2d 353], where Vietnam War protesters had attempted to distribute leaflets in the Los Angeles Union Station, owned by three private companies. It housed a restaurant, snack bar, cocktail lounge, and magazine stand in addition to facilities directly related to transporting passengers. The public was free to use the whole station. Chief Justice Traynor's opinion made it clear that property owners as well as government may regulate speech as to time, place, and manner. (*Id.*, at pp. 852-853.) Nonetheless, "a railway station is like a public street or park." (*Id.*, at p. 851.) Further, "the test is not whether petitioners' use of the station was a railway use but whether it interfered with that use." (*Id.*) The opinion thus affirms that the public interest in peaceful speech outweighs the desire of property owners for control over their property. (See too *In re Cox* (1970) 3 Cal.3d 205, 217-218 [90 Cal.Rptr. 24, 474 P.2d 992]: "The shopping center may no more exclude individuals who wear long hair . . . who are black, who are members of the John Birch Society, or who belong to the American Civil Liberties Union, merely because of these characteristics or associations, than may the City of San Rafael.")

Diamond I, quoting *Schwartz-Torrance, supra,* stated: " '[T]he countervailing interest which [the owner] endeavors to vindicate emanates from the exclusive possession and enjoyment of private property. Because of the public character of the shopping center, however, the impairment of [the owner's] interest must be largely theoretical. [The owner] has fully opened his [*sic*] property to the public. . . .' " (*Diamond I, supra,* 3 Cal.3d at p. 662, bracketed material in original.)

In his *Diamond II* dissent Justice Mosk describes the extensive use of private shopping centers.[5] His observa-

[5] "The importance assumed by the shopping center as a place for large groups of citizens to congregate is revealed by statistics;

tions on the role of the centers in our society are even more forceful now than when he wrote. The California Constitution broadly proclaims speech and petition rights. Shopping centers to which the public is invited can provide an essential and invaluable forum for exercising those rights.

We therefore hold that *Diamond II* must be overruled. (See particularly 11 Cal.3d at p. 335, fn. 4) A closer look at *Lloyd Corp., supra,* 407 U.S. 551, has revealed that it does not prevent California's providing greater protection than the First Amendment now seems to provide. 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.

By no means do we imply that those who wish to disseminate ideas have free rein. We noted above Chief Justice Traynor's endorsement of time, place, and manner rules. (*In re Hoffman, supra,* 67 Cal.2d at pp. 852-853.) Further, as Justice Mosk stated in *Diamond II,* "It bears repeated emphasis that we do not have under consideration the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment. As a result of advertising and the lure of a congenial en-

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in 21 of the largest metropolitan areas of the country shopping centers account for 50 percent of the retail trade; in some communities the figure is even higher, such as St. Louis (67 percent) and Boston (70 percent). (Note (1973) Wis.L.Rev. 612, 618 and fn. 51.) Increasingly, such centers are becoming 'miniature downtowns'; some contain major department stores, hotels, apartment houses, office buildings, theatres and churches. (Business Week, Sept. 4, 1971, pp. 34-38; Chain Store Age, Sept. 1971, p. 4.) It has been predicted that there will be 25,000 shopping centers in the United States by 1985. (Publishers Weekly, Feb. 1, 1971, pp. 54-55.) Their significance to shoppers who by choice or necessity avoid travel to the central city is certain to become accentuated in this period of gasoline and energy shortage." (11 Cal.3d at p. 342 (dis. opn. of Mosk, J.).)

vironment, 25,000 persons are induced to congregate daily to take advantage of the numerous amenities offered by the [shopping center there]. A handful of additional orderly persons soliciting signatures and distributing handbills in connection therewith, under reasonable regulations adopted by defendant to assure that these activities do not interfere with normal business operations (see *Diamond* [*I*] at p. 665) would not markedly dilute defendant's property rights." (11 Cal.3d at p. 345 (dis. opn. of Mosk, J.).)

The judgment rejecting appellants' request that Pruneyard be enjoined from denying access to circulate the petition is reversed.

Bird, C. J., Tobriner, J., and Mosk, J., concurred.

RICHARDSON, J.—I respectfully dissent. The majority relegates the private property rights of the shopping center owner to a secondary, disfavored, and subservient position vis-a-vis the "free speech" claims of plaintiffs. Such a holding clearly violates *federal* constitutional guarantees announced in *Lloyd Corp.* v. *Tanner* (1972) 407 U.S. 551 [33 L.Ed.2d 131, 92 S.Ct. 2219].

The majority recites, in cursory fashion, that the trial court herein "rejected [plaintiffs'] request that Pruneyard be enjoined from denying them access." (*Ante,* p. 903.) Conspicuously absent from the opinion, however, is any reference to the trial court's careful findings of fact and conclusions of law, which are essential to a proper understanding and disposition of this case.

In brief, following a full evidentiary hearing, the trial court specifically found as follows: The Pruneyard Shopping Center is located entirely on private property, and its owner had adopted a nondiscriminatory policy of prohibiting all handbilling and circulation of petitions by anyone and regardless of content. Plaintiffs entered on Pruneyard property and sought to obtain signatures to petitions entirely unrelated to any activities occurring at the center. (The petitions were to the President of the United States

and the Congress opposing a United Nations resolution which condemned Zionism and attacking Syria's emigration policy.) Pruneyard is located in Santa Clara County which contains numerous forums for distributing handbills or gathering signatures, including "many shopping centers, public shopping and business areas, public buildings, parks, stadia, universities, colleges, schools, post offices and similar public areas where large numbers of people congregate." The court further found that numerous alternative public sites were available to plaintiffs for their purposes. Nonetheless, plaintiffs made no attempt whatever to obtain signatures on their petition in these alternative public areas, whether situated nearby or otherwise.

From the foregoing findings of fact the trial court expressly concluded as matters of law that there had been no dedication of the center's property to public use, that the center is not the "functional equivalent" of a municipality, and that "There are adequate, effective channels of communication for plaintiffs other than soliciting on the private property of the Center." On the basis of these findings of fact and conclusions of law, the trial court denied plaintiffs the injunctive relief which they sought.

With due deference, I suggest that the able trial court's judgment was not only entirely proper, but was compelled by the holdings in *Lloyd Corp.* v. *Tanner, supra,* 407 U.S. 551, and *Diamond* v. *Bland* (1974) 11 Cal.3d 331 [113 Cal. Rptr. 468, 521 P.2d 460] (cert. den. 419 U.S. 885 [42 L.Ed.2d 125, 95 S.Ct. 152]). The present majority, unable to escape the controlling force of *Lloyd,* acknowledges that "*Lloyd* held that a shopping center owner could prohibit distribution of leaflets when they communicated an information relating to the center's business and when there was an adequate, alternate menas of communication." (*Ante,* p. 904.) However, the majority attempts to circumvent *Lloyd* by relying upon the "liberty of speech clauses" of the

California Constitution. I believe that such 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. Indeed, this was the precise effect of our own express holding in *Diamond* v. *Bland, supra,* wherein we stated with great clarity that ". . . we must reject plaintiff's proposal . . . that we consider using the 'free speech' provisions of our state Constitution to reach a contrary result in this case. Even were we to hold that the state Constitution in some manner affords broader protection than the First Amendment to the United States Constitution . . . , *nevertheless supremacy principles would prevent us from employing state constitutional provisions to defeat defendant's federal constitutional rights.*" (11 Cal.3d at p. 335, fn. 4, italics added.) This constitutional principle is as sound today as it was less than five years ago when we last expressed it.

The application of our *Diamond* holding to the case before us is clear and inescapable. Nonetheless, the present majority now disavows *Diamond* and attempts to distinguish *Lloyd* as "primarily a First Amendment case" rather than a private property case. (*Ante,* p. 904.) Apparently, the majority now believes that *Lloyd* merely held that the leaflet distributors in that case lacked any *First Amendment* rights to assert against the shopping center owners, a deficiency the majority would now cure by creating more substantial "free speech" rights under the California Constitution than are recognized under the First Amendment.

The majority seriously errs in its excessively narrow reading of *Lloyd,* which expressed its fundamental reliance upon the *constitutional private property rights of the owner* throughout the entire opinion. This becomes apparent in the opening paragraph of *Lloyd,* wherein the high court, speaking through Justice Powell, explained that

"We granted certiorari to consider petitioner's contention that the decision below *violates rights of private property protected by the Fifth and Fourteenth Amendments.*" (407 U.S. at pp. 552-553 [33 L.Ed.2d at p. 133], italics added.) The court further observed that "The basic issue in this case is whether respondents, in the exercise of asserted First Amendment rights, may distribute handbills on Lloyd's private property contrary to its wishes and contrary to a policy enforced against *all* handbilling." (P. 567 [33 L.Ed.2d at p. 142], italics in original.) The *Lloyd* court carefully admonished that "It would be *an unwarranted infringement of property rights* to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist. Such an accommodation would diminish property rights without significantly enhancing the asserted right of free speech." (*Ibid.* [33 L.Ed.2d, pp. 141-142], italics added.) This has precise application to the case before us for, as noted above, the trial court in the present case expressly found that plaintiffs had adequate alternative forums in which to conduct their activities. Contrary to the majority's thesis, *Lloyd* cannot be distinguished. It was, and is, a *property rights case of controlling force* in the litigation before us.

Recognizing the "special solicitude" owed to the First Amendment guarantees, the high court in *Lloyd* nonetheless noted that "this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only." (P. 568 [33 L.Ed.2d p. 142].) Moreover, the court determined that although a *shopping center* is open to the public, "property [does not] lose its private character merely because the public is generally invited to use it for designated purposes." (P. 569 [33 L.Ed.2d, p. 143].) It is self-evident that the *federally* protected property rights are the same

whether the shopping center is in *Oregon,* as in *Lloyd,* or in *California,* as in the present case.

The *Lloyd* court acknowledged that considerations of public health and safety may justify an "appropriate government response" through police power regulations. (P. 570 [33 L.Ed.2d, p. 143].) However, "the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected. The Framers of the Constitution certainly did not think these fundamental rights of a free society are incompatible with each other. There may be situations where accommodations between them, and the drawing of lines to assure due protection of both, are not easy. *But on the facts presented in this case, the answer is clear.* [¶] We hold that there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitled respondents to exercise therein the asserted First Amendment rights." (*Ibid.* [33 L.Ed.2d p. 143], italics added.)

The lesson to be learned from *Lloyd* is unmistakable and irrefutable: A private shopping center owner is protected by the *federal* Constitution from unauthorized invasions by persons who enter the premises to conduct general "free speech" activities unrelated to the shopping center's purposes and functions. Nor is the foregoing principle in any way diminished or affected by the fact that the claimed free speech rights are purportedly sanctioned by the California Constitution, given the overriding supremacy of the federal Constitution.

The familiar words of article VI, clause 2, of the United States Constitution reads as follows: "*This Constitution,* and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, *shall be the supreme law of the land;* and the *Judges in every State shall be bound thereby, anything in the Constitution or*

laws of any State to the contrary notwithstanding." (Italics added.) The controlling import of the supremacy clause on the issue before us is readily apparent. The United States Supreme Court, interpreting the United States Constitution, has declared that an owner of a private shopping center "when adequate, alternative avenues of communication exist," has a property right protected by the Fifth and Fourteenth Amendments which is superior to the First Amendment right of those who come upon the shopping center premises for purposes unrelated to the center. In such cases, no state court, interpreting a state Constitution, including this court interpreting the California Constitution, can contravene such a federal constitutionally protected right. Thus, in this case, the majority is prevented from relying on the California Constitution to impair or interfere with those property rights. We are bound by the United States Supreme Court interpretations of the United States Constitution. More specifically, in a confrontation between federal and state constitutional interests, federally protected property rights recognized by the United States Supreme Court will prevail against state protected free speech interests where alternative means of free expression are available.

The federal cases decided in this area subsequent to *Lloyd* do not support the majority's holding. In *Hudgens* v. *NLRB* (1976) 424 U.S. 507 [47 L.Ed.2d 196, 96 S.Ct. 1029], the high court cited and quoted from *Lloyd* with obvious approval, and extended *Lloyd's* holding to encompass labor dispute picketing within a private shopping center. The picketers in *Hudgens* had argued that their free speech interests were paramount to the private property rights of the center owner, given the existence of a labor dispute with one of the center's lessees. The high court rejected the argument, relying upon *Lloyd,* and remanded the case to the National Labor Relations Board for disposition. Contrary to the suggestion of the majority herein, the remand to the NLRB was not an implied re-

jection of the property interests of the center owner, for it is well established (by a companion case to *Lloyd*) that the NLRB *must* uphold the owner's private property rights in such cases unless there has been an outright dedication of the center property to public use. (*Central Hardware Co.* v. *NLRB* (1972) 407 U.S. 539, 547 [33 L.Ed.2d 122, 128-129, 92 S.Ct. 2238].) As *Central Hardware* explains, and echoing *Lloyd,* to accept the premise that such a dedication occurs merely because private property is "open to the public" for commercial purposes would constitute "an unwarranted infringement of long-settled *rights of private property* protected by the Fifth and Fourteenth Amendments." (*Ibid.* [33 L.Ed.2d 122, 129], italics added.)

Nor does the recent case of *Eastex, Inc.* v. *NLRB* (1978) 437 U.S. 556 [57 L.Ed.2d 428, 98 S.Ct. —], assist the majority. There, the Supreme Court upheld the rights of *employees* to distribute certain organizational material at their work site. The distinction between the rights of employees and nonemployees in this situation is well recognized, as was expressly noted by the *Eastex* court itself: "The Court recently has emphasized the distinction between the two cases: 'A wholly different balance was struck when the organizational activity was carried on by employees already rightfully on the employer's property, since the employer's management interests *rather than his property interests* were there involved.' [Citing *Hudgens,* 424 U.S. 507, and *Central Hardware,* 407 U.S. 539, both *supra.*]." (Pp. 571-572 [57 L.Ed.2d p. 442], italics added.)

The majority correctly observes that "property rights must yield to the public interest served by zoning laws . . ., and to many other public concerns." (*Ante,* p. 906.) Yet the "zoning for free speech uses" which the majority attempts to accomplish today goes far beyond any traditional police power regulation. Such unprecedented fiat has no support

in constitutional, statutory or decisional law. The character of a free speech claim cannot be transmuted into something else by changing the label and invoking the police power. As noted above, the *Lloyd* case acknowledged that considerations of public health and safety may justify an "appropriate government response," but that "on the facts presented in this case, *the answer is clear.*" (407 U.S. at p. 570 [33 L.Ed.2d at p. 143], italics added; see also, *Euclid* v. *Ambler Co.* (1926) 272 U.S. 365, 395 [71 L.Ed. 303, 314, 47 S.Ct. 114, 54 A.L.R. 1016] [zoning laws, and other police power regulations, must have a substantial relation to the public health, safety, morals or general welfare].)

Because, as the trial court expressly found, plaintiffs had adequate public forums in which to conduct their activities, their unauthorized entries on Pruneyard property manifestly cannot be excused on the basis of any state policy or goal "to protect free speech and petitioning." (*Ante,* p. 908.) The *Lloyd* rationale is applicable and unanswerable. The majority may not evade it by resort, in this instance, to the California Constitution, which must yield to a paramount federal constitutional imperative.

The judgment should be affirmed.

Clark, J., and Manuel, J., concurred.

APPENDIX D

FILED
MAY 23, 1979
G. E. BISHEL, CLERK

Order Denying Rehearing

S. F. No. 23812

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

ROBINS ET AL., *Plaintiffs and Appellants,*

v.

PRUNEYARD SHOPPING CENTER ET AL.,
Defendants and Respondents.

Respondents' petition for rehearing DENIED.

Clark, J., Richardson, J., and Manuel, J., are of the opinion that the petition should be granted.

/S/ BIRD
Chief Justice

APPENDIX E

FILED
MAY 30, 1979
G. E. BISHEL, CLERK

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Action No. S.F. 23812

Superior Court # 349363

PRUNEYARD SHOPPING CENTER, et al., *Appellants,*

VS

MICHAEL ROBINS, et al., *Appellees.*

Notice of Appeal to the Supreme Court of the United States

SUPREME COURT

NOTICE IS HEREBY GIVEN that PRUNEYARD SHOPPING CENTER, et al., the Appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of California,

reversing the denial of an injunction, entered in this action on May 23, 1979.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

Dated: May 29, 1979.

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